

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, )  
 by KWAME RAOUL, Attorney General )  
 of the State of Illinois, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 IRONHUSTLER EXCAVATING, INC., an )  
 Illinois corporation, RIVER CITY )  
 CONSTRUCTION, LLC, an Illinois limited )  
 liability company, and VENOVIK )  
 CONSTRUCTION CO., an Illinois corporation, )  
 )  
 Respondents.

PCB No. 2020-16  
(Enforcement)

NOTICE OF FILING

TO: See attached service list

PLEASE TAKE NOTICE that I did on November 27, 2019, file with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the following Notice of Filing and Motion to Strike Affirmative Defense Filed by IronHustler, copies of which are hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS  
KWAME RAOUL, ATTORNEY GENERAL

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

BY: s/Raymond J. Callery  
Raymond J. Callery, #6193579  
Assistant Attorney General  
500 South Second Street  
Springfield, Illinois 62701  
217/782-9031  
rcallery@atg.state.il.us  
ebs@atg.state.il.us

Dated: November 27, 2019

**Service List**

**For the Respondents**

Venovich Construction Company  
c/o Joseph L. Venovich, Jr., Registered Agent  
207 South Sampton Street  
P.O. Box 410  
Tremont, IL 61568

Kenneth Eathington  
Quinn Johnston Henderson & Pretorius  
227 N.E. Jefferson Street  
Peoria, IL 61602

Jay H. Scholl  
Davis & Campbell L.L.C.  
401 Main Street, Suite 1600  
Peoria, IL 61602-1241

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB No. 20-16
	)	(Enforcement – Land)
IRONHUSTLER EXCAVATING, INC.,	)	
an Illinois corporation, RIVER CITY	)	
CONSTRUCTION, LLC, an Illinois limited	)	
liability company, and VENOVICH	)	
CONSTRUCTION CO., an Illinois corporation,	)	
	)	
Respondents.	)	

**MOTION TO STRIKE AFFIRMATIVE DEFENSE FILED BY IRONHUSTLER**

Complainant, the PEOPLE OF THE STATE OF ILLINOIS, by KWAME RAOUL, Attorney General of the State of Illinois, moves the Board, pursuant to Section 2-615 of the Code of Civil Procedure, 735 ILCS 5/2-615 (2018), and Section 101.506 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.506, to strike the affirmative defense asserted in the November 20, 2019 Answer to the Complaint filed by Respondent, IRONHUSTLER EXCAVATING, INC. ("Ironhustler"), and in support of this motion states as follows:

**A. INTRODUCTION**

On September 16, 2019, Complainant filed its Complaint with the Illinois Pollution Control Board ("Board") alleging Respondent, Ironhustler, violated various provisions of the Illinois Environmental Protection Act ("Act") and associated regulations. In its November 20, 2019 Answer to the Complaint, Ironhustler pled what appears to be one Affirmative Defense applicable to all counts of the Complaint, as follows:

**AFFIRMATIVE DEFENSE**

**(ALL COUNTS)**

1. Management of Ironhustler had arranged for materials to be taken from the Source Site to a lawful disposal facility, namely the Tazewell County Landfill

(also known as the Hopedale Landfill and the Indian Creek Landfill).

2. On information and belief, materials from the Source Site were, in fact, taken from the Source Site to the Tazewell County Landfill on June 28, 2017, June 29, 2017, June 30, 2017, July 5, 2017, July 7, 2017, July 11, 2017, July 14, 2017, and July 17, 2017.

3. On information and belief, the alleged diversion of materials from the previously-arranged lawful disposal facility to the Disposal Site occurred on July 7, 2017.

4. Management of Ironhustler was not aware that materials were being taken from the Source Site to the Disposal Site until it received notice that the Illinois EPA had conducted an investigation at the Disposal Site on or around July 13, 2017.

5. Upon learning of the alleged violations, Ironhustler took immediate remedial action, including but not limited to prohibiting any future materials from being diverted to the Disposal Site and directing that any materials alleged to have been diverted to the Disposal Site be removed and delivered to the Tazewell County Landfill.

6. By July 17, 2017, the materials from the Source Site alleged to have been diverted to the Disposal Site were removed and delivered to the Tazewell County Landfill.

7. Accordingly, within four days after the purported inspection by the Illinois EPA, Ironhustler had ceased all alleged open dumping of waste and removed all materials alleged to have been improperly disposed at the Disposal Site.

8. Within weeks, the Disposal Site was returned to the same or better environmental condition as before any alleged diversion of materials from the previously arranged lawful disposal facility to the Disposal Site.

9. There is no resulting long-term impact on the environment resulting from any alleged diversion of materials from the previously-arranged lawful disposal facility to the Disposal Site.

