

ILLINOIS POLLUTION CONTROL BOARD
May 15, 2014

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 11-42
) (Enforcement – Land)
JOEL A. MOSKE, d/b/a U.S. SCRAP,)
)
Respondent.)

OPINION AND ORDER OF THE BOARD (by D. Glosser):

On January 19, 2011, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a three-count complaint (Comp.) against Joel A. Moske d/b/a U.S. Scrap (Moske), alleging violations of the Environmental Protection Act (Act) and the Board’s regulations. *See* 415 ILCS 5/31(c)(1) (2012)¹; 35 Ill. Adm. Code 103.204. The complaint involves the U.S. Scrap site (Site) located at 1551 E. McBride Street, Decatur, Macon County. Comp. at 2. On January 7, 2014, the People filed a motion to deem admitted matters of fact and genuineness of documents (Mot. to Admit). On January 9, 2014, the People filed a motion for summary judgment (Mot.).

On February 20, 2014, the Board granted the People’s motion to admit and granted, in part, the People’s motion for summary judgment, finding that Moske violated Sections 9(a), 9(c), 21(a), 21(e), 21(p)(3) and 21(p)(7)(i) of the Act (415 ILCS 5/9(a), 9(c), 21(a), 21(e), 21(p)(3), 21(p)(7)(i) (2012)). On the same date, the Board denied the People’s motion for summary judgment with respect to count III of the complaint alleging violations of Sections 722.111 and 808.121 of the Board’s waste regulations (35 Ill. Adm. Code 722.111, 808.121). On April 17, 2014, the People filed both a motion for penalty determination and a motion for voluntary dismissal (Mot. Dismiss) of count III of the complaint.

In this opinion and order, the Board grants the People’s motion to voluntarily dismiss before briefly summarizing the facts of the case and discussing the statutory penalty considerations. Finally, the Board directs Moske to pay a civil penalty of \$8,000 for the violations of Sections 9(a), 9(c), 21(a), 21(e), 21(p)(3) and 21(p)(7)(i) of the Act (415 ILCS 5/9(a), 9(c), 21(a), 21(e), 21(p)(3), 21(p)(7)(i) (2012)).

VOLUNTARY DISMISSAL

As stated above, the Board granted the People’s motion for summary judgment, in part, on February 20, 2014. The Board’s February 20 Order found that Moske violated Sections 9(a), 9(c), 21(a), 21(e), 21(p)(3) and 21(p)(7)(i) of the Act (415 ILCS 5/9(a), 9(c), 21(a), 21(e),

¹All citations to the Act will be to the 2012 compiled statutes, unless the provision at issue has been substantively amended in the 2012 compiled statutes.

21(p)(3), 21(p)(7)(i) (2012)) as alleged in counts I and II of the People's complaint. On April 17, 2014, the People filed a motion for voluntary dismissal stating, "[c]omplainant no longer wishes to proceed to hearing on [c]ount III of the [c]omplaint." Mot. Dismiss at 2. The Board grants the People's motion and dismisses count III of the complaint.

FACTS

U.S. Scrap was registered as a domestic corporation in Illinois, but was involuntarily dissolved in August of 2009. Mot. to Admit Exh. 1 at 1. Moske was the president of the corporation. *Id.* Moske continues to operate U.S. Scrap at the Site, which is not permitted by IEPA as a sanitary landfill. *Id.* IEPA conducted a number of inspections of the Site that resulted in administrative citations and violation notices before the February 21, 2007 inspection that is the subject of the People's complaint. Moske was present at the Site for the IEPA inspections conducted on February 21, 2007 and June 22, 2009. *See* Mot. to Admit Exh. 1-A, 1-B, 1-C, 1-D, and 1-E.²

On February 20, 2007, IEPA received a complaint that tires were being burned on the Site. Mot. to Admit Exh. 1-A. On February 21, 2007, Dustin Burger, an inspector with the IEPA Bureau of Land, conducted an inspection of the Site. *Id.* Mr. Burger observed several piles of soil mixed with debris including wood, metal, concrete, and insulation. *Id.* Also present at the Site were a pile of gray ash-like material, a large pile of broken concrete with protruding rebar, as well as a pile of scrap wood, insulation, and tarboard that was smoldering. *Id.* Moske acknowledged the pile of gray fly ash at the Site and indicated that it was present when he bought the Site. *Id.* The IEPA inspection report indicates that the estimated volume of waste at the Site was 250 cubic yards. *Id.*

