ILLINOIS POLLUTION CONTROL BOARD
May 28, 1987

THERESA CASTELLARI, DEE ANN MAYER, AND SHIRLEY WATSON, Complainants, v. JOHN PRIOR, Respondent.	)	PCB 86-79

MR. JAMES YOHO APPEARED ON BEHALF OF THE COMPLAINANTS.

MR. GEORGE C. LACKEY APPEARED ON BEHALF OF THE RESPONDENTS.

OPINION AND ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board upon a twelve (12) count complaint filed on June 11, 1986 by Theresa Castellari, Dee Ann Mayer, and Shirley Watson (Complainants) against John Prior. The Complaint alleges that Prior owned and operated two non-hazardous waste landfills located in an unincorporated area of Marion County and that Prior violated various provisions of the Illinois Environmental Protection Act (Act) and Board regulations dealing with landfill operations. The Complainants request that the Board impose a civil penalty of $10,000 against Prior. Hearings were held in this matter on October 16 and 21 in Salem. The Board has received a letter from Shirley Watson, dated March 3, 1987, in which she requests that the Board render a decision at the "earliest possible date". The Board views this letter as a Motion for Expedited Decision and hereby grants the motion.

The two landfills at issue are located adjacent to one another and are commonly called Centralia Prior and Centralia/Prior-Blackwell. The two landfills utilize the same entrance. (R. 21, 32). Since no distinction is made between the two landfills in the alleged violations, the Board will refer to the two collectively as "the Landfills".

One count concerns alleged violations between May 9, 1985 and December 17, 1985. Another count spans the period from May 9, 1985 to January 22, 1986. Ten of the complaint's counts allege violations that occurred between May 9, 1985 and May 31, 1986. The threshold issue for the Board to decide is whether Prior owned and/or operated the Landfills during the time frames specified in the complaint.

Prior's Role as Owner or Operator During Alleged Violations

Prior admits that up until the last day of June, 1985 he owned and operated the landfills. (R. 227). He claims, though, that beginning on July 1, 1985, he no longer operated, managed, or controlled the Landfills. According to Prior, Jackson County Landfill, Inc. (Jackson) and Jeffrey Pauline, owner of Jackson, took over the operations of the Landfills on July 1. The complainants claim that Prior was a lessor for the time period alleged in the complaint. In addition, they assert that Prior was the permit holder for the Landfills during the alleged violation. The permit issue will be discussed later.

On June 21, 1985, a Lease and Purchase Agreement (Agreement) was entered into between Prior, his wife Betty, I.S., Inc. as landlord/seller and Jackson County Landfill, Inc. as tenant/buyer. The Agreement was admitted as Respondent's Exhibit #1. According to the Agreement, Jackson agreed to lease the Landfills and operate them as sanitary landfills. The term of the lease was to begin July 1, 1985 and end September 14, 1986. (Resp. Exh. #1, 1). The Agreement also provides that on the "day after the end of the term of the foregoing Lease Agreement Landlord shall sell and Tenant shall buy" the Landfills. (Resp. Exh. #1, 16). The purchase part of the Agreement can be classified as a "contract for deed" arrangement. The Agreemenet states:

> If the Buyer shall first make the payments and perform the covenants herein contained on its part to be made and performed, Seller agrees to convey the Property to Buyer by a good and sufficient Warranty Deed, with revenue stamps paid by Seller. (Resp. Exh. #1, 17).

At hearing, Paul Schoen, Jackson's and Pauline's attorney, stated, "If my client has performed all conditions imposed upon him under the purchase agreement portion of this document he is entitled to possession of and to record the warranty, the deed; not until." (R. 167). The Agreement states that rent paid under the lease portion of the Agreement will be applied to the purchase price. In addition, the Agreement sets forth a schedule of payments to be made by Jackson during the purchase period. However, the number of required monthly payments is blackened out on the exhibit. (Resp. Exh. #1, 18). At hearing, though, Prior stipulated that "the total amount of money due for the purchase of the properties has not yet been paid because the total months of installments haven't yet passed." (R. 247). Consequently, at the time of the hearing, title to the Landfills had not passed according to the Agreement, because Jackson had not completed payments to Prior.

In summary, Prior was an owner and operator of the Landfills for the period covered by the complaint prior to July 1, 1985. Subsequent to that date and until September 14, 1986, Prior's role with regard to the Landfills was that of an owner-lessor pursuant to the lease portion of the Agreement. After September 14, 1986 until the date of the hearing, Prior still held title to the Landfills under the purchase portion of the Agreement.

Standard of Owner-Lessor Liability

An examination of the case law relevant to the issue of owner-lessor liability is necessary. The Board has long held that the Act imposes an affirmative duty on persons in positions of potential control to take action to prevent pollution. Environmental Protection Agency v. James McHugh Construction Company, PCB 71-291, 4 PCB 511, 513 (1972). The Board has previously determined that lessors have such a duty if they are in a position to control the activities occurring. Environmental Protection Agency v. Thompson Oil Company, PCB 75-475, 32 PCB 3, 9 (1978). The test used by the Board to determine liability in both of the above-cited cases was one of reasonableness; i.e., that a person is liable if it was reasonable for him to have exercised control in order to prevent pollution. A determination using this standard will necessarily be dependent upon the particular circumstances of each individual case. Illinois Environmental Protection Agency v. Bittle, PCB 83-163, slip. op. at 6 (April 16, 1987).

The requisite control which would impose liability on the landowner does not automatically stem from the lessor-lessee relationship. Ownership of land, used pursuant to a lease, is not sufficient alone to impose liability upon the lessor for actions of the lessee. Bittle, at 6.

In Environmental Protection Agency v. Lake County Grading Company, PCB 81-11, 58 PCB 75 (1984), the Board indicated, in dicta, that lessor control, hence liability, is not automatically presumed from a lessor-lessee relationship. In that case, the lessee-operator of a sanitary landfill was found to have violated numerous sections of the Act and regulations. Although the lessors of the site were not named as Respondents in the case, the Board stated that the lessors were "merely the landowners who lease the land to [the lessee] and [they] do not have any control over the operations of [the lessee]." Lake County Grading Company at 77. Such an aside indicates that a lessor does not necessarily control a lessee's operations. Therefore, in order to find the requisite control, the Board needs to look at the particular relationship at issue.

The Illinois Appellate Courts have held that the Environmental Protection Act (Act) is malum prohibitum; no proof

of guilty knowledge or mens rea is necessary in order to support a finding of guilt. Paul Hindman v. Pollution Control Board, 42 Ill. App. 3d 766, 769 (5th District 1976); Meadowlark Farms, Inc. v. Pollution Control Board, 17 Ill. App. 3d 851, 861 (5th District 1974); Bath, Inc. v. Pollution Control Board, 10 Ill. App. 3d 507 (4th District 1973).

In Bath, the owner-lessor of a landfill had been found by the Board in violation of a rule concerning the burning of refuse. The petitioners claimed that the finding of violation was an error due to the fact that the petitioners never caused or intended the burning. The court, in upholding the Board's finding, stated that "[i]t is not an element of a violation of the rule that the burning was knowing or intentional. We hold that knowledge, intent, or scienter is not an element of the case to be established by the Environmental Protection Agency upon the issue of burning." Bath, 294 N.E.2d at 781.

The reasoning in Bath was also adopted by the court in Hindman. In that case, Hindman, the petitioner, was an operator-lessee of a landfill. He, too, was found in violation of the Act and rules concerning refuse burning. Hindman similarly claimed that he did not cause or intend the fire and that as a consequence, he did not violate the Act. The court followed Bath and affirmed the Board's finding of violation. Citing Meadowlark Farms, the court stated, "other authorities have adopted the Bath standard and have concluded that the Environmental Protection Act is malum prohibitum, there being no proof of guilty knowledge or mens rea necessary to support a finding of guilty." Hindman 42 Ill. App. 3d at 769.