10. Ironhustler received no economic advantage or benefit as a result of any alleged diversion of materials from the previously-arranged lawful disposal facility to the Disposal Site.

11. The employees of Ironhustler who were involved in any alleged diversion of materials from the previously-arranged lawful disposal facility to the Disposal Site are no longer employed by Ironhustler.

12. Ironhustler has implemented policies to ensure that materials are not diverted from previously-arranged lawful disposal facilities.

13. Ironhustler offered to enter into a compliance commitment agreement with the Illinois EPA, but the Illinois EPA refused that request.

14. Imposition of a civil fine would in no way aid the enforcement of the Act.

The above fourteen paragraphs set forth a variety of allegations and legal arguments. No single paragraph sets forth a legally valid affirmative defense to the Complaint. Taken as a whole, these fourteen paragraphs also fail to set forth any legally valid affirmative defense. A number of these paragraphs provide, in fact, important admissions establishing Ironhustler's liability. "[D]iversion of materials from the previously-arranged lawful disposal facility to the Disposal Site occurred on July 7, 2017." (¶ 3). "[W]ithin four days after the purported inspection by the Illinois EPA, Ironhustler had ceased all alleged open dumping of waste and removed all materials alleged to have been improperly disposed at the Disposal Site." (¶ 7). "The employees of Ironhustler who were involved in any alleged diversion of materials from the previously-arranged lawful disposal

facility to the Disposal Site are no longer employed by Ironhustler." (§ 11). Potential admissions aside, Ironhustler's Affirmative Defense should be stricken in its entirety as both factually and legal insufficient.

**B. ARGUMENT**

**1. Failure to Plainly Set Forth Facts Constituting Affirmative Defense**

Any facts constituting an affirmative defense must be plainly set forth in the answer. Section 103.204(d) of the Board's Procedural Rules, 35 Ill. Adm. Code 103.204(d). Illinois is a fact-pleading jurisdiction, rather than a notice-pleading jurisdiction as is the federal court system. *People v. Waste Hauling Landfill, Inc.*, PCB 10-9, slip op. at 12 (December 3, 2009) (citing *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 518 (1989)). Legal conclusions unsupported by allegations of specific facts are insufficient. *Waste Hauling Landfill, Inc.*, PCB 10-9, slip op. at 12 (December 3, 2009) (citing *LaSalle National Trust N.A. v. Village of Mettawa*, 249 Ill. 3d 550, 557 (2nd Dist. 1993)). Ironhustler fails to plead sufficient facts to set forth any affirmative defense.

Paragraph 4, for example, of the Affirmative Defense alleges management of Ironhustler did not know of the "diversion" of waste material to the Disposal Site until notified by Illinois EPA. No facts are included to support this legal conclusion. Paragraph 16 of the Complaint notes that an Ironhustler John Deere dozer was present at the Disposal Site. Paragraph 11 of the Affirmative Defenses concedes that employees of Ironhustler were responsible for the diversion of this waste material but provides no facts as to how many employees were involved, how the waste was hauled to the Disposal Site or how that could have been accomplished without the management of Ironhustler being aware of these actions.

Likewise, other paragraphs of the purported Affirmative Defense consist of nothing but legal conclusions with no supporting facts. "Within weeks, the Disposal Site was returned to the same or better environmental condition as before any alleged 'diversion' of material . . ." (§ 8). "There is no resulting long-term impact on the environment resulting from any alleged 'diversion' of materials . . ."

(¶ 9). "Ironhustler received no economic advantage or benefit" from the 'diversion' of waste material.

(¶ 10). "Ironhustler has implemented policies to ensure that materials are not diverted" in the future.

(¶ 12). While it may be unlikely that any of these allegations could constitute a legally valid affirmative defense, the lack of any factual support clearly provides grounds to strike the Affirmative Defense and each cited paragraph. The Affirmative Defense must be stricken as it is factually insufficient to set forth any valid affirmative defense.

**2. Failure to Separately Designate and Number Affirmative Defenses**

In addition to the requirement of Section 103.204(d) of the Board's Procedural Rules that facts constituting an affirmative defense must be plainly set forth in the answer, Section 2-613(a) of the Code of Civil Procedure ("Code"), 735 ILCS 5/2-613(a) (2018), further provides: "[p]arties may plead as many . . . defenses, and matters in reply as they may have, and each shall be separately designated and numbered." The Board may look to the Code of Civil Procedure for guidance. 35 Ill. Adm. Code 101.100(b). It is unclear if all fourteen paragraphs of Ironhustler's "Affirmative Defense" are meant to plead one affirmative defense or if fourteen separate affirmative defenses are being asserted.

