ILLINOIS POLLUTION CONTROL BOARD
May 21, 1998

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. WASTE HAULING LANDFILL, INC., an Illinois corporation, and WASTE HAULING, INC., an Illinois corporation, Respondents.	)	PCB 95-91 (Enforcement - Land)

WASTE HAULING LANDFILL, INC., an Illinois corporation, and WASTE HAULING, INC., an Illinois corporation, Cross-complainants, v. BELL SPORTS, INC., a California corporation, Cross-respondent.	)	PCB 95-91 (Enforcement - Land) (Cross-Claim)

THOMAS DAVIS AND MARIA MENOTTI OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE, AND GREGORY RICHARDSON OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF COMPLAINANT;

PHILLIP R. VAN NESS OF WEBBER & THIES, P.C., AND STEPHEN O. WILLOUGHBY AND K. MICHAEL LATSHAW OF WILLOUGHBY, LATSHAW & HOPKINS, APPEARED ON BEHALF OF WASTE HAULING LANDFILL, INC. AND WASTE HAULING INC.;

BYRON F. TAYLOR AND IRA JACK NAHMOD OF SIDLEY AND AUSTIN APPEARED ON BEHALF OF BELL SPORTS, INC.

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

This matter is before the Board on the filing of a complaint on March 14, 1995, by the Illinois Attorney General's Office, on behalf of the People of the State of Illinois

(complainant) and at the request of the Illinois Environmental Protection Agency (Agency) against Bell Sports, Inc. (Bell Sports), Waste Hauling Landfill, Inc. (WHLI) and Waste Hauling, Inc. (WHI). The complaint concerns Bell Sports' alleged generation and shipment of drums containing hazardous waste from its business located in Rantoul, County of Champaign, Illinois, to the Waste Hauling landfill (landfill). The complaint also contains several alleged violations against either WHLI or WHI for, generally, the transport, storage, and disposal of hazardous waste. On September 11, 1995, WHLI and WHI filed a cross-claim against Bell Sports requesting that Bell Sports be found liable for civil penalties due to the release or threatened release of hazardous substances on the premises of the landfill.

On March 20, 1997, the Board accepted a stipulation and settlement agreement entered between complainant and Bell Sports. See People v. Bell Sports, Waste Hauling Landfill, Inc., *et al*. (March 20, 1997), PCB 95-91. The Board found that the stipulation "may be entered between complainant and one multiple party respondent, and that the stipulation at issue complies with Section 103.180(a) [35 Ill. Adm. Code 103.180(a)] of the Board's procedural rules." Bell Sports (March 20, 1997), PCB 95-91, slip op. at 6. Although Bell Sports denied the violations alleged by complainant, as well as any violations alleged against WHLI/WHI, to the extent that any such violations might provide a basis for a finding that Bell Sports was in violation of the Environmental Protection Act (Act) or the Board's rules, the Board ordered that Bell Sports pay the stipulated amount of $69,427. Bell Sports (March 20, 1997), PCB 95-91, slip op. at 2, 8-9. The Board further found that complainant's enforcement action against WHLI/WHI, and WHLI/WHI's cross-claim against Bell Sports, should proceed as scheduled by then-Chief Hearing Officer Michael L. Wallace. Bell Sports (March 20, 1997), PCB 95-91, slip op. at 6-8.

This opinion addresses two actions: (1) the complaint filed by complainant against WHLI/WHI, and (2) the cross-claim filed by WHLI/WHI against Bell Sports. For the reasons set forth below, the Board finds WHLI in violation of the following Board regulations and sections of the Act: Sections 703.121(a), 703.121(b), 703.150(a), 724.115(b), 724.173(a), 724.175, 724.191, 724.212(a)(1), 724.218, 724.242(a), 724.243, 724.244, 724.245, 724.401, 724.409, 724.414(b), 807.301, 807.302, 807.501(b), 807.503, 807.506(a), 807.523, 807.601(b), and 807.602(b) of the Board's regulations and Sections 21(d)(1), 21(d)(2), 21(f)(1), 21(f)(2), 21(o)(9), and 21.1(a) of the Act.

After considering the factors in Section 33(c) and 42(h) of the Act (415 ILCS 5/33(c), 42(h) (1996)), the Board imposes a penalty in the amount of $472,000 against WHLI, and attorney fees/costs in the amount of $18,535. Additionally, the Board dismisses the cross-claim between WHLI/WHI and Bell Sports.

BACKGROUND

Because the Board stated in its March 20, 1997, opinion that it views complainant's enforcement action against WHLI/WHI and WHLI/WHI's cross-claim as "separate allegations which took place during the same string of transactions," (see Bell Sports, PCB 95-91, slip op. at 7), this opinion will discuss all background facts in one section. But, the "Analysis" section, discussed *infra* at 16, will assess each case, along with the allegations and arguments

presented by the parties, separately. Below, the Board first explains what has occurred procedurally in this matter, and then the Board discusses the facts pertinent to the pending enforcement action and cross-claim.

Procedural History

WHLI/WHI filed its first motion to dismiss on June 14, 1995, arguing that the complaint was duplicative. By Board order of August 3, 1995, the Board denied this motion. See Bell Sports (August 3, 1995), PCB 95-91. Subsequently, on September 11, 1995, WHLI/WHI filed its second motion to dismiss asserting that counts V and VI should be dismissed under principles of *res judicata* and estoppel, as well as the policy against claim-splitting. Bell Sports filed a motion to dismiss on September 18, 1995, seeking to strike the cross-claim brought by WHLI/WHI as duplicative and frivolous. By order of December 7, 1995, the Board again denied both motions to dismiss and, concurrently, sent the matter to hearing. See Bell Sports (December 7, 1995), PCB 95-91.

