ILLINOIS POLLUTION CONTROL BOARD
November 16, 2000

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

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

ORDER OF THE BOARD (by E.Z. Kezelis):

This matter is before the Board on a variety of issues. Pending before the Board is an October 10, 2000 motion for summary judgment filed by Briggs Industries, Inc. (Briggs).[1] Complainant responded to this motion on October 17, 2000. On October 20, 2000, Briggs filed a motion for leave to file a reply, a reply, and a motion to strike in response to complainant's response to the summary judgment motion. Complainant responded to the motion to strike on October 25, 2000.[2]

Also before the Board is a duplicitous and frivolous determination, pursuant to Section 31(b) of the Environmental Protection Act (Act) (415 ILCS 5/31(b) (1998)) pertaining to the third-party complaint filed by Briggs against third-party respondents, Loren West and Abingdon Salvage Company, Inc.

[1] Briggs also filed a motion seeking leave to file its brief in excess of 15 pages. This motion was granted by the hearing officer by order of October 12, 2000.

[2] Briggs' motion for summary judgment is referred to herein as "Mot. at __." Complainant's response is referred to as "Resp. at __." Briggs' reply is referred to as "Reply at __." Briggs' motion to strike is referred to as "Mot. to Strike at __." Complainant's response to the motion to strike is referred to as "Resp. to Mot. at __."

For the reasons set forth herein, Briggs' motion for summary judgment is denied. Briggs' third-party complaint is, with exceptions noted herein, accepted for hearing.

BACKGROUND

In its three-count complaint (Comp.), filed on April 30, 1998, complainant alleges that Briggs, along with respondents Doren Poland and Lloyd Yoho, violated various provisions of the Act and Board regulations, pertaining to the operation of a "new landfill" located in Knox County, Illinois, on property that is adjacent to the previously permitted Abingdon Landfill. Poland and Yoho were allegedly the owners and operators of the Abingdon Landfill, which ceased accepting waste in 1993. Comp. at 2. Although not alleged in the complaint, documentation provided in response to the motion for summary judgment suggests that Briggs was also one of the permitted operators of the Abingdon Landfill. See Resp. at Ex. A-E. The complainant alleges that Briggs generated the scrap clay, waste vitreous china, bricks, and Portland cement (mixed ceramic waste) that was disposed of at the Abingdon Landfill and the new landfill.

The complainant alleges that each of the respondents, including Briggs, violated the following provisions of the Act and Board regulations: Sections 21(a), (d), (e), and (p)(1) of the Act (415 ILCS 5/21(a), (d), (e), and (p)(1) (1998)); and Sections 807.201, 807.202(a), 812.101, and 813.102 of the Board's waste disposal regulations (35 Ill. Adm. Code 807.201, 807.202(a), 812.101, and 813.102). Aside from being the generator of the mixed ceramic waste, the complaint itself is silent as to how Briggs specifically violated the Act and Board regulations at issue. It is, nevertheless, undisputed that Briggs' involvement with the Abingdon Landfill and the new landfill extended beyond its mere status as a generator of the mixed ceramic waste. See generally Mot. at 4-5.

On September 25 and October 13, 2000, Briggs filed third-party complaints against third-party respondents Loren West and Abingdon Salvage. The third-party respondents have been served with the complaint and no answer or other responsive pleadings have been filed with the Board.

MOTION FOR SUMMARY JUDGMENT

Briggs' Motion for Summary Judgment

Briggs argues that it is entitled to summary judgment on each of the three counts of the complaint. In count I, the complainant alleges that Briggs violated Sections 21(a), (d), (e) and (p)(1) of the Act (415 ILCS 5/21(a), (d), (e), and (p)(1) (1998)), by: causing or allowing the open dumping of any waste; conducting a waste-disposal operation without a permit and in violation of Board regulations; disposing of waste at a site that does not meet the requirements of the Act and Board regulations; and causing or allowing open dumping of waste to result in litter.