Meadowlark Farms concerned the violation of Section 12(a) of the Act due to the discharge of contaminants into a creek from iron pyrite mining refuse piles. The petitioner, who owned the land on which the piles were located, had been found by the Board in violation of the Act. The refuse piles were the result of a mining operation that had taken place on the land prior to the petitioner's ownership. The court affirmed the Board's findings

> that the petitioner had ownership of the surface rights of the property which was the source of the violation, that the evidence showed that the pollution had its source on that property and that fish were killed, and that the petitioner had the capability of controlling the pollutional discharge. Therefore, petitioner was found to have violated section 12(a) of the Act, as well as violating the other rules and regulations related to water pollution.
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> Meadowlark Farms, 17 Ill. App. 3d at 861.

The court, after discussing Bath, found that the same reasoning applied to Meadowlark Farms, Inc. Consequently, the court held "that knowledge is not an element of a violation of 12(a) and lack of knowledge is no defense." Id. at 862.

The Board notes that there are several cases which have held that a degree of intent or knowledge of the wrongdoing is required before a violation may be found.

In McIntyre v. Pollution Control Board, 8 Ill. App. 3d 1024, 1029, 291 N.E.2d 253 (3rd Dist. 1972), the Third District reversed the Board's finding that the Petitioner had violated Sections 9(a) and (c) of the Act by having caused or allowed the open burnings of refuse and auto salvage. The court stated that the mere occurrence of fire is not a violation of Section 9(c). "The motive, intent or purpose to institute or permit open burning for the purpose of disposing of refuse either by itself or as an incident to salvage must be shown before any statutory violations can be proved."

The Third District, in People v. Joliet Railway, 108 Ill. App. 3d 197, 438 N.E.2d 1205 (3d Dist. 1982) followed McIntyre when it reversed a Will County Circuit Court's injunction regarding open burning by a business engaged in the dismantling of railway cars. The Third District stated,

> The accidental or incidental starting of a fire within a railroad car being scrapped would not, in and of itself, constitute "open burning." Granted, it would be open burning if a railroad car were deliberately set on fire to burn out all of the wood before the steel was cut up. It would not be open burning if wood components in the car caught on fire during the use of a cutting torch by an operator who was disassembling a railroad car. In the latter instance, such a fire would be an accidental or incidental occurrence...The mere occurrence of a fire or its frequency is insufficient to support a conclusion that the defendants engaged in open burning.
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> Joliet Railway, 108 Ill. App. 3d at 204-205.

In Wasteland, Inc. v. Illinois Pollution Control Board, 118 Ill. App. 3d 1041, 456 N.E.2d 964 (3d Dist. 1983), the Third District continued its line of decisions regarding open burning. In Wasteland, the Third District reversed the Board's finding of violation of the Act due to open burning at a landfill

and a paper recovery site. The Third District cited Joliet Railway and McIntyre and held,

> With respect to the open burning violation, we find the Board's conclusion to have been in error, for it has been established that where there is no evidence that fires have been intentionally set for the purpose of disposing of refuse, there is no violation.
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> Wasteland, 456 N.E.2d at 974.

The Fifth District also has implied that a degree of knowledge is a necessary prerequisite for a finding of violation. In Alton and Southern Railway v. Illinois Pollution Control Board, 12 Ill. App. 3d 319, 297 N.E.2d 762, (5th District 1973), the Fifth District reversed a Board decision which had imposed liability upon a lessor due to illegal actions stemming from the operations of a lessee. In Alton and Southern Railway, the lessee was operating an auto salvage operation on land it leased from the lessor as well as on the right-of-way that the lessor owned but had not leased. The salvage work on the right-of-way was done for such a period of time that the court presumed the lessor to have had notice of the operation. The alleged illegal action entailed the burning of junk autos. Two incidents of such burning occurred on the right-of-way. After considering these facts, the court held,

> from the fact that Alton and Southern may be presumed to know that salvage operations were being conducted on their land, it does not follow that they may be presumed to know that the operations were being conducted illegally.
>
> Alton and Southern Railway, 297 N.E.2d at 763.

In Alton and Southern Railway, the court relieved the lessor from liability and implied that knowledge of the wrongdoing was a necessary factor in order to hold a lessor liable for the operations of the lessee.

Although the above cases seem to be inconsistent with Bath and Hindman, cases which also concern open burning violations, the Board will adopt and follow the holding of Bath and its progeny.

Although knowledge of wrongdoing is not necessary for a finding of violation of the Act, it is one factor which the Board may look to in order to assess whether the lessor could have reasonably exercised control over the lessee in order to prevent

pollution. Illinois Environmental Protection Agency v. Bittle, PCB 83-163, slip. op. at 8 (April 16, 1987).

Prior claims that the Board should determine that the lessor of real estate is not liable for the acts of the tenant in possession. Prior cites two cases as authority for such a holding: Wright v. Mr. Quick, Inc., 109 Ill. 2d 236, 486 N.E.2d 908 (1985) and Gilbreath v. Greenwalt, 88 Ill. App.3d 308, 410 N.E.2d 539 (3d Dist. 1980). The Board finds, though, that the holdings in these cases are not applicable to the instant case. The cases that Prior cites are personal injury tort actions brought against a sublessor in one instance and a lessor in the other. The primary issue in each case concerns the standard of care owed by a lessor to keep third persons safe from injury. In the instant case, the complainants are not bringing a personal injury action against Prior, but rather they are bringing an enforcement action against Prior for failure to comply with State environmental laws and regulations. As discussed earlier, the standard of lessor liability for an enforcement action has already been defined by the Board.

Liability of Prior as Owner-Lessor

Prior admits that he was owner and operator of the landfills prior to July 1, 1985. As a result, Prior would be liable for any violations during that period. Prior's liability subsequent to July 1, 1985, the beginning date of the lease term pursuant to the Agreement, will be discussed next.

As stated above, liability, in the case of an owner-lessor, does not automatically result from a lessor-lessee relationship. The standard must be applied to the particular circumstances of each case in order to determine whether to hold the lessor liable for the illegal operations conducted by the lessee. In the instant action, the Board must determine if it was reasonable for Prior to have exercised control over Jackson to prevent pollution.

The Agreement between Prior and Jackson sets forth the terms of the relationship between the two. The purchase portion of the Agreement incorporates several paragraphs of the lease portion. Consequently, there are provisions common to both the lease and purchase portions. Among the common provisions are the following:

1. The property shall be used for the conduct of a sanitary landfill. (Resp. Exh. #1, 4).

2. Tenants shall operate the sanitary landfill in accordance with all applicable federal, state, and local laws and regulations.... (Resp. Exh. #1, 4(A)).

3. Tenants shall exercise all reasonable efforts to keep in full force and effect all sanitary landfill permits heretofore or hereafter transferred to Tenant by Landlord and all additional permits hereafter acquired by Tenant from the State of Illinois or other governmental agencies.... (Resp. Exh. #1, 4(B)).

4. Tenant shall not dispose of any hazardous wastes on the property.... (Resp. Exh. #1, 4(C)).

5. All trash shall be compacted and buried so as to maximize the useful life of the landfill site; provided, that Tenant's obligation hereunder shall be met if it follows the practices heretofore followed by Landlord in operating the landfill. (Resp. Exh. #1, 4(D)).

6. In the event that Tenant ceases operation of any landfill site, Tenant shall properly close such site in accordance with all applicable laws, rules and regulations. (Resp. Exh. #1, 4(E)).

7. Tenant shall not sell or remove any dirt for use off the premises without the written consent of Landlord, except as provided [for in] this Agreement. (Resp. Exh. #1, 4(F)).

8. Landlord shall at all reasonable times during Tenant's business hours have access to the property for the purpose of inspection. (Resp. Exh. #1, 10).