As previously discussed, complainant and Bell Sports filed a stipulation with the Board on August 26, 1996. On September 19, 1996, the Board denied WHLI/WHI's motion to strike the stipulation and ordered the hearing officer to schedule a hearing on the proposed stipulation as requested by WHLI/WHI pursuant to Section 31 of the Act (see 415 ILCS 5/31 (1996)). See Bell Sports (September 19, 1996), PCB 95-91. The hearing on the stipulation was held on December 4, 1996, and the Board accepted the stipulation by order of March 20, 1997. See Bell Sports (March 20, 1997), PCB 95-91.

Then-Chief Hearing Officer Wallace held three hearings on the remaining matters, People v. WHLI/WHI and WHLI/WHI v. Bell Sports, on March 3-4, April 15-16, and May 19-20, 1997, in Springfield, Illinois. On behalf of complainant, the following individuals testified: (1) Kenneth Smith, environmental protection engineer at the Agency in the solid waste unit of the permit section of the Bureau of Land; (2) Steven Townsend, Agency field inspector; (3) Jeffrey Turner, Agency regional geologist, Bureau of Land, Champaign regional office; (4) Robert Krimmel, consulting engineer with SKS Engineers, Inc., engineer of record for WHLI; (5) William Zierath, Agency solid waste and hazardous waste inspector, Bureau of Land in the Springfield regional office; (6) Dustin Burger, Agency solid waste and hazardous waste inspector, Bureau of Land in the Champaign regional office; and (7) John Taylor, Agency financial assurance analyst for the Bureau of Land.

On behalf of WHLI/WHI, the following individuals testified: (1) Charles Maw, project manager for Weston Environmental Matrix; (2) Robert Krimmel; (3) Edwin Bakowski, Senior Public Service Administrator and Section Manager in the Agency's Division of Land Pollution Control, Bureau of Land; (4) William Zierath; (5) Gerald Riddle, facilities manager at Bell Sports; and (6) Jerry Camfield, Sr., director, officer, and sole shareholder of WHLI and WHI. Bell Sports called the following witnesses to testify: (1) Robert Miller, production supervisor for Bell Sports; and (2) Steven Townsend.

Complainant filed its brief on July 2, 1997; WHLI/WHI filed their response brief and cross-claim brief on July 23, 1997; Bell Sports filed its response brief on August 11, 1997;

complainant filed its response brief on August 13, 1997; and WHLI/WHI filed their reply brief on August 20, 1997. Complainant filed a motion to allow offer of proof on April 28, 1997, and WHLI/WHI filed a response to the motion on May 5, 1997. Complainant filed a motion to amend pleadings to conform to proof on June 2, 1997, and a motion for leave to file a second motion to conform pleadings to proof instanter and second motion to conform pleadings to proof on August 12, 1997. WHI filed its request to deny complainant's second motion to conform pleadings to proof on August 18, 1997. These preliminary motions are addressed below.

Preliminary Motions

Motion to Allow Offer of Proof

On April 28, 1997, complainant filed a motion to allow offer of proof requesting that the Board admit complainant's exhibit 18 into the record. Complainant argues that exhibit 18 is pertinent to the record since it is an Agency inspection report from August 1996, which alludes to various solid waste and hazardous waste violations. Complainant asserts that the hearing officer erred on April 16, 1997, by not allowing exhibit 18 into the record during complainant's presentation of its witness, Dustin Burger.

WHLI/WHI objected to the motion on May 5, 1997. Because complainant stated it had no further testimony with regard to the solid waste issues on March 4, 1997, and because the hearing officer bifurcated the hearings between the solid waste counts and the hazardous waste counts, WHLI/WHI asserts that exhibit 18 should not be allowed into the record after the solid waste issues had been previously addressed. Additionally, WHLI/WHI argues that since complainant neglected to seek leave to tender exhibit 18 as an offer of proof, the Board should not allow exhibit 18 as an offer of proof subsequent to the hearing.

The Board denies the motion to allow offer of proof and, in so doing, supports the hearing officer's ruling which disallowed complainant's exhibit 18 into the record. The parties had agreed, in accordance with the hearing officer's order, that complainant would present its witnesses to testify on the solid waste counts on March 3 and 4, 1997, while the hazardous waste counts would be addressed on April 15 and 16, 1997. Exhibit 18 is an inspection report which pertains mainly to solid waste violations of which the testimony was heard in March rather than April 1997. Even though exhibit 18 will not be made part of the record in this matter, the hearing officer did allow the testimony of Burger to the extent that his testimony was "simply cumulative of the prior witness on counts 5 and 6." Tr.2(b) at 7. The Board will not disturb the determination of its hearing officer on this evidentiary issue as the Board believes that the hearing officer acted clearly within his authority pursuant to Section 101.220 of the Board's procedural rules. See 35 Ill. Adm. Code 101.220. Accordingly, this motion is denied.

Motions to Amend Pleadings to Conform to Proof

Complainant filed its first motion to amend the pleadings to conform to proof on June 2, 1997. Complainant filed a motion for leave to file a second motion to conform pleadings to

proof instanter, which the Board grants, and the second motion on August 12, 1997. WHLI/WHI filed its request to deny complainant's second motion to conform pleadings to proof on August 18, 1997.

Complainant requests that paragraphs 33, 34, and 38 of count V be amended to read "since at least 1987," rather than "since at least 1983." The Board grants complainant's first unopposed motion to amend pleadings to conform to proof.

