ILLINOIS POLLUTION CONTROL BOARD
October 3, 2002

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-193
	)	(Enforcement - Land)
COMMUNITY LANDFILL COMPANY, INC,	)	
	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by G.T. Girard):

On October 15, 2001, complainant filed a partial motion for summary judgment (C.Mot.S.J.) in this matter. On October 24, 2001, the hearing officer allowed respondent 90 days to conduct discovery and an additional 30 days to file a response to the motion for summary judgment. On March 1, 2002, respondent filed a cross-motion for partial summary judgment (R.Mot.S.J.). Again pursuant to hearing officer order, the complainant was allowed until May 6, 2002, to file a response (C.Reply) and did so on that date. Also pursuant to hearing officer order respondent was given until June 10, 2002, to reply and did so (R. Reply).

On June 11, 2002, respondent filed a motion to strike an affidavit included in the complainant's response (Mot.Strike). On August 26, 2002,[1] complainant filed a response to the motion to strike *instanter* (R.Mot.Strike). The motion to file *instanter* is granted. The motion to strike is denied as determined below.

For the reasons discussed below the Board grants the complainant's motion for partial summary judgment in part and denies the motion in part. The Board also grants respondent's motion for partial summary judgment in part and denies the motion in part. The Board finds that respondent has violated the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq*. (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and Board regulations as specified in counts III, IV, VII, VIII, IX, X, XIII, XIV, XVI, XXI, and in part on count XIX of the complaint. The parties shall proceed to hearing to present evidence on the appropriate penalty to be levied against respondent for these violations. In addition the parties shall proceed to hearing on counts I, II, VI, XV, XVII, XX, and in part on count XIX to determine the liability of the respondent. The Board dismisses counts XI, XVIII, and XXII.

[1] Due to a motion to strike the motion to strike denied by the Board on August 8, 2002, the complainant was given until August 15, 2002, to respond to the motion to strike. On August 13, 2002, complainant filed a motion for extension of time which is mooted by the motion to file *instanter*.

BACKGROUND

Respondent operates a permitted landfill located at 1501 Ashley Road in Morris, Grundy County. The approximate 119-acre site consists of two parcels, Parcel A and Parcel B. On May 1, 1997, complainant filed an initial six-count complaint alleging that respondent violated various sections of the Act (415 ILCS 5/1 *et seq*. (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and the Board's landfill regulations (35 Ill. Adm. Code 807). Specifically the complaint included allegations that the respondent allowed uncovered refuse, leachate seeps, and landscape waste at the landfill. On April 3, 1998, complainant filed an amended complaint adding counts VII through X. These counts relate to the depositing of excess waste in Parcel B at elevations above the permitted height. On November 24, 1999, a second amended complaint was filed by complainant adding counts XI through XXII. These additional counts include further allegations that the improper handling of asbestos and improper disposal of waste tires violated the Act and Board's regulations. Counts XI through XXII also include allegations that several permit provisions were violated.

On July 31, 2000, complainant filed a partial motion for summary judgment (concerning counts V and XII) and on October 30, 2000, respondent filed a cross-motion for summary judgment. On April 5, 2001, the Board entered an order granting complainants motion for summary judgment on count V, but denying both motions for summary judgment on count XII and directing the parties to hearing on count XII and the issue of penalties for count V. People v. Community Landfill Company, Inc., PCB 97-193 (Apr. 5, 2001). On July 26, 2001, the Board granted a motion to reconsider its April 5, 2001 order. In the order of July 26, 2001, the Board denied complainants motion for summary judgment on count XII and thus granted respondent's motion. *See*, People v. Community Landfill Company, Inc., PCB 97-193 (July 26, 2001) and People v. Community Landfill Company, Inc., PCB 97-193 (Aug. 23, 2001).

As a result of the Board's prior orders, two counts of the 22 counts at issue in this proceeding have been addressed. The partial motion for summary judgment and the cross-motion for summary judgment pending before the Board concern the remaining 20 counts of the complaint.

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (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." *Id*. 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." *Id*, citing Purtill v. Hess, 111 Ill. 2d 299, 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 (2d Dist. 1994).

In this case both parties have asked that the Board grant summary judgment. Upon reviewing the pleadings and the record in this matter, the Board agrees that there are no issues of material fact and judgment may be granted as a matter of law on some of the counts. Therefore, the Board finds that summary judgment is appropriate as to those counts. The remaining counts have material issues of fact and should proceed to hearing. The Board will discuss each of the counts separately below.

FINDINGS OF FACT

The Illinois Environmental Protection Agency (Agency) conducted several inspections of the landfill operated by respondent. Inspections took place on April 7, 1994, March 22, 1995, May 22, 1995, March 5, 1997, July 28, 1998, November 19, 1998, March 31, 1999, May 11, 1999, and July 20, 1999. Comp. at 4. Agency employees, Warren Weritz and Tina Kovasznay, conducted the inspections. *See* C.Mot.S.J. at Exh. P, pp. 1-2 and Exh. N, pp. 1-4. During those inspections, Mr. Weritz and Ms. Kovasznay recorded several observations that led to the allegations in the complaint.

MOTION TO STRIKE

Respondent seeks to strike paragraphs 9, 11, 13, 14, and 18 from the second affidavit of Warren Weritz, which was attached to the complainant's reply. Mot.Strike at 1. Respondent argues that those paragraphs should be struck because the statements conflict with the prior sworn testimony of Mr. Weritz. Mot.Strike at 2. Respondent points to several portions of Mr. Weritz's prior affidavit and the deposition taken by respondent of Mr. Weritz to support the argument that the paragraphs conflict with prior statements or the statements were not based on personal knowledge.

Complainant argues that the affidavit should not be struck as the points made in the second affidavit are further clarification of Mr. Weritz's prior affidavit and the deposition. R.Mot.Strike at 3. Complainant then points to each of the paragraphs and argues that the statements are based on Mr. Weritz's personal knowledge and are consistent with prior statements.

The Board denies the motion to strike the second affidavit. The statements made in the second affidavit, when read with the other statements from Mr. Weritz, demonstrate that in several instances questions of material fact still exist. Therefore, the Board will consider the second affidavit in this proceeding.

STATUTORY AND REGULATORY BACKGROUND

The complaint alleges violations of several sections of the Act, the Board's procedural rules, and permit conditions. The specific sections of the Act are Sections 3.305, 9.1, 21, 21.1, 22.22, 12, and 55(b-1). 415 ILCS 5/3.305, 9.1, 21, 21.1, 22.22, 12, and 55(b-1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002). The provisions of the Board's rules are 35 Ill. Adm. Code 807.306, 807.313, 807.314, 807.601, 807.603, and 807.623.

Section 3.305 of the Act defines "open dumping" as" the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." (415 ILCS 5/3.305 (2000) *amended by* P.A. 92-0574, eff. June 26, 2002).