The lease portion further provides:

> In the event that Tenant defaults in paying any installment of rent or other sums of money required to be paid...or defaults in performing any of the other covenants, agreements, or conditions...and such default continues for a period of 30 days after notice in writing thereof from Landlord to Tenant, this Agreement shall, at the sole option of Landlord, be terminated.

A similar provision appears in the purchase portion of the Agreement.

> In the event that Buyer defaults in paying any installments or other sums of money required to be paid hereunder, or defaults in performing any of the other covenants, agreements, or conditions of this Agreement, and such default continues for a period of [number blackened out] days after notice in

> writing thereof from Seller to Buyer, then the Seller shall have the following remedies, in addition to any other remedies provided by law:
>
> A. To retain all sums of money paid by the Buyer as liquidated damages and cancel this Agreement, or
>
> B. To continue this Agreement in full force and effect and hold Buyer liable for all damages permitted by law, or
>
> C. To keep this Agreement in full force and effect and demand specific performance thereof by the Buyer....
>
> (Resp. Exh. #1, 23)

It is apparent that the Agreement sets forth specific guidelines as to how Jackson must operate the landfills. In particular, Jackson is required to operate the landfill in accordance with the State laws and regulations. The Agreement also provides Prior with the power to terminate the Agreement or, in the case of the purchase portion, demand specific performance if these guidelines are not followed by Jackson. To that end, the Agreement gives Prior the right to inspect the premises during Jackson's business hours.

Such clauses in a lease give the lessor a certain amount of control over the lessor-lessee relationship. However, this control manifests itself only after the lessee has already violated laws, regulations, or other covenants of the lease. That is, these clauses alone do not grant the lessor control over the actions of the lessee prior to the lessee's wrongdoing. Other than the use of coercion, by threatening to terminate the lease, the lessor does not have the power to mold the lessee's behavior according to the lessor's wishes. Even threatening to terminate the lease may not influence the actions of the lessee, particularly since termination may involve court action.

However, there are indications that Prior could have had some influence over Jackson short of threatening to terminate or terminating the Agreement. One provision in the Agreement states:

> John Prior agrees to act without compensation as a consultant to the Buyer in the conduct of the waste hauling and landfill business

> for a minimum period of twelve months from the date of closing.
>
> (Resp. Exh. #1, 36)

It is clear that Prior did have the ability to control the actons of Jackson in order to prevent continued violations. Specifically, he could terminate the Agreement thereby shutting down any illegal operations. It would certainly be unreasonable for him to exercise his control -- terminate the Agreement -- prior to having any knowledge that Jackson was violating the Act. On the other hand, it is quite reasonable to expect him to exercise control once he knew or reasonably should have known of the violations.

Allegations concerning illegal operations of the Landfills are not new. The Agreement, executed on June 21, 1985, states:

> There is pending in the Circuit Court for the Fourth Judicial Circuit, Marion County, Illinois, Cause No. 85-CH-17, being a suit for injunction and other relief filed by the People of the State of Illinois against the seller. Said suit as presently constituted seeks monetary fines against the Seller together with an injunction requiring the Seller to comply with the laws and the rules and regulations pertaining to the operation of a landfill.
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> (Resp. Exh. #1, 31)

Cause No. 85-CH-17 was eventually resolved by a consent decree issued by the circuit court on August 5, 1986. (Resp. Exh. #3). The court determined that Prior violated Sections 21(a) and 21(d)(2) of the Act as well as 35 Ill. Adm. Code 807.301 and 807.305(a) by failing to place daily cover on exposed refuse; Prior was ordered to pay $12,000 as a civil penalty. The court dismissed the remaining five counts of the Amended Complaint. Although this circuit court action was resolved in August of 1986, it is probative for the Board to note the status of this action at or near the time that Prior entered into the Agreement with Jackson.

The Stipulation and Settlement Agreement (Settlement) states that the People of the State of Illinois filed an Amended Complaint against Prior on July 25, 1985. (Resp. Exh. #2, 5). The date upon which the original complaint was filed is not in the record. However, the acknowledgement of the "pending" suit in the Agreement indicates that the original complaint in Cause No. 85-CH-17, was filed previous to June 21, 1985.

The six-count Amended Complaint charged Prior with

1) Failure to place daily cover on exposed refuse,

2) Failure to spread and compact refuse,

3) Failure to deposit refuse into the toe of the fill,

4) Failure to collect and dispose of litter,

5) Failure to comply with certain permit conditions, and

6) Failure to control leachate adequately.

(Id. at 6)

As stated in the Agreement, the remedies sought by the People of the State of Illinois entailed a monetary penalty as well as an injunction requiring Prior to comply with the laws and the rules and regulations pertaining to the operation of the Landfills. Given all these facts, Prior knew or should have known that the legality of the Landfills' operations had been seriously challenged. The Board notes that the violations alleged in the Amended Complaint were not unlike those alleged in the instant action. The requested relief should have also alerted Prior to the fact that the operations of the Landfills would have to change if the enforcement action was successful. All of this would have led a reasonable man to have taken affirmative action to ensure that the Landfills' operations were in fact in compliance with the laws of Illinois.

Such a conclusion is proper despite the fact that the operations of the Landfills were leased to Jackson. Prior knew of the violations that were alleged to have occurred during his tenure as operator. He also was on notice of the fact that continuing violations, if found, would have to cease. Given the Landfills' history, Prior, as owner and lessor, should have closely monitored the operations of Jackson and made sure that those operations were in compliance with the state laws and regulations. If the operations were not in compliance, Prior had the authority to terminate the Agreement. The Agreement also gave Prior the authority to inspect the Landfills and act as a consultant for operators. Given such a framework, it would not have been unreasonable for Prior to have actively taken steps to bring the operations into compliance with the regulations.

In actuality, Prior never contacted Jackson or Jackson's owner, Pauline, to determine whether Jackson's operations were in compliance. (R. 303-04). At hearing, Prior stated "after that date [execution of the Agreement] I don't know a thing about it [the Landfills]." (R. 303). Prior claims that since the last day of June he has had nothing to do with the Landfills. In addition, Prior stated that he has never undertaken any efforts to terminate the Agreement with Jackson. (R. 278-79).

The Board notes that in Illinois Environmental Protection Agency v. Bittle, PCB 83-163 (April 16, 1987), the Board held an owner-lessor liable for the illegal operations of the lessee when there was even less of an opportunity for the owner to become involved with the operations.

In conclusion, from the time the lease began, Prior should have scrutinized Jackson's operations and then taken steps to prevent violations. At no time did Prior scrutinize the operation let alone exercise or attempt to exercise such control. Consequently, Prior is liable for any violations which occurred on or subsequent to July 1, 1985.

Admissibility of Photocopies of Agency Records

At hearing, the complainants introduced two letters (Comp. Exh. #5 and 6) and various inspection reports (Comp. Exh. #7), all of which are alleged to be photocopies of originals located in the Agency files in Springfield. Complainant Mayer testified that Complainant Exhibits #5 and #6 are photocopies of letters addressed to Prior from the Agency (R. 112-113). The letters grant landfill operating permits to Prior; they are dated July 23, 1975 and October 31, 1981. Complainant Mayer also testified that Complainants' Exhibit #7 consists of photocopies of inspection reports which are also present in Agency files. (R. 122). The copied reports memorialize Agency inspections of the Centralia/Prior-Blackwell Landfill conducted on December 17, 1985 and February 21 [year is not visible on the photocopy] and of the Centralia/Prior Landfill conducted on December 17, 1985, January 22, 1986, February 21, 1986, and April 8, 1986.

At hearing, Prior objected to the letters on the grounds that they were hearsay and that they did not have proper foundation to be admitted. Prior similarly objected to the inspection reports, stating that no one was present at the hearing who could be cross-examined as to the truth of the reports' contents. (R. 146-47). The Hearing Officer admitted the exhibits over Prior's objections. (R. 150).

