

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD


PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 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.)	

NOTICE OF FILING

To: See attached Certificate of Service.

PLEASE TAKE NOTICE that on January 10, 2020, I filed with the Office of the Clerk of the Pollution Control Board this Notice of Filing and a Response to the Motion to Strike Affirmative Defense Filed by IronHustler, copies of which are hereby served upon you.

IRONHUSTLER EXCAVATING, INC.
An Illinois corporation, Respondent

By: 
One of Its Attorneys

Jay H. Scholl, ARDC # 6297558
DAVIS & CAMPBELL L.L.C.
401 Main Street, Suite 1600
Peoria, IL 61602
Tel: (309) 673-1681
Fax: (309) 673-1690
jhscholl@dcamplaw.com
00245070.DOCX

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served on January 10, 2020, the attached Notice of Filing upon the following persons by email:

Raymond J. Callery
Office of the Attorney General
500 South Second Street
Springfield, IL 62701
rcallery@atg.state.il.us
Assistant Attorney General

Carol Webb
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
Carol.Webb@illinois.gov
Hearing Officer

Kenneth Eathington
Jeffry A. Ryva
Matthew A. Warner
Quinn, Johnston, Henderson
Pretorius & Cerulo
227 N.E. Jefferson Street
Peoria, IL 61602
keathington@quinnjohnston.com
jryva@quinnjohnston.com
mwarner@quinnjohnston.com
*Attorneys for River City
Construction, LLC*

Furthermore, I, the undersigned, certify that I have served on January 10, 2020, the attached Notice of Filing upon the following persons by depositing the document in a U.S. Postal Service mailbox by the time of 5:00 P.M., with proper postage or delivery charges prepaid:

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



Jay H. Scholl, ARDC # 6297558
DAVIS & CAMPBELL L.L.C.
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Peoria, IL 61602
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**RESPONSE TO THE MOTION TO STRIKE
AFFIRMATIVE DEFENSE FILED BY IRONHUSTLER**

NOW COMES the Respondent, IRONHUSTLER EXCAVATING, INC., an Illinois corporation (“IronHustler”), by its attorneys at Davis & Campbell L.L.C., and responds to the Motion to Strike Affirmative Defense filed by IronHustler (the “Motion”) filed by the Complainant, PEOPLE OF THE STATE OF ILLINOIS (“Complainant”), as follows:

**RESPONSE TO REQUEST TO STRIKE
AFFIRMATIVE DEFENSE**

IronHustler does not object to the striking of the mitigating factors that were alleged as an affirmative defense in its Answer dated November 20, 2019; provided that the striking of those mitigating factors shall not be deemed a waiver of, or a preclusion against, introducing at hearing evidence regarding mitigating factors provided by 415 ILCS 5/33(c). *See, e.g., People v. GeonCo, Inc.*, PCB 97-62 (Oct. 2, 1997) (after striking mitigating factors asserted as an affirmative defense, reminding the parties that the respondent “is not precluded from introducing at hearing evidence regarding such mitigation factors.”). IronHustler expressly reserves its right to introduce at hearing evidence regarding mitigating factors, as “the [Environmental Protection] Act [(the “Act”)] does

not confer upon the [Pollution Control] Board [(the “Board”)] the authority to impose a civil penalty in every case of a violation of the Act or regulations.” ESG Watts, Inc. c. Illinois Pollution Control Bd., 282 Ill. App. 3d 43, 51, 668 N.E.2d 1015, 1020 (4th Dist. 1996).

**RESPONSE TO ADDITIONAL MATTERS THAT ARE IRRELEVANT
TO THE REQUEST TO STRIKE AFFIRMATIVE DEFENSE**

After arguing that the mitigating factors to be considered by the Board do not constitute an affirmative defense, the Motion goes on to argue several points which are irrelevant to whether those mitigating factors constitute an affirmative defense. Specifically, in Sections 6 and 7 of the Motion, Complainant raises arguments regarding the appropriateness of penalties should the Board find a violation of the Act. IronHustler responds to those arguments as follows:

1. Penalties Should Not be Imposed for Wholly Past Violations, Particularly Where the Respondent is Demonstrated to Have Exercised Good Faith

In Section 6 of the Motion, Complainant argues that “penalties may be imposed under the Act for wholly past violations.” However, there is a wealth of case law holding that penalties should not be imposed where the party has exercised good faith and/or the violations ceased before a complaint is filed before the Board.

In evaluating the Act, the Illinois Supreme Court has long recognized that “the principal reason for authorizing the imposition of civil penalties was to provide a method to aid the enforcement of the Act and that the punitive considerations were secondary.” S. Illinois Asphalt Co., Inc. v. Pollution Control Bd., 60 Ill. 2d 204, 207, 326 N.E.2d 406, 408 (1975). For that reason, “the General Assembly did not intend that the . . . Board should impose a monetary fine in every case of a violation of the Act or regulations.” Id. at 208. Accordingly, “[t]he imposition of [a] penalty constitutes an arbitrary abuse of discretion” where the penalty “can only be viewed as punishment . . . and is not required as an aid in the enforcement of the Act.” Id. at 212.