Section 9.1(d)(1) of the Act provides that no person shall:

(1) violate any provisions of Sections 111, 112, 165 or 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto; or

Section 12(a) of the Act provides that no person shall:

Cause or threaten or allow the discharge of any contaminants 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, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

Section 21(d) and (o) of the Act provide, in pertinent part that no person shall:

(d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:

(2) in violation of any regulations or standards adopted by the Board under this Act;

* * *

(o) Conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section, in a manner which results in any of the following conditions:

(1) refuse in standing or flowing waters;

(2) leachate flows entering waters of the State;

(3) leachate flows exiting the landfill confines (as determined by the boundaries established for the landfill by a permit issued by the Agency);

* * *

(5) uncovered refuse remaining from any previous operating day or at the conclusion of any operating day, unless authorized by permit;

* * *

(12) failure to collect and contain litter from the site by the end of each operating day.

Section 21.1(a) of the Act provides:

> Except as provided in subsection (a.5), no person other than the State of Illinois, its agencies and institutions, or a unit of local government shall conduct any waste disposal operation on or after March 1, 1985, which requires a permit under subsection (d) of Section 21 of this Act, unless such person has posted with the Agency a performance bond or other security for the purpose of insuring closure of the site and post-closure care in accordance with this Act and regulations adopted thereunder.

Section 22.22(c) of the Act provides:

> If remediation of real property contaminated by hazardous substances or petroleum products cannot be reasonably accomplished without entering onto land adjoining the site from which those substances were released, and if the owner of the adjoining land refuses to permit entry onto the adjoining land for the purpose of effecting remediation, then the owner or operator of the site may bring an action to compel the owner of the adjoining land to permit immediate entry for purposes relating to the remediation of the site, the adjoining land, and any other real property that may be contaminated with the hazardous substances or petroleum products. The court shall prescribe the conditions of the entry and shall determine the amount of damages, if any, to be paid to the owner of the adjoining land as compensation for the entry. The court may require the owner or operator who is seeking entry to give bond to the owner of the adjoining land to secure performance and payment.

Section 55(b-1) of the Act provides:

> (b-1) Beginning January 1, 1995, no person shall knowingly mix any used or waste tire, either whole or cut, with municipal waste, and no owner or operator of a sanitary landfill shall accept any used or waste tire for final disposal . . . .

Section 807.306 provides that "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." 35 Ill. Adm. Code 807.306.

Section 807.313 provides:

> No person shall cause or allow operation of a sanitary landfill so as to cause or threaten or allow the discharge of any contaminants 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, or so as to violate regulations or standards adopted by the Pollution Control Board under the Act. 35 Ill. Adm. Code 807.313.

Section 807.314(e) provides that no person shall cause or allow the development or operation of a landfill that does not provide "adequate measures to monitor and control leachate." 35 Ill. Adm. Code 807.314(e).

Section 807.601(a) provides:

> The financial assurance requirement does not apply to the State of Illinois, its agencies and institutions, or to any unit of local government; provided, however, that any other persons who conduct such a waste disposal operation on a site which may be owned or operated by such a government entity must provide financial assurance for closure and post-closure care of the site. 35 Ill. Adm. Code 807.601.

Section 807.603(b)(1) provides that the "operator must increase the total amount of financial assurance so as to equal the current cost estimate within 90 days after" an increase in the current cost estimate. 35 Ill. Adm. Code 807.603(b)(1).

Section 807.623(a) provides that "the operator must revise the current cost estimate at least once every two years. The revised current cost estimate must be filed on or before the second anniversary of the filing or last revision of the current cost estimate." 35 Ill. Adm. Code 807.623(a).

DISCUSSION

The following discussion will delineate the allegation in each of the remaining twenty counts. The Board will then summarize the arguments of the parties. Finally for each count the Board will discuss the issue and make a finding.

Count I

Count I of the complaint[2] argues that respondent failed to adequately manage refuse and litter at the landfill site in violation of Sections 21(d)(2), 21(o)(1), (5) and (12) of the Act (415 ILCS 5/21 *amended by* P.A. 92-0574, eff. June 26, 2002)) and 35 Ill. Adm. Code 807.306. Comp. at 6. The complaint asserts that on three separate inspections litter was observed in the perimeter ditch and at least once in the retention pond. Comp. at 4. Also on one occasion leachate seeps had exposed previously covered refuse, according to the allegations in the complaint. *Id*. On two occasions the Agency inspector alleged that there was uncovered refuse from the day before and on the other two occasions the inspector maintained that the landfill was accepting waste and there was uncovered refuse, including bags of waste material containing asbestos and blowing litter. Comp. at 4-5.

Complainant's Arguments

[2] All references to the complaint herein are to the second amended complaint filed on November 24, 1999 and will be cited as "Comp. at __" in this order.

In support of the motion for summary judgment, complainant filed the affidavits of Mr. Weritz and Ms. Kovasznay. Mr. Weritz indicated that on his inspection of April 7, 1994, he observed litter in the perimeter ditch which had standing water and on the southwest slope. C.Mot.S.J. at Exh. P, p. 2. Mr. Weritz also states in the affidavit that the respondent's site manager "stated to me that litter was not being collected at the end of each working day." *Id*. Mr. Weritz also indicated that on his March 22, 1995, and May 22, 1995, inspections he again observed litter in the perimeter ditch and in the drainage ditch and retention pond. *Id*.

On May 11, 1999, Ms. Kovasznay inspected the site and observed uncovered bags "of asbestos containing materials" at the site. C.Mot.S.J. at Exh. N, p. 3. Ms. Kovasznay also states in the affidavit that the respondent's site manager had informed her "that the last date Respondent had received asbestos was on May 7, 1999." C.Mot.S.J. at Exh. N, p. 4.

Complainant maintains that the inspectors' statements indicate that refuse was uncovered from the day prior to inspections and that the uncovered refuse led to the observance of litter on the day of inspection. C.Reply at 15. Complainant argues that the weather conditions on the days of inspection and the location of the litter support this conclusion. *Id*. The complainants point to the second affidavit[3] of Mr. Weritz for support.

Respondent's Argument

Respondent argues that the provisions of the Act the complaint alleges respondent violated require that litter be controlled by the end of each operating day and refuse be covered. R.Mot.S.J. at 18. Respondent asserts that neither Ms. Kovasznay nor Mr. Weritz were present at the end of the operating day and Mr. Weritz admitted in his deposition that he did not know whether respondent took steps at the end of the day to correct the alleged litter violation. *Id*. Therefore, respondent asserts that the observations of the inspectors cannot be used to sustain the alleged violation. *Id*. Furthermore, the affidavit of respondent's site manager, James Pelnarsh, takes issue with Mr. Weritz statements concerning what Mr. Pelnarsh allegedly told Mr. Weritz. R.Mot.S.J. at 18, citing Exh. 3. Mr. Pelnarsh states that he never advised Mr. Weritz that respondent was not picking up litter at the end of the operating day. *Id*.