Briggs contends that it cannot be held liable for the violations of Sections 21(a) or (p)(1), because it did not own the new landfill and did not control the trucks that hauled the waste from its business to the new landfill. Mot. at 9. Briggs maintains that as merely the generator of the mixed ceramic waste, it cannot be liable for any resulting disposal-related violations. *Id*. In support of this argument, Briggs cites to United States v. A & F Materials, Co., 578 F. Supp. 1249 (S.D. Ill. 1984), for the proposition that a generator of waste may only be held liable for disposal related violations if, at the time of disposal, the generator is found to have exercised control over the source of the pollution. *Id*.

Briggs also cites to People v. McFalls, 313 Ill. App. 3d 223, 728 N.E.2d 1152 (3d Dist. 2000), in which the court rejected the argument that only those persons who owned or controlled a new landfill could be held liable for open dumping. Mot. at 8. Briggs argues that although the court in McFalls found off-site generators liable for improper dumping, the court focused on the off-site generator's control over the "instruments releasing the pollution." Mot. at 9. Briggs then attempts to distinguish itself from the generators in McFalls by reiterating that it neither owned the new landfill, nor controlled the dump trucks. *Id*.

Briggs also argues that it cannot be liable for a violation of Section 21(d) because it did not "conduct" waste disposal or waste storage activities at the new landfill. Mot. at 15. However, Briggs does concede that it paid "one-half of bulldozing and consultant expenditures at the 'new landfill.'" *Id*. Briggs maintains that this does not "prove" that Briggs operated the new landfill. *Id*. Briggs concludes that "the undisputed facts show that Briggs did not conduct waste-disposal or waste-storage operations at the 'new landfill'" and that it is entitled to judgment as a matter of law. *Id*.

Additionally, with regard to count I, Briggs also argues that it cannot be held liable for a violation of Section 21(e), because it neither stored nor disposed of waste at the new landfill.

In count II, the complainant alleges that Briggs violated Sections 807.201 and 807.202(a) of the Board's waste disposal regulations (35 Ill. Adm. Code 807.201 and 807.202(a)) by causing or allowing the development and operation of a landfill without obtaining the necessary development and operating permits. Briggs argues that because it was neither the owner nor operator of the new landfill, it did not have the ability to seek permits.

Finally, with regard to count III, the complainant alleges that Briggs violated Section 812.101 and 813.102 of the Board's waste disposal regulations (35 Ill. Adm. Code 812.101 and 813.102) by failing to file a complete permit application and by failing to submit the permit application on the appropriate Illinois Environmental Protection Agency (Agency) forms. Briggs argues that, "these charges . . . are suspect for a number of reasons." Mot. at 19. Briggs contends that these charges are suspect because, "the Board has never held anyone liable for violating these provisions, nor do reported Board opinions indicate that anyone has ever previously been charged with violating these provisions." *Id*.

In addition, Briggs argues that it is entitled to summary judgment on count III because it is undisputed that it is not the owner or operator of the new landfill and because it did not actually file any permit application with the Agency. Mot. at 19.

Complainant's Response to Motion for Summary Judgment

Complainant opposes Briggs' motion for summary judgment. Essentially, complainant argues that the dealings and relationship between Briggs and the other respondents (Poland and Yoho) are relevant to establishing the level of Briggs' involvement in the disposal activities at the new landfill and, that this level of involvement arguably makes Briggs liable for resulting violations at the new landfill. See generally Resp. at 1-2. While complainant agrees that specific facts pertaining to Briggs' involvement with the new landfill may not be in dispute, it argues that the Board could draw different conclusions from the facts than those conclusions reached by Briggs. Resp. at 4. In support of this reasoning, complainant cites to Larsen v. Vic Tanny Int'l, 130 Ill. App. 3d 574, 474 N.E.2d 729 (5th Dist. 1984) and *In re* Estate of Ciesiolkiewicz, 243 Ill. App. 3d 506, 611 N.E.2d 1278 (1st Dist. 1993). Complainant relies on these cases in arguing that, "a genuine issue of material fact exists not only when facts are in dispute, but also where reasonable persons could draw different inferences from undisputed facts." Resp. at 4.