In complainant's second motion to conform pleadings to proof, complainant requests that the Board amend the pleadings pursuant to Section 103.210(a) of the Board's procedural rules (35 Ill. Adm. Code 101.210(a)). Among other things, complainant requests that references to WHLI in counts I, II, IV, V, and VI be amended to "the Waste Hauling Respondents." Further complainant asserts that no undue prejudice or surprise will result to WHLI/WHI since there was an opportunity to cross-examine complainant's witnesses. If the Board does not make such amendments, complainant states it may file a new enforcement action against WHI for violations at the landfill during the time period that WHI was responsible for the operation of the landfill. Since the testimony would be "nearly identical" to the testimony elicited in the present case, complainant believes that State resources would be wasted if the motion were denied.

WHI responds to the motion by stating that the motion should be summarily denied since the motion is violative of WHI's due process rights as tardy under the circumstances. Specifically, WHI asserts that WHI should not be made a party respondent to five counts where such allegations had not been previously alleged against WHI. WHI argues that complainant failed to supply evidence of a corporate relationship between WHLI and WHI. WHI last argues that the corporate veil must first be pierced before WHI is amended as a party respondent to the other counts of the complaint.

The Board denies the motion to conform pleadings to proof. Section 103.210(a) of the Board's procedural rules allows pleadings to be "amended to conform to proof, so long as no undue surprise results that cannot be remedied by a continuance." 35 Ill. Adm. Code 103.210(a). Pleadings may be amended to conform to the proof so long as the proof already produced supports the amendment. See Bank of Illinois v. Thweatt, 258 Ill. App. 3d 349, 355, 630 N.E.2d 121, 125 (4th Dist. 1994); Harding v. Amsted Industries, Inc., *et al*., 276 Ill. App. 3d 483, 494, 658 N.E.2d 1208, 1215 (1st Dist. 1995).

The Board believes that if complainant had proved its case with regard to WHI being in violation of counts I, II, IV, V, and VI, a motion to conform pleadings to proof would be appropriate. However, the Board does not find that complainant met its burden to show that WHI, in addition to or in lieu of WHLI, was in violation of any of the proposed amended counts to the complaint. During the timeframe of the alleged violations concerning the transportation, acceptance, and disposal of hazardous wastes, the record shows that WHLI, rather than WHI, was the owner/operator of the landfill. Additionally, during the timeframe of the alleged violations concerning the overheight, overfill, financial assurance, closure, and post-closure care plan submittals, the record refers to WHLI rather than WHI. WHI would not have had any opportunity to defend itself, as due process would require, if the Board

allowed this motion. Though some of complainant's exhibits show that WHI was the applicant for a certain permit or financial assurance (see Comp. Exh. 3, 11, 12), the Board finds that the proof does not show WHI is a liable party with regard to the proposed amendments. Accordingly, the motion is denied.

FACTS

Bell Sports owns and operates a helmet manufacturing and painting facility located in Rantoul, Illinois.[1] Bell Sp. Ans. at 2. WHLI owns and operates a landfill located west of Decatur, just north of Rockspring Road, approximately two miles west of Wyckles Road in the northwest quarter of Section 26, Township 16 North, Range 1 East, in Macon County, Illinois. WHLI/WHI Ans. at 2. Prior to 1987, WHI was responsible for the daily operation of the landfill. Subsequent to the date when WHLI became incorporated on August 25, 1987 (WHLI/WHI Ans. at 1-2), WHLI assumed responsibility for the daily operation of the landfill. Jerry Camfield, Sr., is the registered agent for both WHLI and WHI. WHLI/WHI Ans. at 1-2. The allegations in the complaint encompass the timeframe during which WHLI operated the landfill.

The total acreage of the landfill is about 50 acres. Tr.3(a) at 178. A creek runs from the southeast to the northwest at an angle. Tr.3(a) at 179. The Agency issued a permit to WHLI allowing the landfill to accept general municipal waste and certain special wastes for disposal under 35 Ill. Adm. Code 807. Tr.2(a) at 115. The Part 807 permit was originally issued by the Agency to the landfill's original owner in 1973. Tr.2(b) at 81. The Agency also issued several waste stream permits for the facility over the years. Tr.2(b) at 81. The landfill has never been permitted to accept hazardous waste. WHLI/WHI Ans. at 8; Resp. to Sec. Request to Admit at 1. Additionally, WHI has never represented itself as being the owner or operator of a hazardous waste transportation service. Resp. to Sec. Request to Admit at 1. WHLI has never maintained records regarding any receipt or disposal of hazardous wastes, nor has WHLI ever submitted a closure plan or financial assurance to the Agency for hazardous waste management. Resp. to Sec. Request to Admit at 2.

The landfill consists of an old area and a new area. The old area ceased operation in early 1979 and is located east of the creek which runs through the property. The new

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[1] Citations to the following pleadings or transcripts will use the short form as defined below: The complaint will be cited to as "Comp. at __." Bell Sports' answer to the complaint will be cited to as "Bell Sp. Ans. at __." WHLI/WHI's answer, affirmative defenses, and cross-claim to the complaint will be cited to as "WHLI/WHI Ans./Cr-Clm. at __." WHLI/WHI's response to complainant's second request for the admission of facts will be cited to as "Resp. to Sec. Request to Admit at ___." The March 3, 1997, hearing transcript will be cited to as "Tr.1(a) at __." The March 4, 1997, hearing transcript will be cited to as "Tr.1(b) at __." The April 15, 1997, hearing transcript will be cited to as "Tr.2(a) at __." The April 16, 1997, hearing transcript will be cited to as "Tr.2(b) at __." The May 19, 1997, hearing transcript will be cited to as "Tr.3(a) at __." The May 20, 1997, hearing transcript will be cited to as "Tr.3(b) at __."

operating area is on the west side of the creek. Tr.3(a) at 179. This area was operated by WHI until it split into two separate corporations (WHI and WHLI) in the mid-1980s when WHLI assumed control of the landfill operation. WHLI/WHI Ans. at 6.