On May 6, 2008, Mr. Burger again inspected the Site. Mot. to Admit Exh. 1-B. Mr. Burger observed that the gray ash-like material, some piles of debris, and some of the broken concrete had been removed. *Id.* However, some tires and broken concrete, as well as a large pile of soil mixed with debris, including metal, plastic, concrete, wood, glass and rubber, remained on the Site. *Id.* The IEPA inspection report again indicates that the estimated volume of waste at the Site was 250 cubic yards. *Id.* The report states that while some waste was removed from the east side of the Site, the removed waste "exposed a large waste area that was an amalgamation of metal, soil, plastic, concrete, wood, glass, and rubber. The volume is extremely large, amounting to approximately 100 semi-loads of mixed debris." *Id.*

On June 22, 2009, Mr. Burger inspected the Site a third time. Mot. to Admit Exh. 1-C. Mr. Burger observed that the majority of the scrapyard was clean, but piles of scrap metal, as well as a large pile containing soil mixed with other debris, remained. *Id.* The soil was mixed with plastic, glass, fiberglass, and metal. *Id.* The IEPA inspection report indicates that the estimated volume of waste at the Site had increased to 500 cubic yards. *Id.*

² The People's motion to admit is not consecutively numbered through the attached exhibits. Exhibit 1 to the motion to admit is the Request for Admission of Fact and Genuineness of Documents. The remaining exhibits are IEPA inspection reports included in support of the Request for Admission of Fact and Genuineness of Documents which the People assigned letters. These exhibits will be cited as Mot. to Admit Exh. 1-A, for example.

On November 12, 2010, Mr. Burger made a fourth inspection of the Site. Mot. to Admit Exh. 1-D. During this inspection, Mr. Burger observed that some metals and waste had been removed from the property, but there were still two piles of soil mixed with metal, rubber, plastic, and other small debris from automobiles. *Id.* There was also a small pile of scrap metals, as well as trailers containing used tires, located on the Site. *Id.* The IEPA inspection report indicates that the estimated volume of waste at the Site had increased to 2000 cubic yards. *Id.*

Finally, on February 22, 2012, Mr. Burger made a fifth inspection of the Site. Mot. to Admit Exh. 1-E. Again, Mr. Burger observed two piles of soil mixed with debris, including metal, rubber, plastic, and small debris from automobiles. *Id.* There was also a small pile of scrap metal and a roll-off box containing old lumber located on the Site. *Id.* The IEPA inspection report again indicates that the estimated volume of waste at the Site was 2000 cubic yards. *Id.* Mr. Burger took pictures documenting his observations during all inspections.

PENALTY DISCUSSION

On April 17, 2014, the People filed its motion for penalty determination and final order (Penalty Mot.). In its motion, the People refer to the January 9, 2014 motion for summary judgment regarding both the Section 33(c) and Section 42(h) factors that the Board must consider in making penalty determinations. Penalty Mot. at 2.; *see* 415 ILCS 5/33(c), 42(h) (2012). The People also state that, “[t]he six violations the Board has previously found under count I and count II, considering the length of time the violations continued, make a penalty in the amount of [\$8,000] appropriate.” Penalty Mot. at 2. The People reminded the Board that it has also requested that, “[r]espondent be ordered to remove any remaining waste material from the Site and properly dispose of it,” along with being ordered to cease and desist from violations of the Act. *Id.*

In its February 20, 2014 order, the Board found that Moske violated Sections 9(a), 9(c), 21(a), 21(e), 21(p)(3), and 21(p)(7)(i) of the Act (415 ILCS 5/9(a), 9(c), 21(e), 21(p)(3), 21(p)(7)(i) (2012)) as alleged in counts I and II of the People’s complaint. With count III of the complaint dismissed, the People request that the Board determine the appropriate penalty for the violations found by the Board in its February 20, 2014 opinion and order. In evaluating the record to determine the appropriate penalty, the Board considers the factors of Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2012)).

Section 33(c) of the Act 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:

- (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 sources; and
- (v) any subsequent compliance. 415 ILCS 5/33(c) (2012).