Complainant suggests that the Board must look not only to the motion for summary judgment and any attachments thereto, but also to the pleadings, depositions, admissions, and affidavits on file to determine whether a genuine issue of material fact exists. Resp. at 4. Complainant argues that all of this information tends to support it's allegations that Briggs' involvement with the new landfill was such that would make Briggs liable for the violations alleged in the complaint.

Complainant relies on two appellate court cases that have addressed the question of what activities constitute operation or control for purposes of liability. The first case, People v. McFalls, was also relied upon by Briggs. Complainant suggests that McFalls supports the idea that an off-site generator, despite it's generator status, may be liable for causing open dumping. Resp. at 4. In the second case, People v. Bishop, 735 N.E.2d 754 (5th Dist. 2000), the court looked to the nature and extent of a person's contacts with a landfill to determine whether that person was in fact liable as an "operator" of the site. Complainant argues that Briggs' involvement with the new landfill was very similar to that of the defendant in Bishop, which the appellate court found substantial enough to hold the defendant liable as an operator. Resp. at 5.

Briggs' Motion for Leave to File Reply and Motion to Strike

On October 20, 2000, Briggs filed a motion seeking leave of the Board to file a reply to complainant's response to the motion for summary judgment. Pursuant to Section 103.140 of the Board's procedural rules, the moving party does not have the right to reply except as permitted by the Board or hearing officer. Complainant objects to Briggs' motion for leave. Despite complainant's objection, the Board believes that the issues addressed in Briggs' reply are pertinent to the Board's understanding of the issues involved in this matter, and accordingly grants Briggs' motion for leave to reply.

Also on October 20, 2000, Briggs filed a motion to strike Exhibits A through E, which are attached to complainant's response to Brigg's motion for summary judgment. Exhibits A through E consist of the following:

(A) Briggs' December 5, 1978 permit application for development and operation of a 15.78 acre landfill;[3]

(B) March 1, 1979 development permit issued to Briggs, Poland, and Yoho for the 15.8 acre site;

(C) April 19, 1979 operating permit issued to Briggs, Poland, and Yoho for the 15.8 acre site;

(D) December 1, 1992 letter from Briggs to the Agency requesting release of two letters of credit; and

(E) Briggs' October 6, 1992 financial assurance trust agreement.

Briggs argues that these documents should be stricken because complainant has provided no evidence authenticating the documents. Mot. to Strike at 1. Briggs disputes complainant's suggestion that the Board may take official notice of these documents. Mot. to Strike at 2. Briggs also argues that, although these documents could be introduced into the record at hearing as business records, the Board may not consider them at the summary judgment stage. *Id*. Briggs maintains that, pursuant to People v. D'Angelo Enterprises, Inc. (November 19, 1998), PCB 97-66, the Board is "limited" to considering the pleadings, depositions, admissions, and affidavits when deciding a motion for summary judgment. *Id*.

Complainant responds to the motion to strike by urging the Board to take official notice of these documents. In the alternative, complainant suggests that if authenticity is a problem, then the proper cure is for it to be allowed an opportunity to file an affidavit authenticating the documents.

[3] Also referred to herein as the "Abingdon Landfill."

The motion to strike is denied. On June 16, 2000, the complainant filed responses to Briggs' request to produce documents. Although the Board does not require parties to file copies of the actual produced documents, complainant did produce these documents to Briggs at that time. The Board's hearing officer confirmed with complainant that these documents were produced to Briggs in the course of discovery. As such, these documents constitute part of the "pleadings, depositions, admissions, and affidavits on file," which the Board may consider in determining a motion for summary judgment. It is entirely appropriate for the Board to look to these documents in deciding the motion for summary judgment and accordingly, the motion to strike is denied.

Briggs' Reply to Complainant's Response to Motion for Summary Judgment

Having granted Briggs leave to reply, the Board now considers those arguments raised in Briggs' reply. Briefly, Briggs argues that complainant has failed to show that any genuine issue of material fact exists, and that summary judgment in its favor is appropriate. Briggs reiterates facts which it claims are undisputed. These facts include: "Briggs, Yoho, and Poland were granted permission to develop and operate the 'Abingdon landfill'" (Reply at 2); and "Briggs paid one-half of the bulldozing and compacting charges and one-half of the landfill consulting fee charges [at the new landfill]" (Reply at 3).