The Illinois Administrative Procedure Act (APA) states that in contested cases "[t]he rules of evidence and privilege as applied in civil cases in the Circuit Courts of this state shall be followed. However, evidence not admissible under such rules of evidence may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." Ill.Rev.Stat.1985 ch. 127, par. 1012(a). As in judicial proceedings, hearsay evidence is generally inadmissible in administrative hearings unless it satisfies the requirements of an exception to the rule excluding hearsay. Daniels v. The Retirement Board of the Policemen's Annuity and Benefit Fund, City of Chicago, 106 Ill. App. 3d 412, 415, 435 N.E.2d 1276 (1st Dist. 1982).

One exception to the rule against hearsay which the courts have recognized concerns public records. In People ex rel. Wenzel v. Chicago and North Western Railway, 28 Ill. 2d 203, 190 N.E.2d 780 (1963), the Illinois Supreme Court enunciated the public record exception.

> At common law it has long been settled as an exception to the hearsay rule that records kept by persons in public office, which they are required either by statute or the nature of their office to maintain in connection with the performance of their official duties, are admissible in evidence and are evidence of those matters which are properly required to be maintained and recorded therein.
>
> (Id. at 211-12)

This public records exception to the rule against hearsay has continued to be recognized by the courts in Illinois. See, e.g. Department of Conservation v. The First National Bank of Lake Forest, 36 Ill. App. 3d 495, 504, 344 N.E.2d 11 (2d Dist. 1976); ex rel Person v. Miller, 56 Ill. App. 3d 450, 371 N.E.2d 1012, 1020 (1st Dist. 1977); and People ex rel. Bernardi v. James E. Moran, 121 Ill. App. 3d 419, 421, 459 N.E.2d 1073 (1st Dist. 1984).

In Broadway v. Secretary of State, 130 Ill. App. 3d 448, 473 N.E.2d 967, 971 (4th Dist. 1985), the Fourth District held that a Department of Transportation certificate of evaluated property damage was admissible under the business record exception to the hearsay rule pursuant to Supreme Court Rule 236. However, in its discussion of the issue of admissibility, the court cited the public record exception language of People ex rel Person v. Miller. This seems to suggest that there is at least some overlap between the public records exception and the business records exception of Supreme Court Rule 236.

The business records exception to the rule against hearsay as stated by Supreme Court Rule 236 is as follows:

> Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an

> act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business," as used in this rule, includes business, profession, occupation, and calling of every kind.
>
> Ill.Rev.Stat.1985, ch. 110A, par. 236(a)

In Illinois Environmental Protection Agency v. Record, 31 PCB 581 (1978), the Board admitted an Agency inspection report under the business record exception of Supreme Court Rule 236. Record concerned an enforcement action against the operator of a landfill. The Board also concluded in Illinois Environmental Protection Agency v. Wasteland Inc., 48 PCB 1 (1982) that observation reports of Agency and Will County inspectors could be characterized as business records. However, in deciding that the reports were properly admitted, the Board also mentioned that the persons most responsible for the reports' preparation were at hearing and that there was considerable testimony aside from the reports which established the same facts. Id. at 9.

The Agency letters and reports which have been challenged by Prior can clearly be classified as the type of documents which could be admitted under the public records exception to the rule against hearsay rule. Likewise, given prior Board case law and Supreme Court Rule 236, the exhibits in question could also come in under the business records exception. However, even though the exhibits could qualify under an exception to the rule against hearsay, their admissibility is not automatic. That is, the documents' authenticity must be shown before being admitted.

The admissibility of public records depends on custody and authenticity. Bell v. Bankers Life & Casualty Co. 327 Ill. App. 321, 64 N.E.2d 204, 208 (1st Dist. 1945).

In People ex rel. Bernardi v. Moran, 121 Ill. App. 3d 419, 459 N.E.2d 1073 (1st Dist. 1984), the First District in discussing the public records exception stated "Production in court by the custodian thereof is sufficient proof of the authenticity of the records." 121 Ill. App. 3d at 421; Bell v. Bankers Life & Casualty Co., 327 Ill. App. 321, 329, 64 N.E.2d 204, 208 (1st Dist. 1945); See also People ex rel. Wenzel v. Chicago & Northwestern Railway Co. 28 Ill. 2d 205, 190 N.E.2d 780 (1963).

The Illinois Code of Civil Procedure (Code) also addresses the issue of authenticity of records. Municipal records "may be proved by a copy thereof, certified under the signature of the Clerk or the keeper thereof, and the corporate seal, if there is any; if not, under his or her signature and private seal." Ill.Rev.Stat.1985 ch. 110, par. 8-1203. Similarly, corporate records "may be proved by a copy thereof, certified under the signature of the secretary clerk, cashier or other keeper of the same. If the corporation or incorporated association has a seal, the same shall be affixed to such certificate." Id. at par. 8-1204. The Code further provides, "Any such papers, entries, records and ordinances may be proved by copies examined and sworn to by credible witnesses." Id. at par. 8-1206.

The Board's own procedural rules parallel the language of the Illinois Administrative Procedure Act with regard to the admissibility of evidence. Section 103.204 provides,

> The Hearing Officer shall receive evidence which is admissible under the rules of evidence as applied in the Courts of Illinois pertaining to civil actions except as these rules otherwise provide. The Hearing Officer may receive evidence which is material, relevant, and would be relied upon by reasonably prudent persons in the conduct of serious affairs provided that the rules relating to privileged communications and privileged topics shall be observed.

In the enforcement case at hand, the letters and reports making up Complainants' Exhibits #5, 6, and 7 were neither signed, certified copies nor did any Agency personnel testify to the authenticity of the copies at hearing. The Board notes that an Agency affidavit stating that the exhibits were unaltered photocopies of Agency documents would have provided a sufficient foundation for admitting the exhibits under the public records or business records exception to the rule against hearsay. The Complainants' exhibits were admitted on the testimony of Complainant Mayer that the exhibits were photocopies of documents found in the Agency's files. The Board will uphold the Hearing Officer's admission of the documents under Section 12(a) of the Illinois Administrative Procedure Act, Ill. Rev. Stat. 1985 ch. 127, par. 1012(a), and the Board's procedural rule 35 Ill. Adm. Code 103.204. The Board has no reason to doubt the authenticity of the exhibits and notes that Prior could have produced his own copies of the permit letters if he desired to challenge the Complainants' copies. The lack of opportunity to examine the persons who prepared the exhibits affects the weight the Board places on them. These exhibits did not determine the outcome of this case. As discussed later, the Board did not make a finding as to whether Prior held the permits during the alleged

violations. Complainants' Exhibit #7 was not used in finding any violation.

Admissibility of Complainants' Observation Logs

Complainants' Exhibits #1, 2, and 3 consist of typed versions of logs in which were recorded observations of the Landfills by the Complainants and one witness during the time period of the complaint. The exhibits were admitted by the Hearing Officer over the objection of Prior (R. 145). The Complainants claim that the logs were properly admitted since they can be considered as either past recollection recorded or as business records of the Concerned Citizens Group, of which the Complainants are members. Prior first claims that the introduction of the logs did not meet the requirements of past recollection recorded. Specifically, Prior asserts that the three logs are not past recollection recorded since he claims that witnesses did not testify that they had no recollection of the events observed. In addition, Prior states that the logs were improperly admitted because they are merely a written summary of testimony not orally presented at hearing. Finally, Prior claims that the logs are not business records since they were made solely in preparation for testimony.

