

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 vs.) PCB No. 10-72
) (Enforcement)
 BYROM WARD, d/b/a WARD ELECTRIC,)
 and TIMOTHY JAMES,)
)
 Respondent.)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on August 8, 2011, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, COMPLAINANT'S CIVIL PENALTY REQUEST, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

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

BY: 

Christine Zeivel
Assistant Attorney General
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Dated: August 8, 2011

CERTIFICATE OF SERVICE

I hereby certify that I did on August 8, 2011, cause to be served by U.S. Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING, COMPLAINANT'S CIVIL PENALTY REQUEST and the INTERIM OPINION AND ORDER OF THE BOARD entered July 7, 2011, upon the persons listed on the Service List.



Christine Zeivel
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

Byrom Ward
d/b/a Ward Electric
2237 County Road 1975 East
Crossville, IL 62827

Timothy James
707 Burrell Street
Carmi, IL 62821

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, IL 62794

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
vs.)	No. 10-72
)	(Enforcement - Land)
)	
BYROM WARD d/b/a WARD ELECTRIC)	
and TIMOTHY JAMES,)	
)	
Respondents.)	

COMPLAINANT'S CIVIL PENALTY REQUEST

The Complainant, PEOPLE OF THE STATE OF ILLINOIS, pursuant to Sections 33(c) and 42(h) of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/33(c) and 42(h) (2010), presents Complainant's Civil Penalty Request.

INTRODUCTION

On July 7, 2011, the Illinois Pollution Control Board ("IPCB") entered an Order granting Complainant's Motion for Summary Judgment against Respondents Byrom Ward d/b/a Ward Electric and Timothy James ("Board Order"). It is now appropriate for the Board to impose a civil penalty against the Respondents. Sections 33(c) and 42(h) of the Act provide statutory guidelines for the Board to consider in imposing civil penalties in environmental enforcement cases. 415 ILCS 5/33(c) and 42(h) (2010). Based upon these provisions and the facts of this case, Complainant requests the Board impose a \$5,000 civil penalty upon Respondent Ward and a \$7,000 civil penalty upon Respondent James.

The facts deemed admitted may be summarized as follows: On or before December 20, 2007, Timothy James transported six electrical transformers, given to him by Byrom Ward for disposal, to the James residence, located at 202 Fackney Street, Carmi, White County, Illinois. Compl. ¶¶ 3, 6. Timothy James then spilled approximately sixty gallons of Polychlorinated

biphenyl ("PCB") laden oil onto the ground of the residence. Compl. ¶ 7. Samples of the oil from the transformers indicated PCB concentrations ranging from 260 ug/kg to 5,600,000 ug/kg. Soil samples confirmed PCB contamination of the soil. Compl. ¶ 10.

By February 26, 2008, remedial action was completed at the site, including excavation of the contaminated soil and decontamination of any equipment or structure believed to have come into contact with PCB-containing oil. Compl. ¶ 11. Fifty-six 55-gallon drums worth of PCB contaminated material remained on the site until sometime after April 23, 2008, when the owner and landlord of the James residence paid for the contaminated material to be properly disposed of at a PCB disposal facility in Alabama. Compl. ¶¶ 12, 13.

ARGUMENT

The Act authorizes the imposition of civil penalties where there has been a violation, 415 ILCS 5/42(a) (2010), and the Board has broad discretionary powers to assess such civil penalties under the statutory authority vested by the Act. *ESG Watts, Inc. v. Pollution Control Bd.*, 282 Ill. App. 3d 43, 50-51 (4th Dist. 1996); *Modine Mfg. Co. v. Pollution Control Bd.*, 193 Ill. App. 3d 643, 647 (2d Dist. 1990). While there is no definitive method for designating an appropriate penalty, *People v. Bernice Kershaw and Darwin Dale Kershaw*, PCB No. 92-164, p.14 (April 20, 1995), in determining an appropriate penalty the Board first calculates the maximum penalty which could be assessed under the Act and then considers the mitigating or aggravating impact of the circumstances of the case, including the factors set forth in Sections 33(c) and 42(h) of the Act, 415 ILCS 5/33(c) and 42(h) (2010). *People v. ESG Watts, Inc.*, PCB No. 96-233, at 8 (February 5, 1998).

The Illinois Legislature's approach to environmental enforcement and the imposition of civil penalties pursuant to the Illinois Environmental Protection Act illustrates that while violations of the Act are to be taken seriously, additional factors must be considered in order to

ensure penalties are appropriate to achieve the goals of the Act. In this case, while the violations were confined to a small area and within a small community, the severity of the violations and the threat posed by the hazardous nature of the pollutants support the imposition of a moderate civil penalty for each Respondent.

I. Changes in the Law Affecting Civil Penalties Occurred in 1990.

Two significant changes in Illinois statutory law concerning civil penalties in environmental enforcement cases occurred in 1990. First, Public Act 86-1014, Section 1, effective July 1, 1990, in subsection (a) of 415 ILCS 5/42, increased the maximum civil penalty from \$10,000.00 to \$50,000.00 for a violation of the Act and increased the maximum daily penalty from \$1,000.00 per day to \$10,000.00 per day for each and every day that a violation persisted. The passage of Public Act 86-1014 and its 500 percent increase in the maximum penalty and 1000 percent increase in the daily penalty clearly indicates the intent of the Illinois Legislature for higher penalties in environmental cases. Second, Public Act 86-1363, Art. 2, Section 2002, effective September 7, 1990, added subsection (h) to 415 ILCS 5/42. Subsection (h) provides factors that must be considered in aggravation or mitigation of the penalty amount in order to ensure an appropriate penalty that achieves the goals of the Act is imposed.