Facts constituting specific affirmative defenses are not "plainly set forth" and the purported affirmative defense or defenses include no designations or numbering suggesting how many or what affirmative defenses are being asserted. Separate theories of relief must be pled in separate counts; neither the court nor the parties should be placed in the position of trying to decipher a count to determine if there is more than one theory of relief in the count and, if so, how many. *In re Estate of Yanni*, 2015 IL App (2d) 150108, ¶28; 735 ILCS 5/2-613(a). Section 103.204(d) of the Board's Procedural Rules and Section 2-613(a) of the Code are meant to prevent such guesswork. Ironhustler's purported defense or defenses are legally invalid and should be stricken for failure to comply with the requirements of Section 103.204(d) and Section 2-613(a).

**3. Failure to Assert New Matter to Defeat Claims**

An affirmative defense asserts new matter to defeat a claim. *Worner Agency, Inc. v. Doyle*, 121 Ill. App. 3d 219, 222-223 (4th Dist. 1984). In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat . . . the government's claim even if all allegations in the complaint are true." *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (August 6, 1998). Nothing alleged in the fourteen paragraphs of Ironhustler's purported affirmative defense asserts any new matter defeating Complainant's claims. Just the opposite, it provides admissions reinforcing Complainant's claims. "The analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution." *People v. A. J. Davinroy Contractors*, 249 Ill.App.3d 788, 793 (5th Dist. 1993) (citing *People v. Fiorini*, 143 Ill. 2d 318, 346 (1991)). Ironhustler admits it had control of the materials to be removed from the "Source Site" (§ 1). Ironhustler further admits that these materials were "diverted" to the "Disposal Site" (§ 3) by employees of Ironhustler (§ 11). Since the Affirmative Defense fails to assert any new matter to defeat the People's claims, it must be stricken as legally insufficient.

**4. Mitigating Factors Do Not Constitute Valid Affirmative Defense**

Much of Ironhustler's purported affirmative defense appears to consist of what it implies are mitigating factors. The Board has been clear that possibly mitigating factors do not constitute a valid affirmation defense and such a purported defense will be stricken. In *People v. Geon Co., Inc.*, PCB 97-62 (Oct. 2, 1997), the Board stated as follows:

The Board in recent rulings has determined that an affirmative defense concerning factors in mitigation with regard to any penalty that may be assessed in this matter, is not an appropriate affirmative defense to a claim that a violation has occurred. *People v. Midwest Grain Products of Illinois, Inc.* (August 21, 1997), PCB 97-179, slip op. at 5; *People v. Douglas Furniture of California, Inc.* (May 1, 1997), PCB 97-133, slip op. at 6. Since Geon's fourth affirmative defense speaks to the imposition of a penalty rather than the underlying allegations in this cause of action, the Board will strike it as improper. The Board reminds the parties that Geon is not precluded from introducing at hearing evidence regarding such mitigation factors.



1997 WL 621493, at \*3.

In *People v. QC Finishers, Inc.*, PCB 01-07, slip op. at 5 (June 19, 2003), the Board found as follows:

The Board agrees with the complainant that respondent's affirmative defense here speaks to the issue of penalty and not the cause of action. Therefore, the Board strikes this affirmative defense.

The majority of the fourteen paragraphs constituting the Ironhustler's Affirmative Defense are directed towards the mitigation of any penalty assessment. To the extent Ironhustler's purported "Affirmative Defense" merely presents possible factors in mitigation of any penalty, it fails to constitute a legally valid defense to violations of the Act and associated regulations alleged in the Complaint and must be stricken.

**5. Subsequent Compliance is Not a Valid Affirmative Defense**

Paragraphs 6, 7, 8, and 9 of the Affirmative Defense concern Ironhustler's alleged subsequent compliance after the violations alleged in the Complaint took place. Ironhustler's effort to assert "subsequent compliance" as a defense is expressly barred by Section 33(a) of the Act, 415 ILCS 5/33(a) (2018), which provides, in pertinent part:

It shall not be a defense to findings of violations of the provisions of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, or a bar to the assessment of civil penalties that the person has come into compliance subsequent to the violation, except where such action is barred by any applicable State or federal statute of limitation.

To the extent Ironhustler's purported "Affirmative Defense" argues "subsequent compliance" constitutes a defense to violations of the Act, the "Affirmative Defense" is legally insufficient and must be stricken.