In Dyan v. McDonald's Corporation, 125 Ill. App. 3d 972, 466 N.E.2d 958, 970 (1st Dist. 1984), the First District set forth the requirements for past recollection recorded:

> Generally, a document is admissible in evidence under the past recollection recorded exception to the hearsay rule if the following four requirements are met: (1) the witness must have had firsthand [sic] knowledge of the event recorded; (2) the written statement must be an original statement made at or near the time of the event; (3) the witness must lack any persent [sic] recollection of the event; and (4) the witness must vouch for the accuracy of the memorandum. [citation omitted]. In determining the admissibility of a document under this hearsay exception, the court should be primarily concerned with the reliability of the proffered document and apply the above criteria accordingly.

Complainants' Exhibits #1 is the observation log of Complainant Mayer. Mayer testified that after observing alleged violations at the Landfills, she recorded those observations in a pocket calendar which she carried with her. She stated that about once a month she and her neighbors would meet and type up the observation notes that they had taken previously. Mayer

claimed that the typed log of her observations was an accurate record of what she had observed at the Landfills. With regard to her memory of the observations she stated, "I remember seeing all of these things. On any given date, I probably could tell you pretty close to what I saw. I would have to refer to my log to be exact on anything." According to Mayer, though, all the observations were recorded at a time when she had recall of the events. (R. 24-28).

Complainants' Exhibit #2 is the observation log of Barbara Miley. As with Complainant Mayer, Miley is a member of Concerned Citizens Group who has also observed the Landfills' activities in the past. With regard to the recording of her observations, Miley stated, "I would have a note pad, I also recorded on a calendar in the kitchen, and I transferred it then to a piece of paper. You know if I had it in the car I transferred it to a paper at home and then we met and typed them up." Miley testified that she recorded her observations "instantaneously almost, right at the moment." She also claims that the meaning or text of the typed version is not different from her handwritten notes and that only some wording might be different. Concerning her memory of the events, she testified, "Most of them I recall vividly, and some of them specifically." (R. 81-83).

Complainant's Exhibits #3 is the observation log of Complainant Castellari. At hearing, Castellari stated that she kept notes of observations in a notebook. She also testified that the events she observed were fresh in her mind when she recorded them. Castellari stated that the procedure used to convert her handwritten notes into a typed form was the same as testified by Mayer and Miley. Complainants' counsel did not ask Castellari whether she could presently remember what she observed. (R. 85-87).

All three witnesses testified that they recorded their observations at a time when the events they had observed were still fresh in their minds. It is also apparent from the testimony that the typed versions of the logs accurately reflect the witnesses' handwritten notes of the observations. With regard to the witnesses' present memory of the observations, the evidence varies. Mayer stated that she would have to "refer" to her log in order to be "exact on anything". Miley stated that she recalled "most" of the observations "vividly". Castellari was not asked by counsel whether she had any present memory of the observations.

A clear and proper foundation for past recollection recorded could have been laid by counsel for the Complainants if just a few pointed questions had been asked of the witnesses. Unfortunately, though, the record is not as clear as it could have been as to the foundational requirements of past recollection recorded in relation to the logs.

The court in Dyan v. McDonald's Corporation, 125 Ill. App. 3d 972, 466 N.E.2d 958, 970 (1st Dist. 1984) explained past recollection recorded as follows:

> The underlying rationale for this [past recollection recorded] hearsay exception relies on the fact that the proffered document contains sufficient circumstantial guarantees of trustworthiness and reliability because the recorded recollection was prepared at or near the time of the event while the witness had a clear and accurate memory of it. (McCormick on Evidence (2d Ed.1977) 299 at 712) Under these circumstances, the reliability of the evidence is perceived to outweigh the inherent testimonial infirmities of hearsay occasioned by the inability of the opposing party to effectively cross-examine.

Consequently, the reliability of the past recollection recorded evidence must be established to the extent that it outweighs the inability of the opponent to cross-examine the witness directly due to the witnesses' lack of present memory.

In this instance, the foundational infirmities of the past recollection recorded evidence stem from the less than clear assertions in the record concerning the witnesses' memory of the observations. That is, the logs seem to meet all the requirements of past recollection recorded except that the witnesses did not affirmatively state that they had no present recollection of all the events recorded in their logs. Mayer seems to indicate at hearing that she did not remember the events clearly. Miley stated that she remembered "most" of them, whereas Castellari did not make any statement as to her present memory. Consequently, Mayer's observation log, Complainants' Exhibit #1, would constitute past recollection recorded. Miley's log, Complainants' Exhibit #2, also meets the past recollection recorded requirement to the extent that Miley has no present memory of observations recorded therein. Unfortunately, the record does not state which observations she does not remember. For the sake of discussion, the Board will assume that Castellari had complete recollection of the events recorded in her log, although there is nothing in the record to indicate that she did remember them. Consequently, Castellari's log, Complainants' Exhibit #3, and parts of Miley's log which she could remember could not typically qualify as past recollection recorded. However, the rationale behind past recollection recorded is not frustrated by admitting Miley's and Castellari's logs in their entirety. Since the witnesses could remember the events which occurred, they could have been cross-examined by Prior as to

those events. However, Prior chose not to ask the witnesses about events which they could remember.

The mere fact that two of the witnesses did not orally testify to events which they remembered does not constitute prejudicial error. Obviously, the witnesses were present at hearing for cross-examination by Prior concerning the events recorded in the log. In addition, the APA provides that "when a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form." Ill.Rev.Stat., 1985 ch. 127 par. 1012. Given all the above considerations, the Board finds that Complainants' Exhibits #1, 2 and 3 were properly admitted.

Denial of Prior's Motion for Continuance

Prior to the hearing, the Hearing Officer issued a subpoena, at the request of Prior, which commanded the appearance and testimony of Joseph Madonia, Assistant Attorney General. In addition, the subpoena required Madonia to produce all documents in his possession relating to the Landfills. (Resp. Exh. #4). Madonia had been involved in the earlier circuit court action against Prior. Madonia appeared at hearing with James L. Morgan, another Assistant Attorney General who was there on behalf of the Attorney General's Office. Morgan made a Motion to Quash the subpoena. At hearing, Morgan stated that Madonia was not at liberty to produce any document and that the formal procedure for the procurement of documents from the Attorney General's Office had not been complied with. He further stated that until the procedure was complied with, the documents could not be released. Next, Morgan claimed that Madonia had no personal knowledge of any of the violations contained in the complaint. In addition, Morgan asserted that any other relevant knowledge possessed by Madonia was priveleged under the attorney-client privilege, work product privilege, or as part of settlement discussions. (R. 6). The Hearing Officer denied the Attorney General's motion and stated that Madonia could make specific objections to questions dealing with privileged information when he testified. At that point both Madonia and Morgan walked out of the hearing. (R. 12).

Later at hearing, Prior moved for a continuance until he could compel the testimony of Madonia. (R. 251). The Hearing Officer denied Prior's Motion for Continuance. (R. 253). However, the Hearing Officer allowed Prior to make an offer of proof as to what he had expected Madonia to testify about (R. 253-256). Essentially, the offer of proof put forth the same information contained in the Stipulation and Settlement Agreement and Order (concerning the previous circuit court action) admitted later in the hearing as Respondent's Exhibit #2 and 3 respectively. However, there are three points made in the offer of proof which do not appear in the Settlement Agreement. For

the sake of discussion, the Board will assume that each would have indeed been adduced at hearing.

First, Prior claims that Madonia would have testified that the Attorney General believed that Jackson and Pauline, owner of Jackson, had become owner and operator of the Landfills as of July 1, 1985. Although such testimony would be relevant to the issue of Prior's role during the alleged violations, a conclusion of the Attorney General is certainly not legally binding upon the Board's deliberations. It is far more important for the Board to consider the terms of the legal documents executed between Prior and Jackson concerning the lease/sale of the Landfills as well as the facts surrounding that transaction. After such consideration, the Board believes it has properly resolved the issue of Prior's ownership. Given the evidence, a contrary conclusion by the Attorney General would not have changed the Board's finding in this instance.