Respondent further argues that although Section 21(o)(1) of the Act prohibits refuse in standing or flowing water, a reasonable interpretation would allow the respondent the opportunity to allow collection of litter at the end of the operating day. R.Mot.S.J. at 19. For these reasons, respondent argues that a question of fact exists and summary judgment should be denied. *Id*.

Board Discussion

The Board finds that a genuine issue of fact remains concerning respondent's litter control at the site. The two affidavits of Mr. Weritz and the conflicting statements by Mr. Pelnarsh establish questions of fact. Mr. Weritz in his second affidavit expanded on prior

[3] The second affidavit of Mr. Weritz is cited in the complainant's response as Exhibit Q; however, the exhibit as attached to the response is titled Exhibit P.

statements in support of the alleged violations here; however, as established in the motion to strike by respondent, some of those statements may conflict with deposition testimony. Therefore, count I should be fully heard at hearing with examination and cross-examination of the witnesses. The Board denies complainant's motion for summary judgment on count I and sends the matter to hearing.

Count II

Count II of the complaint alleges that respondent caused or allowed violations of Sections 21(d)(2) and 21(o)(2) and (3) of the Act (415 ILCS 5/21(d)(2) and 21(o)(2) and (3) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and 35 Ill. Adm. Code 807.314(e) of the Board regulations, by allowing leachate to exit the landfill boundaries and enter waters of the State. Comp. at 8. Specifically the complaint alleges that during the inspections on April 7, 1994, March 22, 1995, and May 22, 1995, leachate seeps were observed at the site and in the north perimeter ditch. Comp. at 7. The north perimeter ditch eventually drains into the Illinois River. *Id*.

Complainant's Arguments

Complainant relies on the observations and affidavit concerning those observations of Mr. Weritz to support the motion for summary judgment. Specifically, Mr. Weritz states in the affidavit that on April 7, 1994, he observed "five leachate seeps along the northwest perimeter of Parcel B of the landfill." C.Mot.S.J. at Exh. P, pg. 3. He further indicates that on March 22, 1995, he observed one leachate seep at the northwest perimeter of the landfill and again on May 22, 1995, a leachate seep along the north slope of Parcel B. *Id*. Mr. Weritz also observed leachate in the north perimeter ditch during the May 22, 1995 inspection. *Id*.

Complainant argues that the liquid observed by Mr. Weritz is leachate within the meaning of the word. C.Reply at 5. Complainant asserts that "leachate is a liquid that has been in direct contact with a solid waste" and points to People v. ESG Watts, PCB 96-107 (Feb. 5, 1998) to support the position. *Id*. Complainant indicates that Mr. Weritz saw "red liquid seeping out of the sidewalls of the landfill, and then flowing into a ditch." C.Reply at 5, citing C.Reply at Exh. P. Complainant maintains that this observation indicated that the material, percolating through the landfill and out the sidewalls, must have come into contact with refuse buried there. C.Reply at 6.

Respondent's Arguments

Respondent argues that summary judgment should be granted to respondent on this count. R.Mot.S.J. at 6. Respondent asserts that Mr. Weritz defines leachate as liquid coming into contact with garbage and Mr. Weritz based his determination that leachate was not being controlled on visual observation. R.Mot.S.J. at 6, citing Exh. 1. Respondent maintains that Mr. Weritz did not take any samples of the material he believed to be leachate nor did he determine that the material he saw in the perimeter ditch was contaminants. *Id*. Finally, Respondent argues that Mr. Weritz did not see any of the reddish liquid leave the site of the landfill. R.Mot.S.J. at 7, citing Exh. 1.

Respondent maintains that in contrast, Mike McDermont filed an affidavit indicating that it is impossible to determine by visual inspection whether the reddish-brown liquid observed by Mr. Weritz is leachate. R.Mot.S.J. at 7, citing Exh. 2, pp. 8-9. Respondent argues that the affidavits of Mr. McDermont and Mr. Pelnarsh, respondent's site manager, establish that there are iron deposits that would create reddish or brownish colored discharges in direct proximity to the landfill. R.Mot.S.J. at 8, citing Exh. 2 and 3. Respondent asserts that the only uncontradicted evidence in this case is that Mr. Weritz did not observe any materials from the landfill entering the perimeter ditch, he did not determine that the perimeter ditch caused or threatened water pollution, and the materials he observed were from iron deposits, not leachate. R.Mot.S.J. at 8.

Board Discussion

The Board finds that there are genuine issues of material fact and summary judgment is not appropriate on count II. The affidavits provided concerning the alleged violations in count II indicate a disagreement over whether the material in the north perimeter ditch was leachate and whether the material migrated offsite. Because of the conflicting statements in the affidavits count II should be fully heard at hearing with examination and cross-examination of the witnesses. Therefore the motions for summary judgment are denied and this count shall proceed to hearing.

Count III

Count III of the complaint alleges that respondent was land filling landscape waste in violation of Section 22.22(c) of the Act (415 ILCS 5/22.22(c) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002). Comp. at 10. The complaint alleges that during inspections conducted on August 18, 1993 and April 7, 1994, the Agency inspector observed landscape waste deposited in the landfill area.

Complainant's Arguments

Complainant provided an affidavit by Mr. Weritz in which he states that on his inspection on August 18, 1993, he observed processed/composted landscape waste in the active area of the landfill. C.Mot.S.J. at 34, citing, Exh. P, p. 3. Furthermore during the inspection of April 7, 1994, he observed landscape waste including tree branches and brush in the active area of Parcel B. *Id*.

Respondent's Argument

The respondent concedes that there is no genuine issue of fact regarding this alleged violation and summary judgment should be granted to the complainant on the issue of liability only.

Board Discussion

The Board finds there is no genuine issue of material fact and grants summary judgment on count III to the complainant. The Board finds that respondent violated Section 22.22(c) of the Act (415 ILCS 5/22.22(c) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) on August 18, 1993, and April 7, 1994.

Count IV

Count IV of the complaint alleges that the respondent failed to provide adequate financial assurance in violation of Sections 21.1 and 21(d)(2) of the Act (415 ILCS 5/21.1 and 21(d)(2) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and 35 Ill. Adm. Code 807.601(a) and 807.603(b)(1) of the Board's rules. Comp. at 13. More specifically, the complaint alleges that the respondent's supplemental permit dated April 20, 1993 required that financial assurance in the amount of $1,342,500 be maintained and respondent failed to increase the total amount of financial assurance within 90 days of the permit issuance. *Id*. The complaint further alleges that respondent provided a performance bond on June 20, 1996. *Id*.

Complainant's Arguments

Complainant argues that special condition three of supplemental permit number 1993-066-SP requires financial assurance in the amount of $1,342,500 be maintained by respondent. C.Mot.S.J. at 12, citing Exh. J. Special condition four of that same permit required that financial assurance documentation be filed with the Agency within 90 days of the date of the permit issuance. *Id*. Blake Harris, a financial assurance reviewer with the Agency, indicates that such documentation was not filed until June 20, 1996. C.Mot.S.J. at Exh. K p. 2. Thus, the complainant argues there is no genuine issue of material fact and summary judgment should be entered for complainant.