Briggs argues that because these, and other facts, are not in dispute, it is entitled to judgment as a matter of law.

Discussion

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief, "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Based on the factual matters asserted in the record, including the undisputed facts put forth by Briggs, the Board finds that Briggs is not entitled to judgment as a matter of law. In order to grant Briggs' motion for summary judgment, we must find that Briggs' right to the relief requested is "clear and free from doubt." See Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill, 111 Ill. 2d at 240, 489 N.E.2d at 871. In light of the varying inferences that could be

drawn from the facts surrounding Briggs' level of involvement with both the Abingdon landfill and the new landfill, we cannot find that Briggs is clearly entitled to the relief which it seeks.

This conclusion is bolstered by recent case law regarding what types of activities can render someone liable for "operator" related violations at a landfill or open dump. We find most compelling the cases of People v. McFalls, 313 Ill. App. 3d 223, 728 N.E.2d 1152 (3rd Dist. 2000) and People v. Bishop, 735 N.E.2d 754 (5th Dist. 2000). Contrary to Briggs' assertions, these cases raise a question as to whether Briggs' involvement with both the Abingdon landfill and the new landfill were sufficient to render Briggs liable for the violations alleged.

There is no cross-motion for summary judgment pending on behalf of the complainant. The Board therefore, does not need to address the question of whether the undisputed facts would support judgment in favor of the complainant. For purposes of this motion for summary judgment, it is sufficient for the Board to conclude that, while there are some undisputed facts, those facts are insufficient to convince the Board that Briggs is entitled to judgment as a matter of law. The motion for summary judgment is accordingly denied.

DUPLICITOUS/FRIVOLOUS DETERMINATION

On September 25, 2000, Briggs filed a third-party complaint against Loren West. According to the certificate of service filed by Briggs, West was served with the third-party complaint on September 23, 2000. Briggs moved to amend the third-party complaint against West by interlineation on October 13, 2000. That motion is granted.

On October 13, 2000, Briggs filed another third-party complaint naming Abingdon Salvage Company, Inc. (Abingdon Salvage), as a third-party respondent. Pursuant to the certificate of service filed with the Board, Abingdon Salvage was served with the third-party complaint on October 11, 2000.

Briggs alleges that since June 30, 1996, West has owned the "property" (which the Board interprets to be both the Abingdon landfill and the new landfill), as tenants in common with Lloyd Yoho. Briggs further alleges that on June 30, 1996, West also purchased Poland's one-half interest in Abingdon Salvage, Inc., a waste hauling business previously owned and operated by Poland and Yoho. As partial owner of the landfill properties and of the waste hauling business, Briggs alleges that West, since June 30, 1996, caused or allowed dumping at the new landfill without appropriate permits.

Briggs alleges that through his activities, West has violated Sections 21(a), (d), (e), and (p)(1) of the Act (415 ILCS 5/21(a), (d), (e), and (p)(1) (1998)), and Sections 807.201, 807.202(a), 812.101, and 813.102 of the Board's waste disposal regulations (35 Ill. Adm. Code 807.201, 807.202(a), 812.101, and 813.102).

As for Abingdon Salvage, Briggs alleges that Abingdon Salvage's business involves waste hauling and operating the new landfill. As the operator of the new landfill, Briggs alleges that Abingdon Salvage violated Sections 21(a), (d), (e), and (p)(1) of the Act (415 ILCS 5/21(a),

(d), (e), and (p)(1) (1998)), and Sections 807.201, 807.202(a), 812.101, and 813.102 of the Board's waste disposal regulations (35 Ill. Adm. Code 807.201, 807.202(a), 812.101, and 813.102).

