



The respondent, in its answer to the complaint and response to the complainant's request to admit facts, admits the following to be true. Respondent owns the Old Weaver Landfill, which is located in the SE 1/4 of the SW 1/4 of Section 9, T.26N, R3W, in Washington Township, Tazewell County. *See* Ans. at 1; Resp. at 1. The Old Weaver Landfill accepted waste from 1966 to 1974. Resp. at 1. Bessie Wyss owned the landfill property and Glenn Weaver operated the landfill. *Id.* Final cover was placed on the landfill in 1975, and the Agency approved closure of the Old Weaver Landfill by letter dated May 18, 1976. *Id.* Respondent admitted that open-dumped waste, including wood, shingles, bedsprings, chairs, mattresses, rusted metal objects, and white goods, existed at the site on March 23, 1999. Resp. at 1. Respondent did not have a permit from the Agency to operate a waste-storage, waste-treatment, or waste-disposal operation at the Old Weaver Landfill site. Resp. at 2.

Mehalic conducted an inspection at the Old Weaver Landfill site on March 23, 1999. Affidavit at 3. On that date, Mehalic observed open-dumped refuse at the northeast corner of the property, including wood waste, shingles, bed springs, chairs, mattresses, various rusted objects, and white goods. *Id.* Mehalic took photographs of the waste, which are attached to his affidavit. *Id.* Mehalic attests that photographs labeled 5, 6, 7, 8, 9, 10, and 12 submitted with the affidavit truly and accurately depict the conditions that he observed on March 23, 1999.

Mehalic noticed after further investigation of the northeast corner of the site that refuse was protruding from ravines where the cover material of the Old Weaver Landfill eroded into the landfill's side slopes. Affidavit at 4. Mehalic saw "water flowing through the ravines and in direct contact with the exposed refuse." *Id.* Mehalic stated that it appeared that flowing water had formed the ravines. *Id.* Mehalic said that the uncovered refuse was part of the closed landfill. *Id.* Mehalic also observed a pool of leachate from the Old Weaver Landfill at the northeastern lower side of the landfill's slope. *Id.* Mehalic stated that a tributary to the Ten Mile Creek runs along the north side of the property near the erosion rills. *Id.*

On April 18, 2000, Mehalic re-inspected the site of the Old Weaver Landfill. Affidavit at 4. Mehalic stated that the conditions were the same as when he inspected the site on 3 March 23, 1999. Specifically, he observed the same types of open-dumped waste in the northeastern corner of the site. *Id.* He also observed water running through the same ravines in direct contact with refuse from the Old Weaver Landfill. Affidavit at 5. Mehalic attached photographs of his observations on that date to his affidavit. *Id.* He attests that photographs labeled 13 through 21 truly and accurately depict the conditions that he observed at the Old Weaver Landfill on April 18, 2000. *Id.*

### **THE PENALTY HEARING AND BRIEFING**

The sole beneficiary for the Patrick Robert Land Trust, Mr. LeRoy, appeared at hearing. He was permitted by the hearing officer to present his testimony as a member of the public in attendance would in free flowing narrative fashion, subject to cross-examination by the parties. Mr. Charles Fuller, a developer of the neighboring property, also appeared on behalf of the Trust. The People called Mr. Ron Mehalic as their sole witness. Mr. Mehalic has a Bachelor of Science in Geology from Illinois State University and has been a field inspector with the Agency for 10

and a half years. The People filed their brief on August 16, 2002, and Mr. LeRoy filed a brief on August 26, 2002.

### **PRELIMINARY MATTERS**

The Board first addresses two preliminary matters, both involving Mr. LeRoy's attempt to represent the Trust himself.

Patrick Robert Land Trust, is a legally formed Trust with Mr. William LeRoy as the sole beneficiary. Being a trust, Patrick Robert Land Trust (Trust) is not an individual and must be represented in all Board matters through a licensed and registered attorney. Mr. LeRoy represented prior to hearing that the Trust is no longer represented by an attorney. Tr. at 9. The Boards' procedural rules clearly state:

Section 101.400 (a)(2)

a) Appearances. A person who is a party in a Board adjudicatory proceeding may appear as follows:

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2) When appearing before the Board, any person other than individuals must appear through an attorney-at-law licensed and registered to practice law. (Section 1 of the Corporation Practice of Law Prohibition Act (705 ILCS 220/1) and Section 1 of the Attorney Act (705 ILCS 205/1))

First, based upon the Board's procedural rules the Board on its own motion strikes pages 76-95 of the transcript where Mr. LeRoy conducted direct examination of Mr. Charles Fuller and Mr. Ronald Mehalic.