**6. Penalties may be imposed under the Act for wholly past violations.**

Paragraphs 8, 9, 10, 11, 12 and 14 of the Affirmative Defense suggest Ironhustler is arguing

no penalty should be assessed against it for wholly past violations. In *Modine Manufacturing Co. v. PCB*, 193 Ill. App. 3d 643 (2nd Dist. 1990), the Appellate Court rejected the defendant's argument that imposition of a penalty would not aid in the enforcement of the Act because it was no longer in violation of the Act at the time the complaint was filed. The Court found: "all the relevant facts and circumstances must be examined to determine if a civil penalty is to be imposed as a method to aid in the enforcement of the Act . . . [and] . . . we decline to hold categorically that penalties may not be imposed for wholly past violations." 193 Ill. App. 3d at 648. To the extent the Affirmative Defense is an attempt to assert a defense to the Complaint based upon the inappropriateness of penalties being imposed for wholly past violations of the Act, it is legally insufficient and must be stricken.

**7. The Act authorizes the Board to assess civil penalties for violations regardless of whether those violations resulted in actual pollution.**

In Paragraphs 8 and 9 of the Affirmative Defense, Ironhustler suggests no penalty should be assessed as no actual pollution resulted from its violations of the Act and associated regulation. As was noted above, these paragraphs consist of nothing but legal conclusions with no supporting facts. Moreover, in *ESG Watts, Inc. v. Illinois Pollution Control Bd.*, 282 Ill.App.3d 43 (4th Dist. 1996), the Appellate Court rejected the argument that civil penalties are not to be imposed unless the violations resulted in actual pollution:

The record must demonstrate an adequate rationale for the imposition of the penalty, and the penalty must be "commensurate with the seriousness of the infraction." *Trilla Steel Drum Corp. v. Pollution Control Board*, 180 Ill.App.3d 1010, 1013, 129 Ill.Dec. 738, 740, 536 N.E.2d 788, 790 (1989). However, the Act clearly authorizes the Board to assess civil penalties for violations regardless of whether those violations resulted in actual pollution. 415 ILCS 5/1 et seq. (West 1992); *Park Crematory, Inc. v. Pollution Control Board*, 264 Ill.App.3d 498, 501-02, 201 Ill.Dec. 931, 934, 637 N.E.2d 520, 523 (1994).

To the extent ¶¶ 8 and 9 are an attempt to assert an affirmative defense that penalties are not to be imposed unless the violations of the Act resulted in actual pollution, this purported defense is legally insufficient and must be stricken.

**C. CONCLUSION**

WHEREFORE, for the above and foregoing reasons, the Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board strike in its entirety the Affirmative Defense or Defenses asserted in the November 20, 2019 Answer to the Complaint filed by Respondent, IRONHUSTLER EXCAVATING, INC., and grant it such other and further relief as the Board deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS  
by KWAME RAOUL,

Attorney General  
of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement Division

BY: s/ Raymond J. Callery  
RAYMOND J. CALLERY  
Assistant Attorney General  
Environmental Bureau

ARDC # 6193579  
500 South Second Street  
Springfield, Illinois 62706  
(217) 782-9031  
[rcallery@atq.state.il.us](mailto:rcallery@atq.state.il.us)  
[ebs@atq.state.il.us](mailto:ebs@atq.state.il.us)

Date: November 27, 2019.

**CERTIFICATE OF SERVICE**

I, Raymond J. Callery, an Assistant Attorney General, certify that on the 27th day of November, 2019, I caused to be served by e-mail and/or regular mail as indicated the foregoing Notice of Filing and Motion to Strike Affirmative Defense Filed by IronHustler to the following:

Kenneth Eathington  
Quinn Johnston Henderson & Pretorius  
227 N.E. Jefferson Street  
Peoria, IL 61602  
[keathington@quinnjohnston.com](mailto:keathington@quinnjohnston.com)  
Attorney for River City Construction, LLC

Carol Webb  
Illinois Pollution Board  
1021 North Grand Avenue East  
P.O. Box 19274  
Springfield, IL 62794-9274  
[carol.webb@illinois.gov](mailto:carol.webb@illinois.gov)  
Hearing Officer

Jay H. Scholl  
Davis & Campbell L.L.C.  
401 Main Street, Suite 1600  
Peoria, IL 61602-1241  
[jhscholl@dcamplaw.com](mailto:jhscholl@dcamplaw.com)  
Attorney for IronHustler Excavating, Inc.

Venovich Construction Company  
c/o Joseph L. Venovich, Jr., Registered Agent  
207 South Sampton Street  
P.O. Box 410  
Tremont, IL 61568

s/Raymond J. Callery  
Raymond J. Callery  
Assistant Attorney General  
500 South Second Street  
Springfield, IL 62701  
217/782-9031  
[rcallery@atg.state.il.us](mailto:rcallery@atg.state.il.us)  
[ebs@atg.state.il.us](mailto:ebs@atg.state.il.us)