II. Maximum Penalty

In granting the People's Motion for Summary Judgment, the Board found that each Respondent had violated three provisions of the Act: Sections 21(a), 21(e) and 21(p)(1). 415 ILCS 5/21(a), 21(e) and 21(p)(1) (2010). Section 42(a) of the Act allows \$50,000 per violation, which multiplied by the three violations, equals \$150,000 for a base maximum penalty. Section 42(a) additionally allows for \$10,000 per day each violation continued. The Respondents violated the Act by disposing of the electrical transformers at the James residence either on or before December 20, 2007. Board Order, pp. 7-9. The People assert that the Respondents

continued to violate Sections 21(a), 21(e) and 21(p)(1) by allowing the discarded waste and its hazardous contaminants to remain at the site until at least April 23, 3008. Compl. Par. 12.

Therefore, at a minimum, each of the three violations continued for an additional 125 days, which adds an additional \$3,750,000 to each Respondent's maximum penalty and results in a total maximum penalty of \$3,900,000 for each Respondent.

II. Section 33(c): Impact on the Public Resulting from Non-compliance with the Act.

The legislature directs the Board to consider the factors provided in Section 33(c) when making penalty determinations in order to protect against the imposition of arbitrary civil penalties. *People ex. rel. Ryan ex. rel. Douglas v. IBP, Inc.*, 309 Ill. App. 3d 631, 639 (3d Dist. 1991), *citing* *City of Waukegan v. Pollution Control Bd.*, 57 Ill. 2d 170, 182-83 (1974).

Section 33(c) provides as follows:

In 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:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
2. the social and economic value of the pollution source;
3. 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;
4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
5. any subsequent compliance.

In response to these Section 33(c) factors, the Complainant states the following:

1. While the spill was confined to a small, self-contained area of a residential backyard, PCBs are hazardous pollutants that are known to cause neurobehavioral and immunological changes in children, skin conditions in adults, and cancer in animals. Therefore,

the Respondents' violations of the Act, including the improper disposal of PCBs and resulting contamination, threatened both human health and the environment.

2. There was no measurable social or economic benefit to the Respondents' improper disposal of waste at the James residence.

3. The disposal of electrical transformers filled with PCB-laden oil was not suitable for a residential property.

4. Compliance with the Act in by properly disposing of the waste was both technically practicable and economically reasonable.

5. Respondent Ward hired Jeff Guisewite, Inc. and Environmental Technologies, Inc. to remediate the PCB contamination at the James residence. The owner and landlord of the James residence paid for the proper disposal of the contaminated soil at a PCB disposal facility in Alabama. Therefore, Respondent Ward was partially responsible for any subsequent compliance achieved.

In sum, the application of the facts of this matter to the Section 33(c) factors as outlined above supports the imposition of a moderate to substantial civil penalty.

III. Consideration of Section 42(h) factors.

Section 42(h) of the Act, 415 ILCS 5/42(h)(2008), provides as follows:

In determining the appropriate civil penalty to be imposed under . . . this Section, the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
3. any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;

4. the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;
6. whether the respondent voluntarily self-disclosed, in accordance with subsection I of this Section, the non-compliance to the Agency; and
7. whether the respondent has agreed to undertake a "supplemental environmental project," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform.

In response to the Section 42(h) factors, Complainant states as follows:

1. The Respondents violated the Act by disposing of the electrical transformers at the James residence either on or before December 20, 2007, and compliance was not achieved until after April 23, 2008, when the owner and landlord of the James residence paid for the contaminated material to be properly disposed of at a PCB disposal facility in Alabama. These actions resulted in the violations continuing for over four months. The gravity of the violations weighs moderately heavy, as a moderate amount of hazardous contaminants, which could pose a significant risk to human health and the environment, were dumped at the James residence.

2. The Respondents did not exercise due diligence in attempting to comply with the requirements of the Act. Respondent Ward was a licensed electrician who collected the old electrical transformers and, despite being knowledgeable with electrical industry, disposed of them in a haphazard manner. Respondent James, who did not work in either the electrical, scrap or waste disposal fields, undertook the responsibility for disposing of the transformers without any diligence in becoming knowledgeable regarding the proper way to handle and

dispose of such equipment.

3. Respondents incurred a moderate economic benefit in that neither Respondent initially paid for the proper disposal of the electrical transformers or the PCB-laden dielectric oil contained within them, nor for the subsequent disposal of the contaminated material at a proper PCB handling and disposal facility.

4. Both Respondents in this matter reside in a very small community where financial resources are often limited. Complainant submits, based upon the specific facts of this matter, that a penalty of \$5,000 for Respondent Ward and \$7,000 for Respondent James, for a total penalty of twelve thousand dollars (\$12,000), will serve to deter further violations of the Act by Respondents and by others similarly situated, and to encourage Respondents and others similarly situated to voluntarily comply with the Act in the future.

5. The People are not aware of any previously adjudicated violations.

6. The Respondents did not self-disclose.

7. A supplemental environmental project is not an issue in this matter.

CONCLUSION

While violations of the Act are to be taken seriously, additional factors must be considered on a case-by-case basis in order to ensure penalties are appropriate in light of the applicable facts. In this case, while the violations were confined to a small area and within a small community, the severity of the violations and the threat posed by the hazardous nature of the pollutants support the imposition of a moderate civil penalty for each Respondent.

Wherefore, Complainant respectfully requests the Board to impose a \$5,000 civil penalty upon Respondent Ward and a \$7,000 civil penalty upon Timothy James, and for the civil penalties to be paid to the Illinois EPA for deposit into the Environmental Protection Trust Fund.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
Attorney General of the State of Illinois

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