Secondly, Prior claims that Madonia would have testified about the efforts of the Attorney General's office in assisting in the transfer of the Agency permits from Prior to Jackson and Pauline. Such efforts, however, are not determinative in concluding whether the permits were in fact transferred. The Agency, not the Attorney General, has the authority to grant or transfer permits. Consequently, this point, if introduced at hearing, would not have changed the Board's finding with regard to the permit issue which is discussed later.

Finally, Prior asserts that Madonia would have testified that the Attorney General's Office has been working with the Agency and Pauline to obtain a satisfactory closure of the Landfills. Efforts by Pauline in the closure of the Landfills do not alter the liability of Prior for violations alleged in the instant Complaint. As discussed earlier, Prior's liability stems from his own action, or in this instance inaction, and is not derived from Pauline's independent actions. Consequently, such evidence, if introduced, would not have changed any Board finding.

In summary, it is apparent from the offer of proof that Prior was not prejudiced by Madonia's failure to testify. Therefore, it was not prejudicial error for the Hearing Officer to deny the Motion for Continuance. The Board affirms the denial.

Whether Prior Was the Permit Holder During Alleged Violations

It is the position of the Complainants that Prior held Agency operating permits for the Landfills during the time period of the violations alleged in the Complaint. In support of that position, the Complainants' point to the testimony of Complainant Mayer. At hearing, Mayer testified that she looked through the

Agency's files subsequent to May 31, 1986 and found no letters or documents indicating to her that the permits for the Landfills had been transferred from Prior. (R. 118-22). Mayer also states that due to her conversations with Agency personnel, she believes that the permits were never transferred from Prior (R. 340-42).

The Agreement provides that the tenant shall keep in full force and effect "all sanitary landfill permits heretofore or hereafter transferred to Tenant by Landlord". (Resp. Exh. #1, 3(b)). However, the Agreement does not mention when the permits are to be transferred. At hearing, Paul Schoen, Pauline's attorney stated, "the applications for transfer were filed on or about the time the agreement between Mr. Prior and Mr. Pauline and their respective companies was executed." (R. 157). He also claimed that he received "a document issued by the IEPA [Agency] that indicates...that the permits have been transferred." (R. 159). However, Schoen did not state when he received the document nor was any such document produced at hearing. On cross-examination, Schoen stated that Pauline was operating the site prior to receiving the permit. (R. 173). However, he again asserted that "Mr. Pauline has been granted the permit for which he applied to have transferred." (R. 174). Prior testified that he did not think he was still the permit holder for the Landfills. (R. 282). He also stated that he did not know whether or not he received any notification from the Agency that the permits had been transferred. (R. 289).

The record is at best inconclusive with regard to the issue of whether Prior held the operating permits during the time frame of the alleged complaint. The Board notes that the Complainants could have subpoenaed Prior or Pauline to produce the permits at issue, but they did not. The Complainants did not put forth sufficient evidence to prove their conclusion that Prior was the permit holder and that the permits had not been transferred prior to the alleged violations. Prior did not put forth sufficient evidence for the Board to conclude that the permits had been transferred prior to alleged violations. Consequently, the Board will not make a finding as to whether Prior held the permits during the alleged violations.

VIOLATIONS

In this case, the Board can essentially turn to only two sources of evidence to determine whether the alleged violations took place. Since oral testimony at hearing regarding the alleged instance was minimal, the Board must rely on the observation logs that were admitted as Complainant's Exhibits #1, 2, and 3. Secondly, the Board can base its determination on photographs of the Landfills taken by Complainant Mayer and her husband during the time of the alleged violations. These photographs were admitted as Complainant's Exhibit #4. The Board notes that Prior did not object to the admission of this exhibit.

(R. 147). In the following discussion concerning the various counts of the complaint, the Board has accounted for any overlap of dates found between the differing observation logs and photographs. For all counts, the Complainants allege that Prior violated Section 21(d) of the Act which requires waste disposal facilities to comply with Board regulations and permit conditions as well as 35 Ill. Adm. Code 807.304 which also requires compliance with Board regulations and permit conditions. Each count then specifies the specific regulation which Prior is alleged to have violated.

Count I -- Failure to Apply Daily Cover

The Complaint alleges that Prior failed to comply with 35 Ill. Adm. Code 807.305(a) from May 9, 1985 until May 31, 1986. That subsection states:

> Daily Cover - a compacted layer of at least 6 inches of suitable material shall be placed on all exposed refuse at the end of each day of operations.

Complainant Mayer stated that whenever she recorded in her log that there was a failure to apply daily cover, she observed that condition after the Landfills closed for the day. (R. 29). Also, when she recorded such an observation, she was refering to incidences where areas of the Landfills lacked any cover whatsoever. That is, even though the regulations require six inches of cover, she did not report "lack of cover" if all the refuse was covered, even if by less than six inches of material. (R. 31). Barbara Miley testified that she defined her observations in the same manner as Mayer with regard to the log entries. (R. 83). Likewise, Complainant Castellari stated that she defined the terms in her log in the same way as did the other witnesses. (R. 87).

After evaluating the observation logs and the photographs of Complainant's Exhibit #4, the Board determines that the witnesses observed 117 distinct days where refuse at the Landfills was not covered. On the days when photos were taken, it is obvious that the failure to apply cover was blatant and widespread across the Landfills. The photos alone depict seven days of violations. Although the complaint alleges violation from May 9, 1985 to May 31, 1986, the 117 days of violations occurred during the period of time between October 3, 1985 and April 2, 1986.

Count II -- Failure to Collect Litter

The Complainant alleges that from May 9, 1985 until May 31, 1986 Prior violated 35 Ill. Adm. Code 807.306. That section requires,

> All litter shall be collected from the sanitary landfill site by the end of each working day and either placed in the fill and compacted and covered that day or stored in a covered container.

Complainant Mayer stated that all the observations regarding blowing or scattered litter took place after closing. (R. 32). Also, as stated earlier the other authors of logs used like definitions for like observations. (R. 83, 87).

After tabulating the incidences recorded on the logs and photos, the Board finds that there were 53 days in which litter was not collected on the Landfills. The photos alone depict one day of violation. The violations took place between November 20, 1985 and April 13, 1986.

Count III -- Failure to Control Leachate

The Complainant alleges that from May 9, 1985 until May 31, 1986 Prior violated 35 Ill. Adm. Code 807.314(e). Section 807.314 states,

> Except as otherwise authorized in writing by the Agency, no person shall cause or allow the development or operation of a sanitary landfill which does not provide:
>
> . . .
>
> e) Adequate measures to monitor and control leachate.

At hearing, Complainant Mayer described what she observed and recorded as leachate. "Leachate is a liquid material that is seeping out of a landfill. It has a terrible odor. Most of what I have seen is black in color and it is just oozing out of the landfill along the perimeter of the landfill. It runs out into the ditch along Perrine Street Road." (R. 33). Complainant Mayer also stated that she could distinguish leachate from uncontaminated water in part because she has a degree in microbiology with a minor in chemistry. (R. 34).

From the logs and photos, Mayer recorded that she observed pooled or flowing leachate for 12 separate days. Barbara Miley recorded one additional day of leachate observations. Section 807.104 defines "leachate" as "liquid containing materials removed from solid waste." Mayer's explanation of leachate observations seems accurate enough for the Board to determine that Mayer did actually observe leachate from the Landfills. Since Miley used the same definitions for her recorded observations (R. 83), the Board finds that leachate was inadequately controlled for 13 days. The photos alone depict one day of violation. These violations occurred during the period between November 27, 1985 to April 6, 1986.

Count IV -- Open Burning

The Complaint alleges that from May 9, 1985 until May 31, 1986, Prior violated 35 Ill. Adm. Code 807.311. That section provides,

> No person shall cause or allow open burning at a sanitary landfill site except in accordance with the provisions of 35 Ill. Adm. Code Subtitle B....