Section 103.124(a) of the Board's procedural rules (35 Ill. Adm. Code 103.124(a)) directs the Board to determine whether or not a citizen's complaint is duplicitous or frivolous. Section 103.124(a) implements Section 31(b) of the Act (415 ILCS 5/31(b) (1998)). Section 103.124(a) provides:

> The Clerk shall assign a docket number to each complaint filed *** the Chairman shall place the matter on the agenda for Board determination whether the complaint is duplicitous or frivolous. If the Board rules that the complaint is duplicitous or frivolous, it shall enter an order setting forth its reasons for so ruling and shall notify the parties of the decision. If the Board rules that the complaint is not duplicitous or frivolous, this does not preclude the filing of motions regarding the insufficiency of the pleadings. 35 Ill. Adm. Code 103.124(a).

The Board finds that the third-party complaints filed by Briggs against West and Abingdon Salvage are neither duplicitous nor frivolous, and therefore accepts these matters for hearing.

Duplicitous

An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum. Brandle v. Ropp (June 13, 1985), PCB 85-68.

The Board has not identified any other cases, identical or substantially similar to these, pending in this or any other forum. Therefore, based on the record before us, these matters are not duplicitous.

Frivolous

An action before the Board is frivolous if it requests relief which the Board cannot grant. Lake County Forest Preserve Dist. v. Ostro (July 30, 1992), PCB 92-80.

In the third-party complaints, Briggs alleges violations relating to the ownership and operation of a waste hauling business and the new landfill. Briggs seeks to have the Board order the following relief: (1) order third-party respondents to obtain appropriate permits to operate the new landfill or to remove the waste from the new landfill to a properly permitted facility; (2) order third-party respondents to cease and desist from further violations; (3) assess against third-party respondents a penalty of up to $50,000 per violation and up to an additional $10,000 per day that the violations continued; (4) award it (Briggs) its costs and attorneys fees; and (5) order third-party respondents to undertake other remedial actions the Board deems necessary and to pay amounts of money ordered in proportion to their respective degrees of responsibility.

The Board finds, with one exception, that Briggs has alleged sufficient facts, that if proven, would result in a finding of violation for which the Board could grant relief. The one exception to this deals with Briggs' request for attorney fees and costs. The Board has previously held that Section 42(f) of the Act allows for an award of attorney fees and costs only in cases in which the Attorney General or a State's Attorney prevail on behalf of the People of the State of Illinois. See 415 ILCS 5/42(f) (1998); see also Universal Scrap Metals, Inc. v. Flexi-Van Leasing, Inc. (May 20, 1999), PCB 99-149 and Charter Hall Homeowner's Association v. Overland Transportation System, Inc. (January 22, 1998), PCB 98-81. Accordingly, the Board strikes those portions of the third-party complaints in which Briggs seeks an award of attorney fees and costs.

Duplicitous/Frivolous Conclusion

The Board finds that, pursuant to Section 103.124(a), the third-party complaints, with the previously noted exception, are neither duplicitous nor frivolous, and are accepted for hearing.

The hearing must be scheduled and completed in a timely manner consistent with Board practices. The Board has assigned a hearing officer to conduct the hearings consistent with this order and with Section 103.125 of the Board's procedural rules. 35 Ill. Adm. Code 103.125. The Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 30 days in advance of hearing so that 21-day public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses, and all actual exhibits to the Board within five days of the hearing.

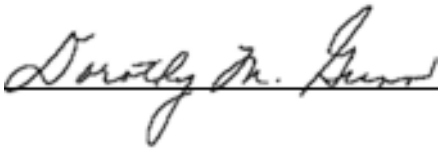
Any briefing schedule shall provide for final filings as expeditiously as possible. If, after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if, after an attempt, the hearing officer is unable to consult with all of the parties, the hearing officer shall unilaterally set a hearing date. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

CONCLUSION

For the foregoing reasons, the Board denies Briggs' motion for summary judgment and orders the case proceed to hearing as scheduled by the Board's hearing officer. In addition, the Board accepts the third-party complaints against Loren West and Abingdon Salvage Company, Inc., and consolidates those matters into one third-party proceeding. The parties should prepare for and proceed to hearing as expeditiously as practicable with regard to the third-party complaint.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 16th day of November 2000 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board