Respondent's Argument

The respondent concedes that respondent failed to increase financial assurance from July 19, 1993 until June 20, 1996. However, respondent asserts that "it is not appropriate for this single act to result in multiple violations." R.Mot.S.J. at 24. Respondent also asserts that the Board has previously held that attempting to impose two penalties for the same offense is improper and cites to County of DuPage v. E & E Hauling, Inc., AC 88-76, 88-77 (Sept. 13, 1989), (consld.).

Board Discussion

The Board finds that there are no genuine issues of material fact regarding the allegation in count IV. Therefore summary judgment is appropriate and the Board grants summary judgment to the complainant on count IV. Furthermore, the Board finds the respondent's argument that a single act cannot result in multiple violations completely devoid of merit. The Board routinely finds that a single act can result in the violation of several provisions of the Act and Board regulations in cases both decided by the Board and in cases which are presented to the Board with stipulated settlements. *See* People v. ESG Watts, Inc., PCB 96-237 (Feb. 19, 1998);

People v. ESG Watts, Inc., PCB 96-107 (Feb. 5, 1998), People v. Louis Berkman, PCB 97-101 (Nov. 2, 2000).

E & E Hauling is easily distinguishable from this case. In E & E Hauling, the Agency argued that refuse at a working landfill on the active face was both "uncovered refuse" from the previous operating day and litter. E & E Hauling *slip. op.* at 6. The Board found that litter was a "subspecies" of refuse and the Agency was attempting to impose two separate penalties for the same offense, where the two violations were mutually exclusive. *Id*. In this case, the failure to maintain adequate financial assurance is specifically a violation of multiple sections of the Act and the Board's regulations. Therefore, the Board finds that respondent violated Sections 21.1 and 21(d)(2) of the Act (415 ILCS 5/21.1 and 21(d)(2) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and 35 Ill. Adm. Code 807.601(a) and 807.603(b)(1) of the Board's rules.

The Board notes that the complainant provided the Board with substantial factual details concerning the alleged economic benefit achieved by respondent. Respondent takes issue with those facts and reserves the right to address those facts when the Board determines the penalty. The Board will not at this time rule on the issue of penalty. As the Board indicated previously, the Board looks to the factors in Section 42(h) of the Act (415 ILCS 5/42 (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) in assessing penalties and each of those factors require factual determinations. People v. Community Landfill Company, Inc., PCB 97-193, *slip. op.* at 10 (Apr. 5, 2001). The Board found that "the factors are not appropriately discussed in an order on cross motions for summary judgment." People v. Community Landfill Company, Inc., PCB 97-193, *slip. op.* at 10 (Apr. 5, 2001). The parties may address the economic benefits gained by respondent as well as the remaining factors under Section 42(h) of the Act (415 ILCS 5/42 (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) at hearing and in final briefs.

Count VI

Count VI of the complaint alleges that respondent caused or allowed water pollution in violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and 35 Ill. Adm. Code 807.313. Comp. at 18. The complaint alleges that during an inspection on May 22, 1995, an inspector observed leachate in the north perimeter ditch which eventually drains into the Illinois River. Comp. at 16.

Complainant's Arguments

Complainant argues that the Section 12(a) of the Act (415 ILCS 5/12(a) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) prohibits the discharge of contaminants into the waters of the State and 35 Ill. Adm. Code 807.313 also prohibits the discharge of contaminants into the waters of the State. C.Mot.S.J. at 35. Mr. Weritz, in his affidavit, states that during his May 22, 1995 inspection, he observed leachate from the landfill in the north perimeter ditch. C.Mot.S.J. at Exh. P, p. 2. The north perimeter ditch drains into the Illinois River. *Id*. Therefore, the complainant argues respondent violated the provision of Section 12(a) of the Act (415 ILCS 5/12(a) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and 35 Ill. Adm. Cod 807.313.

Respondent's Arguments

Respondent argues that summary judgment should be granted to respondent on this count. R.Mot.S.J. at 6. Respondent asserts that Mr. Weritz defines leachate as liquid coming into contact with garbage and Mr. Weritz based his determination that leachate was not being controlled on visual observation. R.Mot.S.J. at 6, citing Exh. 1. Respondent maintains that Mr. Weritz did not take any samples of the material he believed to be leachate nor did he determine that the materials he saw in the perimeter ditch were contaminants. *Id*. Finally, Respondent argues that Mr. Weritz did not see any of the reddish liquid leave the site of the landfill. R.Mot.S.J. at 7, citing Exh. 1.

In contrast, respondent maintains that Mike McDermont filed an affidavit indicating that it is impossible to determine by visual inspection whether the reddish-brown liquid observed by Mr. Weritz is leachate. R.Mot.S.J. at 7, citing Exh. 2, pp. 8-9. Respondent argues that the affidavits of Mr. McDermont and Mr. Pelnarsh establish that there are iron deposits that would create reddish or brownish colored discharges in direct proximity to the landfill. R.Mot.S.J. at 8, citing Exh. 2 and 3. Respondent asserts that the only uncontradicted evidence in this case is that Mr. Weritz did not observe any materials from the landfill entering the perimeter ditch, he did not determine that the perimeter ditch caused or threatened water pollution, and the materials he observed were from iron deposits, not leachate. R.Mot.S.J. at 8.

Board Discussion

The Board finds that there are genuine issues of fact remaining on count VI and therefore the Board denies both motions for summary judgment on count VI. The affidavits provided concerning the alleged violations in count VI indicate a disagreement over whether the material in the north perimeter ditch was leachate and whether the material migrated offsite. Because of the conflicting statements in the affidavits, count VI should be fully heard at hearing with examination and cross-examination of the witnesses. Therefore the motions for summary judgment are denied and count VI shall proceed to hearing.

Count VII, VIII, IX, AND X

Counts VII, VIII, IX, and X involve the same facts. Specifically, the complaint alleges that the respondent has deposited refuse above the permitted elevations for Parcel B. Comp. at 21. In so doing, the complaint alleges that respondent has caused or allowed violation of Sections 21(o)(9) (count VII), 21(d)(1) (count VIII and X), and 21(a) (count IX) of the Act (415 ILCS 5/21(o)(9) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002).