The Agency made several inspections of the landfill including April 26, 1990, July 15, 1991, April 6, 1992, April 22, 1992, May 8, 1992, May 12, 1992, July 9, 1992, September 22, 1992, August 28, 1996, and February 28, 1997. These inspections are the basis for complainant's allegations concerning solid waste violations, the unlawful disposal of hazardous wastes without a permit, and violations of the hazardous waste regulations. Additionally, complainant alleges violations of the hazardous waste transportation regulations against WHI due to at least one shipment of hazardous wastes from the Bell Sports facility to the Waste Hauling landfill.

Solid Waste Violations

WHLI/WHI obtained a sanitary landfill operating permit from the Agency (permit number 1973-41) for the operation of the Waste Hauling Landfill. The permit describes, among other things, the allowable dimensions for the landfill, fill boundaries, density requirements, and operating procedures.

WHLI has submitted various closure and post-closure plans which have all been rejected by the Agency. John Taylor testified that the landfill provided closure and post-closure care cost estimates in 1985. Tr.2(b) at 14-15. Additionally, WHLI submitted a closure and post-closure care plan in early 1988 which the Agency rejected on May 10, 1988. Tr.1(a) at 75; Tr.2(b) at 15. WHLI submitted a second plan which was denied in 1989. The Agency denied a third submittal in December 1989. Tr.1(a) at 75. Further, there was an April 1991 application which, in its letter of November 4, 1991, the Agency found to be deficient. Tr.1(a) at 31, 76; see Comp. Exh. 2.[2] The latter application was denied based on 16 deficiencies including, but not limited to: leachate management plan problems, exceedences of vertical and lateral contours, deficiencies in the closure and post-closure plans, and deficiencies in the groundwater monitoring programs. Tr.1(a) at 29; Comp. Exh. 2.

Four years later, on March 26, 1996, WHLI submitted information regarding the deficiencies noted in the November 4, 1991, letter. The Agency denied this application on June 26, 1996, because WHLI merely provided responses to the deficiencies without addressing the problems. Tr.1(a) at 33; see Comp. Exh. 3. Among other things, WHLI/WHI agreed that the landfill has continuing problems with overheight, *i.e.*, the landfill exceeds its maximum permitted height contours. See Comp. Exh. 3.

Regarding financial assurance, on February 26, 1988, a letter of credit was issued which was effective as of March 1, 1988, and expired on March 1, 1992. After the letter of credit was denied in 1992, WHLI did not file anything further with the Agency in the form of financial assurance. Tr.2(b) at 18. As of the date of the April 16, 1997, hearing, Taylor

[2] Complainant's exhibits will be cited to as "Comp. Exh." WHLI/WHI's exhibits will be cited to as "WHLI/WHI Exh." Bell Sports' exhibits will be cited to as "Bell Sp. Exh."

stated that WHLI was not in compliance with the financial assurance regulations. Tr.2(b) at 18. Taylor estimated that because WHLI had not complied with these financial assurance regulations, it had "more than likely gained some sort of an economic benefit." Tr.2(b) at 18.

Occasional inspections by the Agency discovered overheight problems at the landfill. The permitted maximum vertical elevation for fill area number two of the landfill is approximately 630-632 feet at mean sea level (MSL). Tr.1(a) at 18. Specifically, when an aerial survey was performed at the landfill on April 14, 1988, the survey showed maximum elevations in the following amounts: (1) 640.5 feet at MSL at the northeast corner; (2) 648 feet at MSL at the southeast corner; and (3) 678.5 feet at MSL at the southwest corner. See Comp. Exh. 1; see also Tr.1(a) at 22-24. Further, during an inspection on April 26, 1990, Steven Townsend noticed both lateral overfill and vertical overheight at the landfill. Tr.1(a) at 98-99; see Comp. Exh. 5. Also on this date, Mr. Townsend noted during his inspection that the landfill had received hazardous waste from DK Manufacturing. Tr.3(b) at 54-55; Comp. Exh. 5. Additionally, during an inspection on April 6, 1992, Townsend again noted that the landfill exceeded lateral and vertical fill boundaries. Tr.1(a) at 123; see Comp. Exh. 6.

In 1990, WHLI sought a siting approval for expansion of the landfill from the Macon County Board; however, the Macon County Board denied the siting petition in 1991. Tr.1(b) at 93. WHLI unsuccessfully appealed the Macon County decision to the Board. Tr.1(b) at 93; see Waste Hauling, Inc. v. Macon County Board (May 7, 1992), PCB 91-223. The landfill continued to accept waste after the petition was denied. Tr.1(b) at 95. Additionally, the Agency issued an administrative citation for violations of Sections 21(p)(1), (p)(2), (p)(5), (p)(9), and (p)(12) of the Act (415 ILCS 5/21 (1990)) which pertain to, among other things, open litter, refuse, leachate, and overheight at the landfill based on a April 26, 1990, Agency inspection. See IEPA v. Waste Hauling Landfill, Inc. (October 25, 1990), AC 90-49; see also WHLI/WHI Exh. 3; Tr.3(a) at 244. The Board ordered WHLI to pay a total penalty of $2,500 for five violations.[3] Further, as Kenneth Smith testified at hearing, the permitted contours of the landfill were filled beyond the vertical boundaries on the west side of the landfill near fill area number two. Tr.1(a) at 49.