After reviewing the logs, the Board can find evidence of open burning only for one incident which occurred on May 6, 1986. Therefore, the Board finds that one violation of open burning occurred at the Landfills.

Count V -- Trash in Water

The complaint alleges that from May 9, 1985 until May 31, 1986 Prior violated 35 Ill. Adm. Code 807.313. That section provides,

> No person shall cause or allow the operation of a sanitary landfill so as to cause or threaten or allow the discharge of any contaminant into the environment in any state so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources....

Section 3 of the Act defines "contaminant" as "any solid, liquid, or gaseous matter, any odor or any form of energy, from whatever source." In addition, the Section defines "water pollution" as:

> such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish or other aquatic life".

"Waters" is defined as "all accumulations of water, surface and underground, natural and artificial, pubic and private, or parts thereof, which are wholly or partially within, flow through, or

border upon this State." Considering the above statutory definitions, the Board finds that trash found in standing water would sufficiently constitute water pollution.

The observation logs and photographs recorded a combined 20 days when trash was observed in standing water on the Landfill's sites or in a nearby creek. The photos alone depict three days of violations. The Board finds Prior in violation for those instances. The violations took place during the period between November 27, 1985 and April 18, 1986.

Count VI -- Site Access

The complaint alleges that from May 9, 1985 to May 31, 1986 Prior violated 35 Ill. Adm. Code 807.314(c). This subsection requires that landfill's shall provide "[f]encing, gates, or other measures to control access to site."

The logs and photos indicate that there were seven days when the gate to the Landfills was not locked after closing. The photos alone depict one day of violation. The Board finds Prior in violation of Section 807.314(c) for those seven days. The violations occurred during the period of time from November 24, 1985 to May 6, 1986.

Count VII -- Vectors

The Complaint alleges that Prior was in violation of 35 Ill. Amd. Code 807.314(f) from May 9, 1985 until May 31, 1986. Section 807.314(f) requires that sanitary landfills be operated to provide "[a]dequate measures to control dust and vectors." Section 807.104 defines "vectors" as "any living agent, other than human, capable of transmitting, directly or indirectly, an infectious disease."

The three observation logs recorded 15 days when dogs or birds were observed feeding on garbage in the Landfills. (The Board notes that one entry on Complainant Mayer's log records the observance of vectors from December 10, 1985 until a date that is not legible on the log. The Board will count that entry as one day). Such vector incidences were likely caused by the inadequate daily cover of the refuse. Consequently, the Board finds that Prior was in violation of this regulation for 15 separate days. These violations occurred during the period from November 29, 1985 to January 2, 1986.

Count VIII -- Odor

The complaint alleges that Prior violated 35 Ill. Adm. Code 807.312 from May 9, 1985 until May 31, 1986. That section states,

> No person shall cause or allow operation of a sanitary landfill so as to cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination from other sources....

As stated earlier, "contaminant" is defined by Section 3 of the Act to include "any odor". In addition, "air pollution" is defined as " the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to...unreasonably interfere with the enjoyment of life or property."

At hearing, Complainant Mayer stated that generally when the observation logs referred to "an odor" such odor could be detected offsite. However, she stated, "The closer you get to the landfill the more it stinks. It smells like putrid garbage. On occasion, there are chemical odors of what has smelled like insecticides or resins, mostly putrid garbage." (R. 37-38).

Mayer also testified that she could smell the Landfills from her house, which is about one quarter of a mile distant, between November 20, 1985 and December 9, 1985. (R. 51). She also stated that she could smell the Landfills as she drove by it on a daily basis. (R. 52). In determining what constitutes air pollution under Section 3 of the Act, the Illinois Supreme Court has stated that the phrase "unreasonably interferes with the enjoyment of life and property" does not include "trifling inconvenience, petty annoyance or minor discomfort." Rather, the Court held that the phrase means "substantial interference with the enjoyment of life and property." Processing and Books, Inc. v. Pollution Control Board, 64 Ill. 2d 68, 77, 351 N.E.2d 865 (1976). Aside from a few adjectives such as "horrible" and "terrible" recorded on the logs, no specifics with regard to the extent of the odor are given. As a result, the odor's degree of interference with the enjoyment of life or property cannot be determined from the record. Therefore, the Board is not able to find that a violation occurred due to the Landfill's odor.

Count IX -- Failure to Conceal Operations from Public View

The Complaint states, "35 Ill. Adm. Code prohibits the operation of landfills for which permits are applied subsequent to the date of the Board's regulations when the landfills operations are not screened from public view." It further alleges that Prior did not comply with this requirement from May 9, 1985 to May 31, 1986. The Board's procedural rules requires that the Complaint cite the specific sections of regulations or the Act which are alleged to be violated. 35 Ill. Adm. Code

103.122(c)(1). Counsel for the complainants neglected to cite the applicable regulation for this count. A cite only to title 35 of the Illinois Administrative Code is insufficient to meet the requirements of a formal complaint. As a consequence, the Board cannot make a finding on this count of the complaint. Even if this count of the complaint was deemed sufficient, the record does not contain information as to when Prior originally applied for permits for the Landfills, so the Board could not make a finding as to whether the regulation applies to Prior.

Count X -- Permit Compliance

The complaint alleges that for the period from May 9, 1985 until December 17, 1985, Prior was in violation of 35 Ill. Adm. Code 807.302. That section states, "All conditions and provisions of each permit shall be complied with." The complaint further states that Prior "failed to comply with Special Condition No. 3 of Supplemental Permit No. 80-1219 in that countour [sic] markers for the 525-foot contour were not in place."

The permit referenced by this count was never introduced into the record by the Complainant. Consequently, the Board cannot determine whether Prior complied with the conditions of that permit.

Count XI -- Final Cover

The Complaint alleges that from May 9, 1985 until January 22, 1986 Prior violated "35 Ill. Adm. Code Sec. 807.0305(c) [sic]." Section 807.305(c) requires for final cover that "a compacted layer of not less than two feet of suitable material shall be placed over the entire surface of each portion of the final lift not later than 60 days following the placement of refuse in the final lift...."

The Complainants did not show that refuse has been placed in the final lift and that the Landfills are ready for final cover. In fact, at hearing Complainant Mayer even stated that the Landfills were still receiving refuse for disposal. (R. 78). The record is clearly insufficient for the Board to make a finding of violation.

Count XII -- Roads

The complaint alleges that from May 9, 1985 until May 31, 1986 and on December 17, 1985, Prior violated 35 Ill. Adm. Code 807.314. Section 807.314(b) requires that a landfill have "[r]oads adequate to allow orderly operations within the site."

The Complainants never showed that the roads in the Landfills were inadequate for "operations within [emphasis added]

the site." In the observation logs, incidences concerning the public roadway and the Landfills operations were recorded. Specifically, mud on the public road from the Landfills was a problem. Also, trucks backing up into the Landfills often caused congestion on the public road. However, no testimony or other evidence was presented which would prove that the roads within the Landfills were inadequate for its operations. Consequently, the Board will not find a violation for this count.

In summary, the Board has made the following findings with respect to each count of the complaint.

Count	Findings	Time Period Covered by the Violatio
I--Failure to Apply Daily Cover	117 days of Violations	October 3, 1985 to April 2, 1986
II--Failure to Collect Litter	53 days of Violations	November 20, 1985 to April 13, 1986
III--Failure to Control Leachate	13 days of Violations	November 27, 1985 to April 6, 1986
IV -- Open Burning	1 day of Violation	May 6, 1986
V -- Trash in Water	20 days of Violations	November 27, 1985 to April 18, 1986
VI -- Site Access	7 days of Violations	November 24, 1985 to May 6, 1986
VII -- Vectors	15 days of Violations	November 29, 1985 to January 2,, 1986
VIII -- Odors	No Finding of Violation	------
IX -- Failure to Control Operations	No Finding of Violation	------
X -- Permit Complaince	No Finding of Violation	------
XI -- Final Cover	No Finding of Violation	------
XII -- Roads	No Finding of Violation	------

The Board notes that all of the violations took place during the lease term of the Agreement. That is, Prior's role was that of lessor during the violations.