Complainant's Arguments

The complainant asserts that in 1989 respondent was issued a permit that allowed the maximum level of Parcel B to be 580 feet above mean sea level. C.Mot.S.J. at 5, citing Exh. F. Complainant maintains that the Agency never issued a modification to that supplemental permit that would allow for a different elevation. *Id*. Furthermore, complainants maintain that respondent has submitted documents to the Agency that provide "undisputed evidence" that the

elevation of Parcel B is above 580 feet. C.Mot.S.J. at 6. Because the Agency never issued a permit for the elevation to exceed 580 feet, the complainant argues respondent deposited waste in an unpermitted portion of a landfill and was conducting a waste operation without a permit in violation of Sections 21(o)(9) and 21(d)(1) of the Act. C.Mot.S.J. at 9. Complainant maintains that the facts also lead to the conclusion that respondent caused or allowed open dumping and failed to comply with respondent's permit in violation of Sections 21(a) and 21(d)(1) of the Act. *Id*.

Respondent's Arguments

Respondent concedes that waste has been deposited in Parcel B above the permitted levels although the extent of the overheight is still at issue. R.Mot.S.J. at 23. However, respondent argues that complainant is attempting to charge multiple violations for the same act and that is inappropriate. *Id*. More specifically, respondent asserts that the single act or series of acts does not constitute open dumping. R.Mot.S.J. at 24. Respondent maintains that this is a sanitary landfill site and the fact that some waste was placed above the permitted level does not constitute open dumping. Finally, respondent also argues that this is a permitted facility and placement of waste above the permitted height does not constitute waste disposal without a permit.

Board Discussion

The Board finds that there are no genuine issues of material fact regarding the allegation in counts VII, VIII, IX, and X. Therefore summary judgment is appropriate and the Board grants summary judgment to the complainant. For the reason discussed above on count IV (*see infra* @), the Board is not convinced by the respondent's argument that a single act cannot be used to charge multiple violations of the Act and the Board's regulations. Furthermore the Board does find that open dumping and waste disposal without a permit occurred at the site. The parties agree that waste and cover materials have been placed in the landfill above the elevation included in landfill permit (*see* R.Mot.S.J. at 23 and C.Mot.S.J. at 6). Depositing waste in that area meets the definition of open dumping (*see* 415 ILCS 5/3.305 (2000) *amended by* P.A. 92-0574, eff. June 26, 2002). Therefore, the Board finds that respondent violated Sections 21(o)(9) count VII), 21(d)(1) (count VIII and X), and 21(a) (count IX) of the Act (415 ILCS 5/21(o)(9) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002).

Count XI

Based on a May 11, 1999, inspection, the complaint alleges that respondent failed to properly handle asbestos containing materials in violation of Section 9.1(d) of the Act (415 ILCS 5/9.1(d) (2000)) and 40 C.F.R. 61.154. Comp. at 31.

Complainant's Arguments

The complainant argues that the Act requires that asbestos containing material either be covered within 24 hours of placement at a landfill or that there be no visible emissions. C.Mot.S.J. at 37. Ms. Kovasznay states in her affidavit that on May 11, 1999, she observed

"uncovered bags of asbestos containing waste material on Parcel A." C.Mot.S.J. at Exh. N, p. 3. Ms. Kovasznay further states that respondent's site manager told her that there had been no asbestos containing waste materials deposited at the landfill since May 7, 1999. C.Mot.S.J. at Exh. N, p. 4. Complainant argues that based on this affidavit there is no genuine issue of fact and summary judgment should be granted to complainant.

Respondent's Arguments

Respondent argues that summary judgment should be granted to respondent on this count. R.Mot.S.J. at 9. Respondent asserts that at her deposition, Ms. Kovasznay indicated that there is no way to look at something and tell it is asbestos. R.Mot.S.J. at 9, citing Exh. 4, pp. 46-47. Respondent argues that Ms. Kovasznay did not perform any testing and cannot say whether anyone from the Agency did test of the materials. *Id*. Respondent argues that Ms. Kovasznay "admitted" that the bags were not marked "asbestos" and based her allegation on what the material looked like. R.Mot.S.J. at 9, citing Exh. 4, pp. 33-34.

Board Discussion

The Board finds that there is no genuine issue of material fact and summary judgment is appropriate. The Board grants respondent's motion for summary judgment. A review of the deposition testimony and affidavits of Ms. Kovasznay establish that she based her conclusions on merely observing materials she thought might contain asbestos. No testing was done on the materials and the materials were not marked as asbestos. The Board finds that this is not sufficient to support a finding of violation on this count. Therefore summary judgment is granted to respondent.

Count XIII

The complaint alleges that on July 28, 1998, respondent was mixing waste tires with municipal waste in violation of Section 55(b-1) of the Act (415 ILCS 5/55(b-1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002).

Complainant's Arguments

Complainant relies on the observations of Mr. Weritz during his inspection of July 28, 1998, to support the motion for summary judgment. C.Mot.S.J. at 39. Mr. Weritz indicates that he observed that respondent had mixed two waste tires with municipal waste in the active area of Parcel A. C.Mot.S.J. at Exh. P, pp. 3.

Respondent's Arguments

Respondent concedes there is not genuine issue of material fact and respondent cannot refute the facts. R.Mot.S.J. at 26-27.

Board Discussion

The Board finds that there is no genuine issue of material fact and grants summary judgment to complainant on count XIII. Therefore, the Board finds that on July 28, 1998, the respondent violated Section 55(b-1) of the Act (415 ILCS 5/55(b-1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) by mixing two waste tires with municipal waste.

Count XIV

The complaint alleges that respondent failed to use a temporary fence to prevent blowing litter on March 31, 1999. Comp. at 39-40. The complaint alleges that the failure to use the fence resulted in violations of Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and special condition 13 of permit number 1989-005-SP.

Complainant's Arguments

In support of the motion for summary judgment, complainant relies on the affidavit of Ms. Kovasznay and her observations in that affidavit. C.Mot.S.J. at 22. Ms. Kovasznay inspected the site on March 31, 1999, and observed blowing litter at the site. C.Mot.S.J. at Exh. N, p. 2. Ms. Kovasznay also observed that the respondent was not using a movable fence at the site on that day. *Id*. Complainant asserts that there is no genuine issue of material fact and summary judgment should be granted to complainant. C.Mot.S.J. at 23.

Respondent's Arguments

Respondent concedes there is not genuine issue of material fact and respondent cannot refute the facts. R.Mot.S.J. at 26-27.

Board Discussion

The Board finds that there is no genuine issue of material fact and grants summary judgment to complainant on Count XIV. The Board finds that respondent violated Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and special condition thirteen of permit number 1989-005-SP on March 31, 1999.

Count XV

The complaint alleges that respondent violated Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and special condition one of permit number 1996-240-SP. Comp. at 40. Specifically, the complaint alleges that special condition one required the respondent to provide to the Agency specific information regarding the gas management system prior to the operation of the system and respondent failed to do so. Comp. at 39-40.

Complainant's Arguments

The complainant maintains that when Ms. Kovasznay performed her inspection on March 31, 1999, the gas management system was operating. C.Mot.S.J. at 25, citing Exh. N, pp. 2-3.

As of that date, complainant asserts the Agency had not received the information required by special condition one. *Id*. The complainant notes that the Agency did receive the information required on May 5, 1999, and the information was dated April 22, 1999. C.Mot.S.J. at 26, citing Exh. N, p. 3.