In addressing the factors included in Section 33(c) of the Act (415 ILCS 5/33(c) (2012)), the People argue that, due to a complaint that tires were being burned at the Site, there is a potential health danger to the public, and the threat of injury is moderate. Mot. at 11. The Board agrees that such action could endanger the health, general welfare, and physical property of the people and weighs this factor in favor of imposing a civil penalty. The People also argue that there was no social or economic value of the discarded debris, which included scrap metal, broken concrete, waste wood, and glass. *Id.* The Board agrees that there is no social or economic value of these discarded materials at this unpermitted facility and weighs this factor in favor of imposing a civil penalty. Additionally, the People allege, and the Board agrees, that disposal of these materials, as well as the open burning of the waste, was not suitable for the property and weighs this factor in favor of imposing a civil penalty. *See id.*

Furthermore, the People argue that proper disposal and recycling of the waste and debris materials was both economically and technically feasible. Mot. at 11. The Board agrees that removal of the material was both economically and technically feasible as evidenced by IEPA documenting removal of some of the debris from the Site. Accordingly, the Board weighs this factor in favor of imposing a civil penalty.

While the People allege that Moske's violations diminished over time, and as of the February 22, 2012 inspection, Moske had removed most, but not all, of the waste materials improperly disposed of at the property, the Board notes that the estimated volume of waste indicated on IEPA inspection reports increased up to the February 2012 inspection. *Id.* The Board agrees that the number of violations diminished over time, but balances the decreased number of violations with the increase in estimated volume of waste and the ongoing nature of the violations to find this factor supports a civil penalty imposed against Moske. The Board weighs each Section 33(c) factor discussed above in favor of imposing a civil penalty.

The People also request that Moske remove and properly dispose of the waste remaining on the property. Mot. at 11, 14. The February 22, 2012 inspection report describes the waste remaining at the site as "two piles of soil mixed with metal, rubber, plastic, and other small bits from automobiles that were dumped onto the ground" and "a roll-off boxfull of demolition debris in the form of old lumber." Mot. to Admit Exh. 1-E. The Board finds that removal of the material is technically practicable. In addition, there is no indication in the record that removal

and proper disposal of the waste is economically unreasonable. Taking these factors into account, the Board finds that the specific relief requested by the People is appropriate along with a civil penalty. Therefore, the Board proceeds to discuss the Section 42(h) factors in determining the appropriate civil penalty.

Section 42(h) of the Act provides as follows:

- (h) In determining the appropriate civil penalty to be imposed under subdivisions (a), (b)(1), (b)(2), (b)(3), or (b)(5) of 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;
 - (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; and
 - (8) whether the respondent has successfully completed a Compliance Commitment Agreement under subsection (a) of Section 31 of this Act to remedy the violations that are the subject of the complaint.

In determining the appropriate civil penalty to be imposed under subsection (a) or paragraph (1), (2), (3), or (5) of subsection (b) of this Section, the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship. However, such civil penalty may be off-set in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and the respondent. 415 ILCS 5/42(h) (2012).

As to the factors in Section 42(h) of the Act (415 ILCS 5/42(h) (2012)), the People argue that the violations continued for at least five years, and while re-inspection of the Site indicated that some violations were corrected, other violations were found at later inspections. Mot. at 12. The Board finds that consideration of the duration and gravity of Moske's violations aggravates the assessment of a penalty. The People argue that Moske has shown a lack of diligence in attempting to come into compliance with the Act and Board regulations. *Id.* However, the People state that as of the February 22, 2012 inspection, Moske had removed most, but not all, of the waste and debris materials improperly disposed of on the property. *Id.* Because the alleged violations continued for more than five years, and the estimated volume of waste grew up to the most recent IEPA inspection of the Site, the Board finds that consideration of this factor aggravates assessment of a substantial penalty.