In a March 14, 1991, letter to the Agency sent by Krimmel, Krimmel stated that the landfill had exceeded its vertically permitted contours. Tr.1(b) at 87; see Comp. Exh. 12. Additionally, a survey performed by Krimmel's consulting firm on October 18, 1991, showed the maximum vertical elevations for fill area number two as 681 feet at MSL, 695 feet at MSL, and 685 feet at MSL. See Comp. Exh. 13; Tr.1(b) at 101,105. As demonstrated by the closure and post-closure care application filed by WHLI in March 1991, and supplemented in March 1996, the landfill exceeded permitted elevation heights. See Comp. Exh. 3. The top area of the landfill's elevation topped off at 700 feet at MSL. Tr.1(b) at 98. The landfill remained overheight on February 27, 1997, about 48 feet above the base where the slope begins. Tr.1(a) at 222-23. Krimmel testified that it would cost the landfill $18-20 million to

[3] Two previous administrative citations have also been filed before the Board: IEPA v. Waste Hauling Landfill, Inc. (January 25, 1990), AC 89-203, AC 89-187. These citations pertained to violations of Section 21 (p)(2), (p)(3), (p)(5), and (p)(12). The Board ordered WHLI to pay a total penalty of $3,000 in these two administrative citations.

remove the present overheight. Tr.2(b) at 125-26. Comparatively, Camfield testified that removal of the overheight would cost about $9 or $10 million. Tr.3(a) at 250.

The landfill has exceeded lateral boundaries as well. Tr.1(a) at 98. The Agency's inspections have indicated that the lateral boundary is exceeded by about 97 feet. Tr.1(a) at 206-07. As estimated by Krimmel, the approximate volume of overfill which would have to be removed due to the alleged overfill is 600,000 to 900,000 cubic yards of material. Tr.2(b) at 125.

WHLI has on various occasions been ordered to raise the level of the berms to keep materials, waste, and trash within the landfill. Tr.1(a) at 200. Berms are a temporary requirement of the permit and must be kept at a certain level above the top level of the waste in the landfill. Tr.3(a) at 240. The landfill waste has, on occasion, been raised above the berm by landfill personnel to prevent water from seeping into the fill area. Tr.3(a) at 240-41.

Hazardous Waste Violations

WHLI submitted a supplemental special waste stream permit application with the Agency on July 14, 1987, and the Agency issued the permit later that same year. Tr.2(b) at 129; see also WHLI/WHI Exh. 11. WHLI submitted a renewal of the supplemental special waste stream permit on May 15, 1990, which the Agency approved on June 26, 1990. See WHLI/WHI Exhs. 12, 13. This particular supplemental special waste stream permit allowed WHLI to accept non-hazardous waste paint sludge from the Bell Sports facility.[4] Tr.2(b) at 128-29. Additionally, the permit allowed WHLI to concurrently dispose of drummed or bulk non-hazardous waste with general refuse streams. Tr.2(a) at 66. WHI acted as the waste hauler for all the shipments to the landfill under the supplemental waste stream permit for Bell's non-hazardous waste. The permit required that the shipments be accompanied by a uniform hazardous waste manifest signed by representatives from Bell Sports. Tr.3(a) at 116-119; see WHLI/WHI Exh. 17. The generator of the waste is required, by the manifest, to declare that the contents are fully and accurately described by proper shipping name and are classified, packed, marked, labeled, and in the proper condition for transport by highway according to applicable international and national government regulations. See Comp. Exh. 17 (Uniform Waste Manifest Form); Tr.2(a) at 58-59.

Bell Sports generated two different types of paint waste: non-hazardous sludge and hazardous waste. Tr.3(b) at 12-13; Tr.3(a) at 133. The non-hazardous sludge consisted of paint sludge which was emitted out of the back of the paint booths. The hazardous waste was considered anything that was generated from the painting operation such as any remaining unused paint or paint thinner. Tr.3(a) at 133. Bell Sports generated more amounts of the nonhazardous waste than the hazardous. Tr.3(a) at 133-34. Bell Sports used an environmental consulting firm to assist it in categorizing and sampling the paint waste stream. Tr.3(a) at 134-36.

[4] At least during 1992, the Bell Sports facility directed that its hazardous wastes be disposed of at a the Clayton landfill, a hazardous waste facility. Tr.3(a) at 152-54. WHLI/WHI Exh. 15.

Prior to placing any waste into a new black drum, Bell Sports labeled each drum. Tr.3(b) at 10, 12. The labels used by Bell Sports during the time in question, April 1992, for categorizing special waste were entitled, "Special Waste Bell Sports In-House Label." It was a 3" by 3" green label with white lettering that included the start date, completion date, spaces for who brought it in and who removed it, as well as the drum control information. See Bell Sports Exh. 7; Tr.3(b) at 12. Bell Sports used a larger generic green and white label for non-hazardous waste and also used a bright yellow label for drums containing hazardous waste. See Bell Sports Exh. 3, 4. Upon loading the drums at the Bell Sports facility, WHLI/WHI personnel would look at the drums to ensure each drum was properly labeled prior to being place onto the truck. Tr.3(a) at 195.

On April 9, 1992, the landfill accepted about 80 drums of paint sludge (4,400 gallons) for disposal from Bell Sports. WHI had transported the waste paint sludge from the Bell Sports facility to the landfill. The load was accompanied by a uniform hazardous waste manifest signed by a Bell Sports representative that the waste paint sludge contained non-hazardous material. Tr.2(a) at 59-60; see also WHLI/WHI Exh. 17. The manifests or other documentation regarding the transportation or disposal services from Bell Sports to the landfill did not identify that any of the wastes were hazardous. Resp. to Sec. Request to Admit at 2. Before accepting the drums for disposal at the landfill, WHLI did not test the shipments of waste. Tr.3(a) at 217.