Respondent's Arguments

Respondent argues that there are genuine issues of material fact involved with count XV and the count should be sent to hearing. R.Mot.S.J. at 21. Specifically, respondent argues that Ms. Kovasznay testified in her deposition that her conclusion that the system was operating was based on hearing what she believed were turbines running in a closed building and statements by the site manager. R.Mot.S.J. at 19. In contrast, the affidavit of the site manager, Mr. Pelnarsh, indicates that the system was not running. R.Mot.S.J. at 20, citing Exh. 3, p. 3. Mr. Pelnarsh indicated in his affidavit that the owner of the system would periodically test the system and he believes that is what was why Ms. Kovasznay heard something running on March 31, 1999. *Id*.

Respondent also argues that the issue of who is responsible for the operation of the system is an issue of material fact. R.Mot.S.J. at 21. Respondent maintains that the respondent does not own or operate the gas management system. *Id.*

Board Discussion

The Board finds that there is a genuine issue of material fact as to whether the gas management system was operating. Ms. Kovasznay's affidavit states the system was running; Mr. Pelnarsh's affidavit states the system was not. Based on the conflicting affidavits the Board finds that there is a genuine issue of material fact and will send this matter to hearing. Because the Board finds that there is a genuine issue of material fact, the Board will not comment on the respondent's argument that because the respondent does not own or operate the system, respondent is somehow not responsible for the alleged permit violation.

Count XVI

The complaint alleges that the respondent violated Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and special condition number nine of supplemental permit 1996-240-SP. Comp. at 45. Specifically, the allegation arose from a March 31, 1999 inspection where "erosion, ponding and cracks over one inch wide at the facility, [and] no vegetative cover" was observed. Comp. at 44. Special condition nine of permit number 1996-240-SP provides:

> While the site is being developed or operated as a gas control or extraction facility, corrective action shall be taken if erosion or ponding are observed, if cracks greater than one inch wide have formed, if gas, odor, vegetative or vector problems arise, or if leachate popouts or seeps are present in the areas disturbed by construction this gas collection facility. Comp. at 44.

Complainant's Arguments

Complainant asserts that there is no genuine issue of material fact and cites to the affidavit of Ms. Kovasznay for support. C.Mot.S.J. at 27. Ms. Kovasznay states in her affidavit that she observed ponding, erosion, and cracks over one inch wide. C.Mot.S.J. at Exh. N, pg. 3. Ms. Kovasznay also stated that there was incomplete vegetative cover during her March 31, 1999 inspection and July 20, 1999 inspection. *Id*. Complainant argues that a complete and proper reading of special condition nine makes clear that respondent was required to correct these problems and respondent failed to do so. C.Reply at 19-20. Complainant asserts that the reading of special condition number nine urged by respondent "flies in the face of the purpose of the permit." C.Reply 20. Complainant argues that summary judgment should be entered in favor of complainant on this issue.

Respondent's Arguments

Respondent asserts that summary judgment should be granted to respondent on this count. R.Mot.S.J. at 14. Respondent argues that the sole evidence provided by complainant in support of this count is the observations of the inspector. R.Mot.S.J. at 13. However, respondent asserts that the gas management system was placed above ground and no areas of the landfill were disturbed during the development of the system. R.Mot.S.J. at 14. In support of this assertion, respondent points to the gas management acceptance report application dated April 22, 1999, and approved by permit number 1999-175-LP. *Id*. The application noted that final cover restoration was not necessary as the area was not disturbed by the installation of the system. *Id*.

Respondent argues that the complainant is "selectively interpreting the language" of special condition nine. R.Mot.S.J. at 14. Respondent asserts that special condition nine applies only to penetration or disturbance of the final cover caused by the construction of the gas control system. *Id*.

Board Discussion

The Board finds that there is no genuine issue of material fact concerning Count XVI. The Board will grant the complainant's motion for summary judgment and therefore, respondent's motion for summary judgment is denied. The Board is not persuaded by respondent's argument concerning the interpretation of special condition nine. The language of condition nine is clear that erosion, ponding, and cracks are to be repaired "while the site is being developed or operated as a gas control or extraction facility." The condition does not limit the scope of responsibility to the areas disturbed by the construction or operation of the gas management system. Therefore, the observations of Ms. Kovasznay are sufficient to support the allegations in the complaint. This matter shall proceed to hearing to determine the appropriate penalty.

Count XVII

The complaint alleges that the respondent violated Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and special condition number

eleven of supplemental permit 1996-240-SP. Comp. at 47. Specifically, the complaint alleges that on March 31, 1999, and July 20, 1999, respondent pumped leachate into new cells for added moisture and did not properly dispose of the leachate at a permitted facility. Comp. at 47. Special condition eleven of permit number 1996-240-SP provides:

> Condensate from the gas accumulations system, and leachate pumped and removed from the landfill shall be disposed at an IEPA permitted publicly owned treatment works, or a commercial treatment or disposal facility. The condensate shall be analyzed to determine if hazardous waste characteristics are present. A written log showing the volume of liquid discharged to the treatment facility each day by the landfill will be maintained at the landfill. This log will also show the hazardous waste determination analytical results. Comp. at 46-47.

Complainant's Arguments

Complainant maintains that respondent improperly disposed of leachate from the landfill by using it to increase the moisture content of the clay. C.Mot.S.J. at 27-28. In support of the argument, complainant relies on the affidavit of Ms. Kovasznay. Ms. Kovasznay states that during her inspections on March 31, 1999, and July 20, 1999, the respondent's site manager "informed me that CLC [respondent] was placing leachate in Parcel A to increase the moisture content of the clay." C.Mot.S.J. at Exh. N, pg. 2.

Respondent's Arguments

Respondent argues that summary judgment should be granted to respondent as the only evidence presented by complainant is the affidavit of Ms. Kovasznay which is "totally based on hearsay". R.Mot.S.J. at 10. Furthermore, the respondent maintains that complainant has not submitted any evidence that the material used to moisten clay on Parcel A came from Parcel B. *Id*. Respondent asserts that in fact the site manager has filed an affidavit indicating that he told Ms. Kovasznay that "on the dates in question" he was pumping "stormwater that may contain small amounts of leachate from the retention pond on the northern slope of Parcel A." R.Mot.S.J. at 10 and see Exh. 3, pg. 2.

Board Discussion

The Board finds that there are genuine issues of material fact and therefore denies both motions for summary judgment on Count XVII. The affidavit of Ms. Kovasznay indicates that Mr. Pelnarsh told her that he was using leachate to moisten Parcel A. However, Mr. Pelnarsh indicated he did not tell her he was using leachate to moisten Parcel A but rather he was using stormwater. Because of the disparity in the affidavits, the Board believes that there exists a genuine issue of material fact. The issue can be better examined after examination and cross-examination of the witnesses. Therefore, the motions for summary judgment are denied.