The People argue that Moske incurred a nominal economic benefit by avoiding the costs of proper disposal of the waste materials, debris, and soil containing waste that was improperly disposed of on the Site. *Id.* The Board factors this economic benefit against Moske. The People state that the record contains no evidence of, and the People are not aware of any prior adjudicated violations. *Id.* at 13. The Board finds that consideration of this factor mitigates against a substantial penalty. Finally, the People allege that Moske did not self-report the alleged violations, did not agree to perform a supplemental environmental project, and did not successfully complete a Compliance Commitment Agreement. *Id.* The Board finds that consideration of these three factors suggests that the assessment of a substantial penalty is appropriate. The People further argue that a total civil penalty of \$8,000 will help deter further violations and aid in future voluntary compliance. *Id.*

Appropriate Civil Penalty

In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2012)). People v. Gilmer, PCB 99-27, slip op. at 6 (Aug. 24, 2000). The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. Wells Manufacturing Company v. Pollution Control Board, 73 Ill. 2d 226, 232-33, 383 N.E.2d 148, 150-51 (1978). The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must bear in mind that no formula exists, and all facts and circumstances must be reviewed. Gilmer, PCB 99-27, slip op. at 8.

The Board has stated that the statutory maximum penalty “is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts.” Gilmer, PCB 99-27, slip op. at 8, citing IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71, slip op. at 72 (May 10, 1990). The basis for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act. *See* 415 ILCS 5/42(a) and (b) (2012). Section 42(a) provides for a civil penalty not to exceed \$50,000 for violating a provision of the Act or Board regulations and an additional civil penalty not to exceed \$10,000 for each day during which the violation continues. However, the civil penalty for a violation of Section 21(p)(3) and 21(p)(7)(i) of the Act is \$1,500. *See* 415 ILCS 5/42(b)(4-5) (2012). In this case, given the duration of the open dumping violations, the statutory maximum penalty is over \$54,500,000. The People ask for a civil penalty of \$8,000.

The record contains no evidence of a specific economic benefit for Moske so the Board cannot determine what economic benefit might have accrued. The People characterize the violations as moderate in nature and have shown that the violations continued for more than five years. The record, however, indicates that Moske has no previously adjudicated violations, and that Moske did act to correct some of the violations after the first IEPA inspection. The People believe that an \$8,000 penalty is sufficient to deter future violations and ensure future compliance. The People did not specifically address the alleged violations of Sections 722.111 and 808.121 of the Board’s waste regulations (35 Ill. Adm. Code 722.111, 808.121) in the penalty portion of the motion for summary judgment. Based on the evidence, an analysis of the Section 33(c) and 42(h) factors illustrates that there are some mitigating factors against the statutory maximum penalty as well as aggravating factors. In addition, the Board finds that an \$8,000 penalty amounts to \$1,333 per violation in counts I and II of the People’s complaint. Given the statutory factors, along with the statutory maximum penalty, the Board finds this amount reasonable despite the Board’s denial of summary judgment on count III. Therefore, the Board finds that an \$8,000 civil penalty is appropriate.

ORDER

1. The Board finds that Joel A. Moske d/b/a U.S. Scrap (Moske) violated Sections 9(a), 9(c), 21(a), 21(e), 21(p)(3), and 21(p)(7)(i) of the Environmental Protection Act (Act) (415 ILCS 5/9(a), 9(c), 21(a), 21(e), 21(p)(3), 21(p)(7)(i) (2012)).
2. The Board dismisses count III of the People’s complaint that alleged violations of Sections 722.111 and 808.121 of the Board’s waste disposal regulations (35 Ill. Adm. Code 722.111, 808.121).
3. The Board directs Moske to pay a civil penalty of \$8,000 no later than June 16, 2014, which is the first business day following the 30th day after the date of this order. Moske must pay the civil penalty by certified check or money order payable to the Illinois Environmental Protection Agency for deposit into the Environmental Protection Trust Fund. The case name, case number, and Moske’s federal tax identification number must appear on the certified check, or money order.

4. Moske must submit payment of the civil penalty to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
PO Box 19276
Springfield IL 62794-9276

Moske must send a copy of the certified check or money order and any transmittal letter to:

Javonna Homan
Assitant Attorney General
Environmental Bureau
500 South Second Street
Springfield IL 62706

5. Penalties unpaid within the time prescribed will accrue interest pursuant to Section 42(g) of the Act (415 ILCS 5/42(g) (2012)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2012)).
6. Moske must remove all remaining waste material from the U.S. Scrap site located at 1551 E. McBride Street, Decatur, Macon County and properly dispose of it. Moske must also cease and desist from future violations of the Act.

IT IS SO ORDERED.

Section 41(a) of the Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2012); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 15, 2014 by a vote of 4 to 0.



John T. Therriault, Clerk
Illinois Pollution Control Board