Second, on August 29, 2002 the People filed a motion to strike respondent's brief pursuant to the Board's Procedural Rule at 35 Ill. Adm. Code 101.500, specifically:

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a) The Board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure.

The People contend that Patrick Robert Land Trust is not an individual and thus must appear before the Board through a licensed and registered attorney, 35 Ill. Adm. Code 101.400 (a)(2). Accordingly, the Board finds the brief filed on behalf of the respondent is not permissible under the Board's procedural rules as required in section 101.500 and strikes respondent's brief.

### **PENALTY ANALYSIS**

In its April 4, 2001 order, the Board found respondents violated Sections 12(a) and 21(a), (d) and (p) of the Act (415 ILCS 5/12(a), 21(a), (d), (p) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002), and Section 812.101 of the Board regulations (35 Ill. Adm. Code 812.101).

In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. ESG Watts, Inc. v. PCB and People of the State of Illinois, 282 Ill. App. 3d 43; 668 N.E.2d 1015, (4th Dist. 1996); People v. Bernice Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park, PCB 92-164 (Apr. 20, 1994); IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990). The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. Wells Manufacturing Company v. PCB, 73 Ill. 2d 226, 383 N.E.2d 148 (1978). The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must remember that no formula exists, and all facts and circumstances must be reviewed. Kershaw, PCB 92-164, slip. op. at 14; Barry, PCB 88-71, slip. op. at 62-63.

### **Maximum Penalty**

The formula for calculating the maximum penalty as contained in Section 42(a) and (b) of the Act. Section 42(a) provides for a civil penalty not to exceed \$50,000 for violating a provision of the Act and an additional civil penalty not to exceed \$10,000 for each day during which the violation continues. The People state that Patrick Robert Land Trust's violation of Section 12(a) of the Act results in a statutory maximum penalty of \$50,000 for the principal violation and an additional \$10,760,000 for each day of continuing violation (*i.e.* 1076 days x \$10,000 = \$10,760,000). The total penalty for this water pollution-related violation alone is an estimated \$10,810,000 (*i.e.* \$50,000 + \$10,760,000). A calculation of the statutory maximum penalty for the respondent's violation of Sections 21(a), (d) and (p) of the Act and Section 812.101(a) of the Board's regulations would result in a similar calculation.

### **Penalty Requested**

The People argue that a substantial fine is warranted in this case, however, they are not requesting the potentially assessable statutory maximum as pleaded in their complaint. The potentially assessable statutory maximum is well in excess of thirty million dollars. Alternatively, the People argue that a penalty of \$12,000 is reasonable given the circumstances and due consideration of the factors enumerated under Section 33(c) and Section 42(h).

The Board now examines the appropriate penalty for these violations.

### **Section 33(c) Factors**

The Act states that the Board must consider all facts and circumstances involved in an enforcement order including, but not limited to, the factors in Section 33(c). 415 ILCS 5/33(c) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002. These factors include:

- i. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- ii. the social and economic value of the pollution source;

- iii. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- iv. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- v. any subsequent compliance.

Other factors, such as good faith, may also be considered. IEPA v. Allen Barry d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990).

### **Section 33(c)(i) - Injury to Health, Welfare, and Property**

Testimony was offered outlining exposed refuse protruding from erosional channels emanating at the former Weaver Landfill, standing water and leachate in close proximity to a tributary to Ten Mile Creek. Tr. at 27. The respondent's noncompliance caused an actual risk to Ten Mile Creek and therefore establishes the unreasonableness of the violations that should be weighed against the Land Trust.

### **Sections 33(c)(ii) and 33(c)(iii) - Social/Economic Value and Suitability to the Area**

The record does not address any facts that might impact upon this consideration. The Board cannot weigh these factors for or against respondent.

### **Section 33(c)(iv) - Economic Reasonableness of Reducing Emissions**

It was technically practicable and economically reasonable for the respondent to eliminate its noncompliance through the removal of the open dumped waste and the coverage of the exposed landfill refuse on the site. Mr. Melhalic estimated that based on the amount of open dumped waste on the site and the logistics involved it should have only taken the Land Trust three to four months to remove the open dumped material and to cover the exposed refuse at the site. Tr. at 49. In addition, Mr. LeRoy admitted that the total expense involved was less than \$2,000 and it was a "minor job." *Id.* at 62.

