

ILLINOIS POLLUTION CONTROL BOARD
January 24, 2002

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 98-148
) (Enforcement – Land)
DOREN POLAND, LLOYD YOHO, and)
BRIGGS INDUSTRIES, INC. a/k/a BRIGGS)
PLUMBING PRODUCTS, INC.,)
)
Respondents.)

BRIGGS INDUSTRIES, INC.,)
)
Third-Party Complainant,)
)
v.) PCB 98-148
) (Citizens Enforcement – Land)
LOREN WEST and ABDINGDON) (Third-Party Complaint)
SALVAGE COMPANY, INC.,)
)
Third-Party Respondents.)

ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on a November 5, 2001 motion for reconsideration and motion for clarification filed by Briggs Industries, Inc. (Briggs) in response to the Board's September 6, 2001 Interim Opinion and Order. The September 6, 2001 Board order was entered in the enforcement action filed by the Illinois Attorney General on behalf of the People of the State of Illinois (People), and at the request of the Illinois Environmental Protection Agency (Agency), against Doren Poland (Poland), Lloyd Yoho (Yoho), and Briggs. On November 20, 2001, People responded to Briggs' motions for reconsideration and clarification.¹ Neither Poland nor Yoho have responded. Both the September 6, 2001 Board order and today's order involve only the original enforcement complaint filed by the complainant. The pending third-party complaint filed by Briggs is not addressed in today's order.

BACKGROUND

¹ Briggs' motion for reconsideration is referred to as "Mot. for Recon. at ___." Briggs' motion for clarification is referred to as "Mot. for Clar. at ___." People's response to both motions is referred to as "Resp. at ___."

People filed a three-count complaint in which it alleged various violations of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2000)) and Board regulations related to the operation of an unpermitted dump site in Knox County, Illinois (the site). A hearing was held on November 28 and 29, 2000, before Board Hearing Officer Steven C. Langhoff. After addressing a number of intervening procedural issues, the Board issued its interim opinion and order on September 6, 2001 (interim order). *See People v. Poland*, PCB 98-148 (Sept. 6, 2001). In the interim order, the Board addressed the alleged violations and the status of Briggs as an operator of the site. The Board found that Briggs was an operator of the site and that Poland, Yoho, and Briggs violated Sections 21(a), (d), (e), and (p)(1) of the Act (415 ILCS 5/21(a), (d), (e), (p)(1) (2000)), and Section 807.201, 807.202(a), and 812.101 of the Board's waste disposal regulations (35 Ill. Adm. Code 807.201, 807.202(a), 812.101). The Board also concluded that the complainant failed to prove a number of other violations. *See Poland*, PCB 98-148, slip op. at 16.

Although the Board concluded that violations were committed, the Board was unable, based upon the record before it, to conclude what an appropriate technical remedy should be. Accordingly, the Board remanded the case back to the hearing officer for further hearings on the appropriate relief, both technical and monetary.

BRIGGS' MOTION FOR RECONSIDERATION

Briggs seeks reconsideration of that portion of the Board's interim order that remanded the case back to the hearing officer for further hearings on the appropriate relief. Mot. for Recon. at 1. Briggs maintains that based on the evidence in the record, "the Board can competently determine what relief is warranted here without another hearing." Mot. for Recon. at 4. Furthermore, Briggs urges the Board to cancel the second hearing because,

[a]fter completing discovery and participating in a hearing, requiring a second hearing to address technical remedies solely because the Complainant failed to present evidence supporting its proposed remedy will render these proceedings fundamentally unfair. Mot. for Recon. at 6.

In its response to Briggs' motion, People expresses a willingness to proceed with a second hearing even though it believe that the "unresolved issues of technical remedy and penalty may be determined by the Board without a further hearing." Resp. at 5. Nevertheless, People asks the Board to deny Briggs' motion for reconsideration, and instead, "define the areas of inquiry for which another hearing may be conducted." Resp. at 6.

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902; *Jersey County Sanitation v. IEPA*, PCB 00-82 (Sept. 20, 2001). *In Citizens Against Regional Landfill v. County Board of Whiteside*, PCB 93-156 (Mar. 11, 1993), we observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992). The Board finds that Briggs' motion for reconsideration presents the Board with no new evidence, change in the law, or any other reason to conclude that the Board's September 6, 2001 decision was in error.

Therefore the motion for reconsideration is denied and a second hearing will be held to address the issue of technical remedy.

BRIGGS' MOTION FOR CLARIFICATION AND PEOPLE'S RESPONSE

As an alternative to its motion for reconsideration, Briggs also sought clarification of the Board's September 6, 2001 opinion and order. Briggs seeks clarification of two issues. First, Briggs requests the Board clarify the scope of evidence that will be permitted at the second hearing.

For example, will the Board accept evidence regarding: (a) the cost of performing various technical remedies; (b) the environmental benefit likely to be obtained by the various, potential, technical remedies in light of the New Landfill's proximity to the Abingdon Landfill; (c) the environmental harm presented by each, potential, technical remedy; and/or (d) the time necessary to perform the various, potential, technical remedies[.] Mot. for Clar. At 3.

Second, Briggs seeks clarification of the portion of the Board's interim opinion and order that dismissed Briggs' counterclaim against Poland and Yoho.