Upon arrival at the landfill, the drums were crushed for disposal. Subsequently, a confidential informant contacted the Illinois State Police stating that the landfill had accepted some drums of waste that the informant believed were hazardous. Tr.2(a) at 14. The drums reportedly were filled with various clear liquids and multi-colored paints. Comp. Exh. 14. Additionally, the informant reported that some pink paint had splashed onto the compactor while some of the drums were being crushed. Comp. Exh. 14. The informant also reported that another group of 160 to 200 55-gallon uncrushed drums were disposed of in a certain area of the landfill. Comp. Exh. 14.

The Illinois State Police, along with the Illinois Attorney General's Office, obtained a search warrant and investigated the landfill on April 22, 1992, with the assistance of the Agency. Tr.2(a) at 13-15; Comp. Exh. 14. Upon arriving at the landfill, the investigators (including the confidential informant) tried to determine, to the best of their ability, where the landfill had been operating during the time when the informant believed the landfill had accepted and crushed the drums containing the alleged hazardous waste. Tr.2(a) at 15. In early April, which was the time of the alleged crushing of hazardous waste, WHLI had been filling the landfill on the south side of the landfill near the top. During the inspection, about 20 days later, WHLI was filling the landfill slightly south of that area at a location down the slope from where WHLI had been filling. Tr.2(a) at 16.

The investigators brought in a backhoe and began digging through the refuse where they suspected the crushed drums were buried. They found 53 crushed drums in the vicinity where the informant reported the incident had taken place. Tr.2(a) at 20; Comp. Exh. 14. The recovered drums varied in color from black, blue, green, and white painted, crushed metal drums. Comp. Exh. 14. William Zierath who conducted the investigation on April 22,

1992, testified that he did not see any labels on the crushed drums but for a green label on one drum with the words "nonhazardous waste" written diagonally across the label. Tr.2(a) at 69. The investigators could detect organic solvent odors occasionally when the drums were lifted from the excavation. Tr.2(a) at 21. Many of the drums had some remaining material in them including rubbery "paint-like" material that was either pink, blue, gray, or muddy-colored. Tr.2(a) at 22. Zierath further noticed small spots of pink paint on the sides of the cab of a steel-wheeled compactor. Comp. Exh. 14. None of the 160 to 200 55-gallon uncrushed drums were found in the area indicated by the informant. Comp. Exh. 14.

The Agency took samples from seven drums, among the 53 drums excavated. Tr.2(a) at 24; Comp. Exh. 14. In determining which drums to draw the samples from, the Agency used a HNU photoionizing detector which detects certain organic compounds. Tr.2(a) at 23. The Agency sampled the drums that had the highest readings of concentrated organic compounds. Tr.2(a) at 23-24; Comp. Exh. 14. The results of the seven samples showed that four of the samples exceeded the regulatory levels for methyl ethyl ketone (Hazardous Waste D035)[5] and benzene (Hazardous Waste D018). Tr.2(a) at 28-29; see Comp. Exh. 15. The regulatory standards are 200,000 micrograms per liter for methyl ethyl ketone and 500 micrograms per liter for benzene. See chart below; see Comp. Exh. 15.

	methyl ethyl ketone (MEK)	Benzene
Regulatory Standard (micrograms/liter)	200,000	500

Sample Number	methyl ethyl ketone (MEK) level (micrograms/liter)	Benzene level (micrograms/liter)
X201	280,000	1,400
X203	1,700,000	1,100
X205	6,600,000	3,000
X206	730,000	1,900

The WHLI office was also searched on April 22, 1992. The Agency obtained waste manifests and daily waste logs for the period of time during which the drums of paint sludge were accepted and disposed of at the landfill. Tr.2(a) at 42-43. Zierath testified in his opinion that the drums from which the hazardous samples were obtained originated from the drums that had been transported from Bell Sports on April 9, 1992. Tr.2(a) at 48-49.

[5] Methyl ethyl ketone (MEK) is also known as 2-Butanone.

When the Macon County Circuit Court issued a preliminary injunction, the landfill ceased operation in 1992. See Comp. Exh. 19.[6] Circuit Judge John L. Davis ordered on June 8, 1992, that WHLI was preliminarily enjoined and directed WHLI to (1) cease and desist from waste disposal operations, (2) remove any leachate[7] and close the trench to prohibit any further leachate flowing into the waters of the State, (3) cover all existing refuse with six inches of suitable material, (4) comply with the Act, and (5) allow unrestricted access to the landfill by representatives of the Agency. Comp. Exh. 19 at 2-3. The landfill eventually was covered with a two-foot cover in accordance with the court's order. Tr.1(b) at 60. Since that time, the landfill has not accepted any further waste. Tr.1(a) at 73.

LEGAL FRAMEWORK

People v. WHLI/WHI[8]

Solid Waste Allegations

Count V: Sanitary Landfill Permit and Regulatory Violations. Complainant alleges that WHLI violated Sections 21(d)(2) and 21(o)(9) of the Act (415 ILCS 21(d)(2), (o)(9) (1994)) and 35 Ill. Adm. Code 807.301, 807.302, and 807.506(a) (1992), which pertain to, among other things, permit dimensions required for the landfill, vertical overheight, lateral exceedences, and failure to timely initiate closure requirements.

Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (1994)) provides:

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;

Section 21(o)(9) of the Act (415 ILCS 5/21(o)(9) (1994)) provides:

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[6] Complainant's exhibit 19 was admitted into the record purely for the purposes of penalty analysis regarding the Section 33(c) factors (415 ILCS 5/33(c) (1996)) in aggravation or mitigation of WHLI/WHI's actions. (Refer to discussion found at Tr.2(a) at 149-153; Tr.2(b) at 5-8; see Comp. Exh. 19.)