Penalty

In Wasteland, Inc. v. Illinois Pollution Control Board, 118 Ill. App. 3d 1041, 456 N.E.2d 964 (3d Dist. 1983), the Third District affirmed the Board's imposition of penalties upon a corporate operator and manager of a waste landfill facility. In its discussion of penalties, the court stated, "the question of good faith or lack thereof, is pertinent to the issue of sanctions." In Wasteland, the court stated that the Board had properly found that the site had been operated in "blatant disregard for the Act, the Board rules and overall environmental safety." The Board had also considered the fact that improper operations had continued despite notice of the violations from state and local officials. The court recognized that the violations were shown to have been committed over a period of a year. In addition, the court noted that the Board had found that the operators had realized a substantial savings due to their sidestepping of applicable rules and regulations. Given the above consideration of the Board, the court concluded that the $75,000 penalty was within the Board's discretion. Wasteland, 456 N.E.2d at 975-76.

Similar considerations are equally applicable to the case at hand. Here, violations took place at the Landfills from October 3, 1985 until April 18, 1986. As a result of the filing of a circuit court action, Prior knew of trouble concerning the Landfills operation many months prior to the first of the violations proved in this case. Yet, Prior never exercised control over Jackson and Pauline in order to prevent continuing violations.

At hearing, evidence of the condition of the Landfills at times subsequent to the time period alleged in the complaint was admitted over the objection of Prior. This evidence in part, consists of Complainant's Exhibits #8, a composite of observation logs which recorded incidences that took place during the period of June 1, 1986 through October 10, 1986. This exhibit contains observations of the Landfill's as well as that of a third site. Also, Complainant's Exhibit #9 consists of photographs of the Landfills taken by Complainant Mayer during the period from June 5, 1986 to September 7, 1986.

According to Prior these exhibits should not have been admitted, since they relate to the Landfill's condition subsequent to the time period of the violations alleged in the Complaint. On the other hand, Complainants argue that these exhibits are presented to the Board not for consideration of a finding of violation, but rather to aid the Board in assessing a penalty.

Prior Board decisions have held that post-complaint facts may be admitted in order to act as mitigating or aggravating factors in the assessment of a penalty. Illinois Environmental Protection Agency v. The Victory Memorial Hospital Association, 51 PCB 99, 103 (February 10, 1983); See Environmental Protection Agency v. Metropolitan Sanitary District of Greater Chicago, 31 PCB 349, 350 (September 7, 1978). Therefore, Complainants' Exhibits #8 and 9 could be properly used in determining a penalty if otherwise admissible.

Complainants' Exhibit #9, the photographs, were properly admitted, since an adequate foundation had been laid at hearing. Complainant Mayer testified that she took the pictures on the dates specified in the exhibit and that the pictures accurately reflect what she had observed on those days. She also stated that the pictures of the Landfills were taken after closing. (R. 334-35, 345-46).

Prior also objects to Complainants Exhibit #8, for the same reasons that he objected to Complainants' Exhibits #1, 2, and 3. After review of the record, the Board finds that it was error to admit Complainants' Exhibit #8. Unlike Complainants' Exhibits #1, 2, and 3, this exhibit is a composite of alleged observation logs. There are several people whose observation are recorded in the exhibit who did not testify at hearing. In addition, not all the observations deal with the Landfills, but rather many concern a third landfill site not the subject of this case. Although the exhibit was introduced while Complainant Mayer was testifying, Mayer's testimony did not address any of the four requisites of past recollection recorded in regard to her own recorded observations. (R. 321-26). Similarly, Miley and Complainant Castellari did not adequately testify to the four requirements, but rather they merely asserted that the exhibit accurately reflects their handwritten notes. Nothing was stated with regard to the timing and accuracy of the handwritten notes. (R.348-51). Due to the above considerations the Board finds that Complainants' Exhibit #8 does not have the same indicia of reliability that Complainants' Exhibits #1, 2, or 3 have. In addition, the Board will not allow this exhibit in under the business records exception to the rule against hearsay. Consequently, Complainants' Exhibit #8 will not be considered by the Board.

However, the photographs of Complainants' Exhibit #9 are quite probative of the fact that conditions at the Landfills have generally not changed since the time of violations complained of in this case. Such continued failure to rectify this troubled situation is grievous and inexcusable.

In an enforcement case, the burden of proof is upon the complainants to prove the violation. However, the burden is on the respondents to supply the Board with information in order to

enable the Board to consider the criteria of Section 33(c) of the Act. Processing and Books, Inc. v. Pollution Control Board, 64 Ill. 2d 68, 76-77, 351 N.E.2d 865 (1976). In making its determinations in this case, the Board has considered Section 33(c) factors to the extent that the applicable information is in the record.

The extent of Prior's non-compliance with the laws and regulations of the State concerning the Landfills' operations was considerable. The great number of observed violations indicates an almost constant interference with the interests that those regulations are designed to protect. The illegal activities of the Landfills created extensive pollution that at times extended beyond the boundaries of the Landfill. In addition, the failure to apply daily cover to the Landfills created a health risk which was exacerbated by the lack of control over vectors. Prior's general disregard for operational requirements of the Board undermines the Board's role in protecting the environment of the State.

Sanitary landfills certainly have social and economic value, however, that value is lost when they are operated in a manner that endangers the environment and the health of the people. The record shows that the Landfills were operated in disregard of the environmental laws and regulations. Such an operation has a negative value for society.

Although the record indicates that the Landfills are located near residences, there is nothing in the record to indicate that the Landfills, if properly run, would be unsuitable in the area. That is, there is no reason to believe that Prior's Landfills are inherently incompatible with the surrounding areas.

Finally, all the violations are such that they could have been corrected by technically feasible and economically reasonable means. For example, applying daily cover cannot be classified as technically infeasible or economically unreasonable. Similarly, collecting litter, controlling leachate, controlling access to the site and controlling vectors are all technically feasible and economically reasonable activities for a landfill operation. Prior has presented no information which would lead the Board to conclude otherwise.

With regard to penalties, Section 42 of the Act states,

> Any person that violates any provisions of this Act or any regulation adopted by the Board...shall be liable to a civil penalty of not to exceed $10,000 for said violation and an additional civil penalty of not to exceed

> $1,000 for each day during which the violation continues....
>
> (Ill.Rev.Stat. 1985, ch. 111 1/2, par. 1042(a))

The Board has found that Prior violated seven different regulatory provisions. This alone would provide a maximum penalty of $70,000. When considering all the additional days of violation, not counting the first day of violation, the maximum penalty that the Board could impose against Prior would be $205,000.

The Board believes that a penalty of $10,000 will aid in the enforcement of the act. The Board notes that the violations at this site continued over a period of six months even after the Attorney General brought action against Prior for similar violations.

This Opinion constitutes the Board findings of fact and conclusions of law in this matter.

Order

It is the Order of the Board that:

1. Respondent has violated Section 21(d) of the Act; 35 Ill. Adm. Code 807.304; 807.305(a); 807.306; 807.314(e); 807.311; 807.313; 807.314(c); 807.314(f).

2. Respondent shall cease and desist from further violations of the Act and regulations promulgated thereunder.

3. Respondent shall, by certified check or money order payable to the State of Illinois and designated for deposit into the Environmental Protection Trust Fund, pay a civil penalty of $10,000. Respondent shall pay this penalty within forty-five (45) days of the date of this Order to:

   Illinois Environmental Protection Agency
   Fiscal Services Division
   2200 Churchill Road
   Springfield, IL 62706

IT IS SO ORDERED.

Board Member J. Anderson concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 28th day of May, 1987, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board