### **Section 33(c)(v) - Subsequent Compliance**

The evidence demonstrates that Patrick Roberts Land Trust actions towards clean up of the Old Weaver Landfill site were dilatory. The Agency began seeking site remediation with a site visit in April of 1998 with a subsequent inspection on September 17, 1998 and six visits. Tr. at 15. Inspector Mehalic noted leachate, open dumping and exposed refuse. Tr. at 20. Site visits occurred on March 23, 1999, finding these violations continued. Tr. at 25, 26. On April 18, 2000 finding these violations continual (Tr. at 35,36); and on April 18, 2001 finding the minor improvements to the site of tires being stacked and pulling up some of the waste. Tr. at 42. The Agency mailed two Violation Notices and three Continuing Violation Letters providing the

measures necessary to bring the site into compliance. Tr. at 22-23, 29-31. Finally, the Agency mailed a Notice of Intent to Pursue Legal Action letter to respondent prior to filing a complaint before the Board. Tr. at 50. The Agency contended that the actions required to remediate the open dump material and exposed rills at the site would take an estimated three to four months. Tr. at 49.

Although there is evidence that Patrick Roberts Land Trust did clean the site in the fall of 2001 (Tr. at 62), it is clear from the record that the remediation occurred after extensive intervention by the Agency and this factor must be a consideration in penalty assessment. It should not be deemed a mitigating factor if compliance is achieved only after enforcement proceedings are initiated. *ESG Watts, Inc. v. PCB*, 282 Ill. App. 3d 43, 52-53 (4th Dist. 1996). While the respondent has recently achieved compliance on the site, the violations continued until the initiation of enforcement proceedings by the Attorney General's Office.

### **Section 42(h) Factors**

Complainants seek a \$12,000 penalty. Tr. at 15. In determining a penalty, Section 33(c) lists general factors for the Board to consider when issuing final orders and determinations, while Section 42(h) specifically governs penalty amounts. 415 ILCS 5/42(h) (2000) *amended by P.A. 92-0574*, eff. June 26, 2002; *People v. Kershaw*, PCB 92-164 (April 20, 1995). Section 42(h) states, in pertinent part:

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

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations there under or to secure relief there from as provided by this Act;
3. any economic benefits accrued by the violator because of delay in compliance with requirements;
4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and
5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (2000) *amended by P.A. 92-0574*, eff. June 26, 2002.

### **Section 42(h)(1) - Duration and Gravity**

The record shows that respondent did not comply with Agency requests for remediation from September 1998 until the Fall of 2001. The record also shows that lechate, open dumping and pooling occurred unabated for approximately three years after notification of Patrick Roberts Land Trust by the Agency. By not acting within a reasonable timeframe, respondents jeopardized the health of the neighboring subdivision residents and the Ten Mile Creek. The violations continued during the time respondent repeatedly received all Violation Notices, Continuing Violation letters and Notices of Intent to Pursue Legal Action letters.

### **Section 42(h)(2) - Due Diligence**

The record shows that Patrick Roberts Land Trust was not diligent in complying with the Act and Board regulations and only complied after repeated Agency demands and the intervention of the Attorney Generals Office. Mr. Mehalic personally informed the respondent on three occasions of the measures necessary to bring the site into compliance and sent numerous Violation Notices, Continuing Violation Letters and a Notice of Intent to Pursue Legal Action Letter providing the same information. Tr. at 21-23, 29-33, 36-37, 43, and 47-48. Mr. LeRoy admitted that he discussed with Mr. Mehalic the remedial measures that were necessary but he took no action in 1998, 1999, and 2000 to initiate compliance on the site. Tr. at 69-70. While there were numerous opportunities to observe and correct its noncompliance, the respondent waited until after the initiation of enforcement by the Attorney General's Office before it initiated its compliance efforts. These facts demonstrate a lack of good faith on the part of the respondent.

### **Section 42(h)(3) - Economic Benefits**

Complainants presented no evidence of economic benefit to Patrick Roberts Land Trust. The Board will not consider this factor.

### **Section 42(h)(4) - Deterring Further Violations**

The issue of deterring further violations is one critical factor in assessing the appropriate penalty upon Patrick Robert Land Trust. By imposing a penalty upon those who blatantly disregard the applicable rules and regulations of the Act, others and Patrick Robert Land Trust in the future who might consider non-compliance will be deterred. Wasteland, Inc. v. PCB, 118 Ill. App.3rd 1041, 456 N.E.2d 964 (3rd Dist. 1983). Further, deterrence is an appropriate objective for the Board to evaluate even where a violator has achieved compliance. ESG Watts, Inc., v. PCB, 282 Ill. App. 3d 43, 668 N.E. 2d 1015 (4th Dist. 1996). "The assessment of penalties against recalcitrant defendants who have not sought to comply with the Act voluntarily but who have by their activities forced the Agency or private citizens to bring action against them may cause other violators to act promptly and not wait for the prodding of the Agency." Lloyd A. Fry Roofing Company v. PCB, 46 Ill. App. 3d 412; 361 N.E. 2d 23, 28-29. (5th Dist. 1977). In the present case, the record is clear. Mr. LeRoy admitted participation in numerous conversations with the Agency but took no action from September 1998 to the fall of 2000 to initiate

compliance. Tr. at 69-70. Mr. LeRoy must not delay remedial cleanup in the event that future violation occur at the site.