Count XVIII

The complaint alleges that the respondent violated Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and special condition number ten of supplemental permit 1996-240-SP. Comp. at 49. Specifically, the allegation arose from a July 20, 1999 inspection where the inspector observed that "appurtenances which were to be buried per the permit application were exposed." Comp. at 49. Special condition ten of permit number 1996-240-SP provides:

> Any penetration or disturbance of the final cover material at this facility caused by the construction of the gas control system shall be sealed or repaired to ensure that a minimum of two feet of compacted clay final cover exits above all buried appurtenances of the gas collection system. Comp. at 49.

Complainant's Arguments

Ms. Kovasznay indicates that she observed that "various pipes pertaining to the gas management system were exposed and not covered with at least two feet of clay" during her July 20, 1999 inspection. C.Mot.S.J. at Exh. N, pg. 3. Complainant argues that respondent was required by special condition ten to place a two-foot clay cover over "appurtenances which were supposed to be buried." C.Mot.S.J. at 29. The observations of Ms. Kovasznay indicate that there is no genuine issue of fact, according to complainant. *Id*. Complainant in the reply argues that the reading of special condition ten urged by respondent is a narrow reading of the permit and would allow a violator to skirt a valid permit condition. C.Reply at 20.

Respondent's Arguments

Respondent asserts that summary judgment should be granted to respondent on this count. R.Mot.S.J. at 14. Respondent argues that the sole evidence provided by complainant in support of this count is the observations of the inspector. R.Mot.S.J. at 13. However, respondent asserts that the gas management system was placed above ground and no areas of the landfill were disturbed during the development of the system. R.Mot.S.J. at 14. In support of this assertion, respondent points to the gas management acceptance report application dated April 22, 1999, and approved by permit number 1999-175-LP. *Id*. The application noted that final cover restoration was not necessary as the area was not disturbed by the installation of the system. *Id*.

Respondent argues that the complainant is "selectively interpreting the language" of special condition ten. R.Mot.S.J. at 14. Respondent asserts that special Condition Ten does not require that all gas control systems be sealed or covered as the complainant suggests. *Id*. Respondent maintains that the gas management acceptance report noted that the header and lateral piping are all located above grade to accommodate the placement of final cover in the future. *Id*.

Board Discussion

The Board finds that there is no genuine issue of material fact and summary judgment is appropriate. The Board grants summary judgment to respondent on this count. Ms. Kovasznay states that she "observed that various pipes pertaining to the gas management system were

exposed and not covered with at least two feet of clay." Respondent has provided information which indicates that the gas management system was placed above ground. Special condition ten provides that that "a minimum of two feet of compacted clay final cover exists above all *buried appurtenances* [emphasis added] of the gas collection system." Since respondent provided information which indicates that the system was above ground, clay final cover is not necessary. Therefore, the Board grants summary judgment to the respondent on count XVIII.

Count XIX

The complaint alleges that the respondent violated Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and special condition number thirteen of supplemental permit 1996-240-SP. Comp. at 52. The complaint alleges that respondent was required to provide financial assurance within 90 days from October 24, 1996, in the amount of $1,431,360 and to increase the amount to $1,439,720 prior to the operation of the gas extraction system. Comp. at 51. The complaint alleges that respondent failed to provide such increased financial insurance until September 1, 1999. Comp. at 51-52.

Complainant's Arguments

Complainant argues that there is no issue of fact that respondent failed to increase the financial assurance by January 22, 1997 (90-days after issuance of the permit) as required by special condition thirteen. C.Mot.S.J. at 16. Furthermore, complainant argues that the gas management system was operating on March 31, 1999 and the respondent had failed to increase the financial assurance. *Id*. Respondent did increase the financial assurance by September 1, 1999.

Respondent's Arguments

The respondent concedes that partial summary judgment on this count for complainant is appropriate. R.Mot.S.J. at 22. Respondent admits that the financial assurance was not raised from $1,342, 500 (the amount required prior to January 22, 1997) to $1,431,360 by January 22, 1997. *Id*. Respondent agrees that summary judgment should be granted on that issue but only as to a violation of the Act or the Board regulations but not both. *Id*.

Respondent argues that a genuine issue of material fact exists however as to whether or not respondent increased financial assurance prior to the operation of the gas management system. R.Mot.S.J. at 22. Respondent argues that when the gas management system actually began operation is at issue. *Id*.

Board Discussion

The Board will grant complainant's motion for summary judgment on count XIX in part. Respondent concedes that the financial assurance requirements were not met in that respondent failed to raise the financial assurance by January 22, 1997. However the Board denies the motion for summary judgment as to the failure to raise the financial assurance prior to operation of the gas management system. As indicated above, the Board finds that there is a genuine issue

of material fact as to when the gas management system began to operate (*see infra* @). Therefore, the complainant's motion for summary judgment is granted in part on count XIX and denied in part.

Count XX

The complaint alleges that the respondent violated Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and special condition number seventeen of supplemental permit 1989-005-SP. Comp. at 54. Specifically, the complaint alleges that on March 31, 1999 and July 20, 1999 respondent pumped leachate, a waste, into areas, which had not been certified or approved by the Agency in violation of special condition number seventeen. Special condition seventeen of permit number 1989-005-SP provides:

> Prior to placing waste material in any Area, a registered professional engineer shall certify that the floor and/or sidewall liner or seal has been developed and constructed in accordance with an approved plan and specifications . . . Such data and certification shall be submitted to the Agency prior to placement of waste in the areas referenced above. No wastes shall be placed in those areas until the Agency has approved the certifications and issued an Operating Permit. Comp. at 54.

Complainant's Arguments

Complainant asserts that the 1989 supplemental permit allowed Parcel A to expand vertically and as a part of the expansion respondent was required to construct a clay barrier layer between the existing landfill in Parcel A and the area of vertical expansion. C.Reply at 9-10. The complainant argues that the clay barrier between the existing landfill and the vertical expansion is the area, which needed to be certified prior to acceptance of waste. C.Reply at 10. The complainant maintains that during the March 31, 1999 and July 20, 1999 inspections, Ms. Kovasznay was told that leachate was being pumped into Parcel A. C.Mot.S.J. at 24. Therefore, complainant argues there is no genuine issue of material fact and summary judgment should be granted to complainant.

Respondent's Arguments

Respondent argues that the language of special condition seventeen "applies only to those areas of the landfill which have not received waste or where the floor and the side walls are accessible." R.Mot.S.J. at 11, citing Exh. 2 at 3. Respondent maintains that the entirety of Parcel A was developed and operated for many years pursuant to prior permits. *Id*. Respondent asserts that there was no requirement to recertify and thus no restriction for placing stormwater in Parcel A even if the stormwater contained leachate. *Id*.

Board Discussion

The Board denies the motion for summary judgment on count XX, because the Board found in count XVII that there is a genuine issue of material fact as to whether the material

pumped into Parcel A was leachate (*see infra* @). Therefore, the Board denies the motion for summary judgment and count XX is sent to hearing.