Along these lines, courts have routinely vacated or reversed penalties awarded by the Board where a party has exercised good faith, *see, e.g., Park Crematory, Inc. v. Pollution Control Bd.*, 264 Ill. App. 3d 498, 505-06, 637 N.E.2d 520, 525 (1st Dist. 1994) (vacating a penalty where “[t]he evidence shows that, at all times, Park’s owner acted in ‘good faith’ ”); CPC Intern., Inc. v. Illinois Pollution Control Bd., 24 Ill. App. 3d 203, 208, 321 N.E.2d 58, 61 (3d Dist. 1974) (vacating a penalty where “[t]he violations were apparently not deliberate and CPC took quick steps to correct the problem”), and/or the violations ceased before a complaint is filed before the Pollution Control Board. *See, e.g., S. Illinois Asphalt Co.*, 60 Ill. 2d at 210 (reversing a penalty where “[t]here was no need to assess a penalty in aid of the enforcement of the Act because Southern had ceased operating prior to the filing of the complaint.”); City of Moline v. Pollution Control Bd., 133 Ill. App. 3d 431, 433, 478 N.E.2d 906, 908 (3d Dist. 1985) (reversing a penalty where, “[w]hile the evidence produced before the Board reveals a seriously troubled and environmentally harmful operation at North Slope in its early years following upgrading, it is equally clear that these problems were substantially under control at the time the complaint was filed”). In these instances, the Pollution Control Board has itself recognized that the imposition of penalties can in fact hinder the fulfillment of the purpose of the Act. *See Employees of Holmes Bros. v. Merlan, Inc.* (1971), 2 Ill.P.C.B.Op. 405, 409 (“In the opinion of the Board, Merlan has exercised good faith in trying to control its problems, and to penalize a company such as this would discourage all those who act in good faith to bring an end to their pollution control problems.”).

Finally, “the severity of the penalty should bear some relationship to the seriousness of the infraction or conduct.” S. Illinois Asphalt Co., 60 Ill. 2d at 208. “In determining if a civil penalty is warranted and, if so, the amount of the penalty, the Board must be governed by the consideration required by [415 ILCS 5/33(c)],” including the character and degree of injury to, or interference

with the protection of the health, general welfare and physical property of the people and any subsequent compliance. Id. at 208-09.

Complainant points to only one case in the Second District, Modine Mfg. Co. v. Pollution Control Bd., for the premise that that “penalties may be imposed under the Act for wholly past violations.” 193 Ill. App. 3d 643, 549 N.E.2d 1379 (2d Dist. 1990). However, as noted in Modine, the First District Court of Appeals and the Third District Court of Appeals (the district in which the violations in this case are alleged to have occurred) have held that the imposition of a penalty based on wholly-past violations does not aid in the enforcement of the Act. Id. at 648. Specifically, in Chicago Magnesium Casting Co. v. Pollution Control Board, the First District Court of Appeals held that the imposition of a penalty was improper because the respondent had been in compliance with the Act for six months, and thus, “the imposition of a civil penalty will in no way aid the enforcement of the Act.” 22 Ill. App. 3d 489, 495, 317 N.E.2d 689, 694 (1st Dist. 1974). Likewise, in City of Moline, the Third District Court of Appeals found that the imposition of a penalty in that case would not aid in the enforcement of the Act because the “problems were substantially under control at the time the complaint was filed.” 133 Ill. App. 3d at 433.

2. Whether Actual Pollution Occurred Is a Factor in Determining a Penalty

Furthermore, in Section 7 of the Motion, Complainant argues that the Board is authorized “to assess civil penalties for violations regardless of whether those violations resulted in actual pollution.” However, whether actual pollution occurred is an important factor in determining whether a penalty should be imposed for violations of the Act.

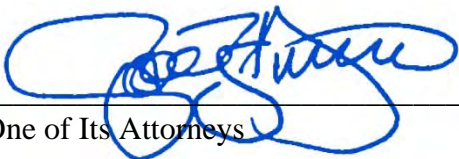
Section 33(c) of the Act provides that “[i]n making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to: (i) *the character and*

degree of injury to, or interference with the protection of the health, general welfare and physical property of the people; (ii) the social and economic value of the pollution source; (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and (v) any subsequent compliance.” 415 ILCS 5/33(c) (emphasis added). As such, whether actual pollution occurred is a factor, out of many, that the Board should take into consideration before imposing a penalty under the Act.

CONCLUSION

WHEREFORE, IronHustler respectfully requests that the Board enter an order: (i) either (a) denying the Motion, or (b) in granting the Motion, finding that IronHustler is not precluded from introducing at hearing evidence regarding mitigating factors; and (ii) granting such further relief as deemed just and appropriate.

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One of Its Attorneys

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Office of the Attorney General
500 South Second Street
Springfield, IL 62701
rccallery@atg.state.il.us
Assistant Attorney General

Carol Webb
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
Carol.Webb@illinois.gov
Hearing Officer

Kenneth Eathington
Jeffrey A. Ryva
Matthew A. Warner
Quinn, Johnston, Henderson
Pretorius & Cerulo
227 N.E. Jefferson Street
Peoria, IL 61602
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jryva@quinnjohnston.com
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