### **Section 42(h)(5) - Previous Violations of the Act**

Complainants do not have any record of respondents committing any prior violations.

### **Penalty**

The record must demonstrate an adequate rationale for the imposition of the penalty, and the penalty must be "commensurate with the seriousness of the infraction." ESG Watts, Inc. v. PCB, 282 Ill. App. 3d 43, 668 N.E.2d 1015 (4th Dist. 1996), citing Trilla Steel Drum Corp. v. PCB, 180 Ill. App. 3d 1010, 1013, 536 N.E.2d 788, 790, (1st Dist. 1989). However, the Act clearly authorizes the Board to assess civil penalties for violations regardless of whether those violations resulted in actual pollution. Park Crematory, Inc. v. PCB, 264 Ill. App. 3d 498, 501-02, 637 N.E.2d 520, 523, 201 Ill. Dec. 931 (1st Dist.1994).

The similarities between the present case and People of the State of Illinois v. James and Carol Gilmer, PCB 99-27 (August 24, 2000) are notable. In Gilmer, contaminants from the landfill potentially impacted the groundwater and leachate was not controlled at the landfill. In the present case, the respondent threatened nearby surface water and leachate was allowed to develop in close proximity to a nearby tributary. In Gilmer, a compacted layer of suitable material on fill areas was not maintained. In the present case, the exposed refuse protruding from erosion rills were not timely covered. In Gilmer, litter was not appropriately collected. Little was not appropriately collected in the instant case. In Gilmore, the Board assessed a penalty of \$40,000 based upon the imposition of \$10,000 for each count of the complaint. *Id* at 1-4.

In this case, it was shown that Patrick Roberts Land Trust did have adequate notice from the Agency to remediate the site of the Old Weaver Landfill. The evidence documents numerous site visits and correspondence requiring site clean up and a 2 and a half year period of non-compliance by Patrick Roberts Land Trust. The facts indicate continued lechate and pollution at the site and little regard for the administrative procedures that are necessary to protect the environment. In Gilmer, the penalty was \$40,000 due to a violation of eight different sections of the Act and over 12 different sections of the Board's regulations. In the present case there were fewer violations. In light of the facts presented, the Board imposes a \$12,000 penalty on the respondent.

### **Attorney Fees**

Section 42(f) of the Act allows the Board to assess attorney fees in cases where a person "has committed a willful, knowing or repeated violation of the Act." 415 ILCS 5/42(f) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002. The record shows that respondents willfully and knowingly violated the permitting procedures of the Act and Code. Therefore, the Board finds the awarding of attorney fees appropriate.



Although complainants request attorney fees and costs, complainants have not provided any information regarding what those fees and costs should be. Complainant must file an affidavit with the Board by November 1, 2002, indicating what complainant believes is an appropriate amount.

This interim opinion constitutes the Board's findings of fact and conclusions of law.

### **ORDER**

- 1) The Board's September 4, 2001 order finding that Patrick Roberts Land Trust violated Section 12(a), 21(a), (d) and (p) of the Act and Section 812.101(a) of the Board's regulations is incorporated by reference as if fully set forth. The Board imposes a civil penalty of \$12,000 on respondent.
- 2) Respondent must pay this penalty within 30 days of the date of this order. Such payment must be made by certified check or money order payable to the Treasurer of the State of Illinois, designated to the Illinois Environmental Protection Trust Fund, and must be sent by first class mail to:

Illinois Environmental Protection Agency  
Fiscal Services Division  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield Illinois 62794-9276

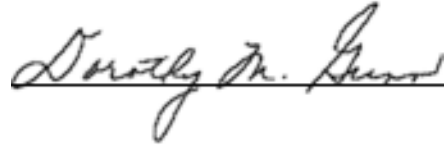
The certified check or money order must clearly indicate on its face this case name and docket number. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2000)).

- 3) Attorneys for Complainant must file an affidavit in support of its request for fees by November 1, 2002. Respondent must file any response to the affidavit by November 15, 2002. The Board will strike any response not filed by an attorney.

IT IS SO ORDERED.

Board Member W.A. Marovitz dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on September 19, 2002, by a vote of 6-1.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board