Count XXI

The complaint alleges that respondent violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and 35 Ill. Adm. Code 807.623(a) by failing to provide a revised cost estimate. Comp. at 57. The complaint alleges that pursuant to a supplemental permit issued on April 20, 1993, respondent was required to provide a revised cost estimate to the Agency by December 26, 1994. *Id*. The complaint alleges that respondent did file a cost estimate on July 26, 1996. *Id*.

Complainant's Arguments

Complainant argues that Section 807.623(a) of the Board's rules requires a revised cost estimate be submitted every two years. C.Mot.S.J. at 19. Furthermore, special condition nine of permit number 1993-066-SP required that respondent file a revised cost estimate by December 24, 1994, according to complainant. *Id*. Complainant maintains that respondent did not file a revised cost estimate until July 26, 1996. *Id*.

In response to the arguments put forward by respondent, complainant maintains that respondent misreads the requirements of the permit. C.Reply at 12. Complainant asserts that the permit application does not provide any cost estimates and the permit is not a certification of cost estimates. *Id*. Furthermore, the complainant argues, the permit is not an "independent determination by the IEPA that the site meets the requirements of 40 CFR 258" but only a certification that the permittee claims compliance. *Id*.

Complainant also takes issue with the respondent's assertion that on-site retention of revised cost estimates is sufficient. C.Reply at 12. Complainant argues that nothing in the permit or the Board rules allows for such a substitution for filing with the Agency. *Id*. Complainant notes that permit number 1993-066-SP even contains a clause that states that the issuance of the permit does not release the permittee from compliance with other applicable statutes and regulations. *Id*.

Respondent's Arguments

Respondent argues that summary judgment should be granted in favor of respondent because respondent did comply with the permit condition. R.Mot.S.J. at 15-16. Specifically, respondent asserts that the permit required that a copy of cost estimates must be maintained at the facility. R.Mot.S.J. at 15. Respondent argues that the cost estimates were filed at the facility and that meet the requirements of the permits. R.Mot.S.J. at 15-17.

Board Discussion

The Board finds that there is no genuine issue of material fact and summary judgment is appropriate for count XXI. The Board grants summary judgment to the complainant.

Respondent's argument that a copy of the revised cost estimates was maintained at the facility does not address the clear language of the Act and the Board's rules that required revised cost estimates to be filed with the Agency. The alleged violation in the complaint is for violation of the Act and the Board's rules, not a permit condition. The language of Section 807.623(a) is clear that "cost estimates must be filed" every two years. Although "filed" is not specifically defined by the Board's rules in Part 807, the clear meaning of the word in the context of the entire regulation is either filed with the Agency or the Board. Therefore, the Board finds that respondent violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and 35 Ill. Adm. Code 807.623(a) by failing to provide a revised cost estimate by December 24, 1994.

Count XXII

The complaint alleges that respondent violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2000) *amended by* P.A. 92-0574, eff. June 26, 2002) and 35 Ill. Adm. Code 807.623(a) by failing to provide a revised cost estimate. Comp. at 59-60. The complaint alleges that respondent was required to provide a revised cost estimate to the Agency by July 26, 1998. Comp. at 59.

Complainant's Arguments

Complainant points out that respondent filed a revised cost estimate on July 26, 1996. C.Mot.S.J. at 21. Thus complainant argues, pursuant to Section 807.623(a) of the Board's rules, the next revised estimate was due July 26, 1998. *Id*. Complainant asserts that the respondent has not filed the revised cost estimate. *Id*. Complainant also maintains that submission of cost estimates as a part of the significant modification permit does not satisfy the requirements of 35 Ill. Adm. Code 807.623(a). C.Reply at 13. The cost estimates submitted as a part of respondent's significant modification permit are for closure pursuant to Part 811, not closure pursuant to Part 807. *Id*. The requirements for closure are different under the two parts, including different criteria and different methods argues complainant. *Id*.

Respondent's Arguments

Respondent argues that summary judgment should be granted to respondent on this count because cost estimates were submitted to the Agency. R.Mot.S.J. at 16-17. Respondent asserts that cost estimates were submitted on August 5, 1996, October 24, 1995, April 30, 1997, October 29. 1997, March 20, 1998, June 18, 1998, September 14, 1998, August 13, 1999, and May 20, 1999. R.Mot.S.J. at 17, citing Exh. 2, pp. 1-2. Respondent argues that nothing in the permit condition requires that the revised cost estimates be filed pursuant to Part 807. R.Reply at 13. The only requirement in the permit is that the cost estimates be filed within two years, according to respondent. *Id*. Therefore, respondent maintains summary judgment should be granted to the respondent on this count.

Board Discussion

The Board finds that there is no genuine issue of material fact in count XXII and grants summary judgment to respondent. The Board agrees that filing the revised cost estimates as a part of the permit process for a significant modification permit is sufficient to meet the requirements of the Act and the Board's rules. This is particularly true when the cost estimates are for closure/post-closure care under the more stringent and expensive Part 811 requirements.

CONCLUSION

After a careful review of the evidence submitted by both parties, the Board finds that on some counts there are no genuine issues of material fact and summary judgment is granted. Specifically, complainant's motion is granted fully on counts III, IV, VII, VIII, IX, X, XIII, XIV, XVI, XXI, and granted in part on count XIX, as no genuine issue of material fact exists on these counts. The Board also grants respondent's motion for summary judgment on counts XI, XVIII, and XXII as no genuine issue of material fact exists on these counts; therefore counts XI, XVIII, and XXII are dismissed. The Board finds that genuine issues of material facts exist on counts I, II, VI, XV, XVII, and XX; therefore, both motions for summary judgment are denied on these counts.

This matter shall proceed to hearing on counts I, II, VI, XV, XVII, XX, and in part on count XIX to determine liability. The hearing shall also include evidence and testimony to be used to determine the appropriate penalty on counts III, IV, VII, VIII, IX, X, XIII, XIV, XVI, XXI, and in part on count XIX. Since respondent has prevailed on counts XI, XVII, and XXII, these counts are dismissed.

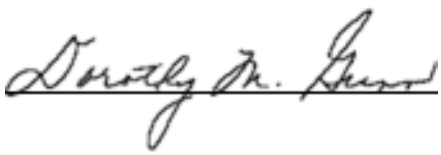
ORDER

The Board finds that respondent has violated the Act and Board regulations as specified in counts III, IV, VII, VIII, IX, X, XIII, XIV, XVI, XXI, and in part on count XIX of the complaint. The parties shall proceed to hearing to present evidence on the appropriate penalty to be levied against respondent for these violations. In addition the parties shall proceed to hearing on counts I, II, VI, XV, XVII, XX, and in part on count XIX to determine the liability of the respondent.

The Board dismisses counts XI, XVIII, and XXII.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 3, 2002, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board