[7] Leachate was not an allegation in the current complaint before the Board since the preliminary injunction was ordered, in part, due to leachate problems at the landfill. See Comp. Exh. 19. Complainant repeatedly reminds the Board that leachate continues to be a problem at the landfill and should be considered by the Board as a "continuing environmental impact attributable to the lack of proper closure and post-closure care." Comp. Reply Br. at 10-11.

[8] The Board notes that count III was not a litigated issue between complainant and WHLI/WHI, but, rather, it applied to the case between complainant and Bell Sports. As noted earlier, this case settled prior to hearing.

No person shall:

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:

9. deposition of refuse in any unpermitted portion of the landfill;

Count VI: Sanitary Landfill Closure and Post-Closure Care Violations. Complainant alleges that WHLI violated Section 21(d)(1) and Section 21.1(a) of the Act (415 ILCS 5/21(d)(1), 21.1(a) (1994)), and the following corresponding Board regulations: 35 Ill. Adm. Code 807.501(b), 807.503, 807.523, 807.601(b), and 807.602(b) (1992), which pertain to the requirements for closure and post-closure care plans, and financial assurance for closure and post-closure care.

Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (1994)) provides:

No person shall:

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

1. without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; provided, however, that, except for municipal solid waste landfill units that receive waste on or after October 9, 1993, no permit shall be required for (i) any person conducting a waste-storage, waste-treatment, or waste-disposal operation for wastes generated by such person's own activities which are stored, treated, or disposed within the site where such wastes are generated, or (ii) a facility located in a county with a population over 700,000, operated and located in accordance with Section 22.38 of this Act, and used exclusively for the transfer, storage, or treatment of general construction or demolition debris;

Section 21.1(a) of the Act (415 ILCS 5/21.1(a) (1994)) 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.

Hazardous Waste Allegations

Count I: Resource Conservation and Recovery Act (RCRA) Disposal Violations. Complainant alleges that WHLI violated Section 21(f)(1) of the Act and 35 Ill. Adm. Code 703.121(b) (1992), which pertain to the unpermitted disposal of hazardous wastes.

Section 21(f)(1) of the Act (415 ILCS 5/21(f)(1) (1994)) provides:

No person shall:

f. Conduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation:

1. without a RCRA permit for the site issued by the Agency under subsection (d) of Section 39 of this Act, or in violation of any condition imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder;

Count II: RCRA Operational Violations. Complainant alleges that WHLI violated Section 21(f)(2) of the Act and the following corresponding Board regulations: 35 Ill. Adm. Code 724.115(b), 35 Ill. Adm. Code 724.173(a), 35 Ill. Adm. Code 724.212(a)(1), 35 Ill. Adm. Code 724.242(a), and 35 Ill. Adm. Code 724.243, which pertain to required facility inspections, maintenance of operating records, closure plans, closure cost estimates, and financial assurance, among other things.

Section 21(f)(2) of the Act (415 ILCS 5/21(f)(2) (1994)) provides:

No person shall:

f. Conduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation:

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

Count IV: RCRA Permit violations. Complainant alleges that WHLI violated Section 21(f)(1) and 21(f)(2) of the Act (415 ILCS 21(f)(1)(2) (1994)) and the following corresponding Board regulations: 35 Ill. Adm. Code 703.121(a), 703.150(a), 724.175, 724.191, 724.218, 724.244, 724.245, 724.401, 724.409, and 724.414(b), which pertain to, among other things, RCRA permit requirements, groundwater compliance monitoring, closure and post-closure plans, cost estimates for closure, and financial assurance.

Count VII: Hazardous Waste Transport Violations. Complainant alleges that WHI violated Section 21(g) of the Act (415 ILCS 5/21(g) (1994)) and the following corresponding

Board regulations: 35 Ill. Adm. Code 723.111, 723.120, 723.121, 723.122, which pertain to the unpermitted transportation, acceptance, and disposal of hazardous waste.

Section 21(g) of the Act (415 ILCS 5/21(g) (1994)) provides:

No person shall:

g. Conduct any hazardous waste-transportation operation;

1. without registering with and obtaining a permit from the Agency in accordance with the Uniform Program implemented under subsection (1-5) of Section 22.2; or

2. in violation of any regulations or standards adopted by the Board under this Act.

WHLI/WHI v. Bell Sports

WHLI/WHI assert in their cross-claim that their allegations against Bell Sports generally mirror the allegations asserted by complainant against Bell Sports. Specifically, WHLI/WHI brought their complaint pursuant to Section 31(b) of the Act (415 ILCS 5/31(b) (1994)). WHLI/WHI Ans./Cr-Clm. at 16. WHLI/WHI allege that Bell Sports failed to perform a hazardous waste determination, failed to properly mark each container as containing hazardous waste, and failed to perform detailed chemical analysis of the waste generated by Bell Sports in violation of Section 21(f)(2) and 21(i) of the Act (415 ILCS 5/21(f)(2), 21(i) (1994)), as well as 35 Ill. Adm. Code 722.132(d) and 724.113(a). WHLI/WHI Ans./Cr-Clm. at 17-18. As a direct and proximate consequence of Bell Sports' failure to follow the above rules and regulations, WHLI/WHI allege that Bell Sports caused to be deposited unpermitted quantities of methyl ethyl ketone and benzene at the landfill. WHLI/WHI Ans./Cr-Clm. at 18. Consequently, WHLI/WHI allege that Bell Sports has caused WHLI/WHI to be subject to potential civil penalties, through no fault of their own, due solely to the failure of Bell Sports. WHLI/WHI Ans./ Cr-Clm. at 18.