In response, People maintains that it "has proven that the Briggs wastes are more likely than not chemical or putrescible by virtue of having proved that the wastes are not inert" (Resp. at 4) and that "[t]he unresolved issues of technical remedy and penalty may be determined by the Board without a further hearing even though it is the Board's prerogative under 35 Ill. Adm. Code 103.212(d) to conduct a separate hearing as to remedy" (Resp. at 5). Nevertheless, should the Board hold a second hearing, People suggests that the focus of the second hearing be further defined. Resp. at 5-6. Although People's response is not captioned as a motion for reconsideration, People does suggest that if the Board's:

finding of no violation [of 35 Ill. Adm. Code 811.302, 811.303, 811.304, 811.306, 811.307, 811.308, 811.309, 811.315, 811.317, 811.318, 811.319, and 811.323 (811 violations)] was premised upon the Board's view that no showing was made that the wastes were not chemical or putrescible, then such a finding ought to be reconsidered. Resp. at 4-5.

The Board denies reconsideration as suggested by People. The Board concluded in its September 6, 2001 interim opinion and order that the People had failed to satisfy its burden of proof with regard to the 811 violations. People has offered no new evidence, change in law, or any other reason to conclude that the Board's decision with regard to the alleged violations of 35 Ill. Adm. Code 811 was in error. Accordingly, the Board will not reconsider this portion of its September 6, 2001 interim order.

The Board notes that People did not address Briggs' second request for clarification, which seeks clarification of the Board's dismissal of Briggs' counterclaim.

Issues for Second Hearing

In its interim opinion and order, the Board found that Poland, Yoho, and Briggs had violated various provisions of the Act and Board regulations related to the open dumping of porcelain-type waste. Having found in favor of People, the issue is now before the Board solely on the issue of remedy; both technical and monetary. In response to the requests of Briggs and People, the Board will clarify the issues that it asks to be addressed at the second hearing.

As a preliminary matter, the Board notes that the second hearing is not intended as a means for either party to relitigate violations that have already been addressed by the Board in its interim opinion and order. The first phase of this proceeding, the “liability” phase, is complete. Regardless of the evidence presented during the second phase of this proceeding, the “remedy” phase, no new violations will be found, and matters already litigated will not be retried. The focus of the second hearing is, as previously indicated, solely on the appropriate technical and monetary relief.

At the second hearing, the Board directs the parties to present factual and technical evidence of the proper characterization of the waste currently disposed of at the site. For example, the Board anticipates that respondents will attempt to prove the “inert” character of the waste, while People will attempt to prove the chemical or putrescible character of the waste. The Board notes that any evidence submitted in this regard by People will be used solely for the purpose of determining an appropriate remedy, not for the purpose of attempting to prove the alleged violations of 35 Ill. Adm. Code 811, that have already been decided by the Board.

In addition to evidence regarding the proper characterization of the waste, the parties should be prepared to present other relevant evidence that will assist the Board in determining an appropriate technical remedy. This type of information might include, but would not be limited to: the cost of removing and disposing of waste in a permitted landfill; the types of monitoring that should be required; the economic reasonableness and technical feasibility of a particular remedy; the anticipated environmental benefits from a particular remedy; and the implementation schedule for a particular remedy.

The Board ordered a second hearing not only for the purpose of determining an appropriate technical remedy, but for the purpose of determining an appropriate civil penalty as well. As a result, the parties should provide the Board with evidence regarding the factors set out in Section 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2000)).

Dismissal of Counterclaim

In its interim opinion and order of September 6, 2001, the Board dismissed Briggs’ counterclaim seeking contribution from Poland and Yoho. Still pending and not addressed in the interim opinion and order are the third-party complaints filed by Briggs against Loren West and Abingdon Salvage. Briggs seeks clarification of the impact of the Board’s dismissal of its counterclaim on the still pending third-party complaints. Briggs asks the Board to clarify whether, “the Board is now holding as a matter of law that operators cannot seek contribution.” Mot. for Clar. At 4.

In dismissing Briggs’ counterclaim against Poland and Yoho, the Board did not hold that operators are precluded from seeking contribution. The Board dismissed Briggs’ counterclaim

because Poland and Yoho were already found to have violated the Act and regulations and because a finding of contribution among jointly and severally liable respondents is premature and inappropriate at this time. Furthermore, as previously noted, the parties may present evidence at the remedy hearing regarding the Section 33(c) factors and how those factors should be applied by the Board to each of the individual respondents. *See generally* 415 ILCS 5/33(c) (2000).

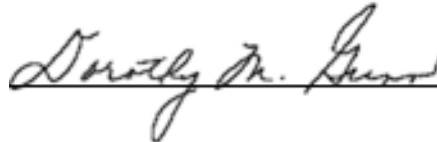
Finally, dismissal of the counterclaim does not impair Briggs' ability to pursue the pending third-party claims against Loren West and Abingdon Salvage. The third-party complaints are different from the counterclaim insofar as the allegations of the third-party complaints have not been litigated and the third-party respondents have not been found liable for any violations at this time.

CONCLUSION

In conclusion, the Board denies Briggs' motion for reconsideration and grants its motion for clarification. Based on the parameters set forth herein, the Board directs this matter proceed to hearing for the purpose of developing a competent and complete record on the issue of appropriate technical and monetary relief.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 24, 2002, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board