Section 21(i) of the Act (415 ILCS 5/21(i) (1994)) provides:

No person shall:

Conduct any process or engage in any act which produces hazardous waste in violation of any regulations or standards adopted by the Board under subsections (a) and (c) of Section 22.4 of this Act.

ANALYSIS

Violations

This section will first present the issues coupled with the parties' arguments, and then the Board's analysis in the first case: People v. WHLI/WHI. In the ensuing subsection, the

Board will then analyze the issues and arguments in the cross-claim: WHLI/WHI v. Bell Sports.

People v. WHLI/WHI

The following issues are before the Board in this matter: (1) whether WHLI is liable for financial assurance violations, vertical overheight, lateral exceedences, closure and post-closure requirements; (2) whether WHI improperly transported hazardous wastes to the landfill; and (3) whether WHLI improperly disposed of hazardous wastes in the landfill.

Solid Waste Violations. Complainant alleges various solid waste violations against WHLI in counts V and VI of the complaint. Generally, these violations pertain to Section 807 of the Board's waste disposal regulations. See 35 Ill. Adm. Code 807.

Argument. Complainant argues that WHLI has failed to submit approvable closure and post-closure care permit plans. Any plans submitted by WHLI were denied by the Agency since the submittals lacked the requisite information.[9] Comp. Br. at 9; see Comp. Exh. 2, 4. Additionally, complainant asserts that in its November 4, 1991, letter written in response to the application for closure, the Agency had listed 16 deficiencies, none of which were corrected by WHLI four years later when supplemental information was submitted to the Agency and denied by the Agency on June 26, 1996. Comp. Br. at 10. Overall, WHLI could not meet the minimum requirements for closure/post-closure care under the Section 807 regulations (see 35 Ill. Adm. Code 807). Complainant therefore argues that WHLI has never submitted the proper closure and post-closure care plans as required by the Agency. Comp. Br. at 11.

Additionally, complainant argues that the landfill has been overheight since 1987 and continued to be overheight up through the date of hearing. Comp. Br. at 11. Because the landfill had not received a new revised permit to expand its present boundaries, complainant argues that the landfill "blatantly disregarded the requirements of its [present] permit." Comp. Br. at 11-12. Complainant believes that although the permitted maximum vertical elevation for part of the fill area is approximately 630-632 feet at MSL, an aerial survey performed at the landfill in 1988 showed exceedences of that maximum amount. Comp. Br. at 13; Tr.1(a) at 22-24; Comp. Exh. 1. As admitted to by Krimmel, vertical elevations were exceeded on various occasions, complainant argues. See Comp. Exh. 12, 13. Complainant relies on the Agency's inspection reports to show vertical overfill problems. See Comp. Exh. 5, 6, 7.

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[9] Complainant's brief filed July 2, 1997, will be cited to as "Comp. Br. at ___." WHLI/WHI's brief filed July 23, 1997, will be cited to as "WHLI/WHI Br. at ___." Complainant's reply brief filed August 12, 1997, will be cited to as "Comp. Reply Br. at ___." WHLI/WHI's brief in support of its cross-claim filed on July 23, 1997, will be cited to as "WHLI/WHI's Cross-Br. at ___." Bell Sports' response brief filed on August 11, 1997, will be cited to as "Bell Sp. Response Br. at ___." Complainant's response brief to the cross-claim filed on August 13, 1997, will be cited to as "Comp. Resp. Br. at ___." WHLI/WHI's cross-claim reply brief filed on August 20, 1997, will be cited to as "WHLI/WHI Reply Br. at ___."

Additionally, complainant points to WHLI's application for closure and post-closure care filed with the Agency in March 1991, where WHLI admits that the top elevation of the area exceeds 700 feet at MSL.

With regard to the lateral boundaries, complainant believes that the landfill continues to exceed its permitted lateral boundaries. Comp. Br. at 13-14. Specifically, complainant argues that the landfill exceeded the lateral boundaries to the west and north areas. Comp. Br. at 13, citing Tr.1(a) at 25, 98. Complainant relies on the Agency's inspections to show that the lateral boundaries have been exceeded. Comp. Br. at 15; see also Comp. Exh. 5, 7. Additionally, complainant points to a "continuing environmental impact" by WHLI due to the solid and hazardous waste impact on groundwater and leachate. Comp. Br. at 32-33. Specifically, complainant points to leachate seeps which have been detected during the Agency's inspections of April 26, 1990,[10] July 15, 1991, April 6, 1992, May 8, 1992, May 12, 1992, July 9, 1992, August 28, 1996,[11] and February 28, 1997.

With regard to final closure and post-closure care plans, WHLI asserts that it made three efforts to submit closure and post-closure care plans for the Part 807 landfills beginning in 1988. WHLI/WHI Br. at 4. Further, WHLI argues that after it submitted such a plan to the Agency in April 1991, the Agency took no action for the next five years. WHLI/WHI Br. at 5, 17. Additionally, it argues that because Krimmel discovered at a meeting with the Agency on March 10, 1993, that hazardous wastes had been discovered at the landfill and the landfill would be required to seek closure as a hazardous waste landfill, an intention of WHLI to submit a revised closure and post-closure care plan was aborted since the closure plan had to address the hazardous waste closure issues. WHLI/WHI Br. at 5; Tr.2(b) at 90-92. WHLI states they filed a supplement to their 1991 closure plan on March 21, 1996 (see Comp. Exh. 3), when the Agency denied the application on June 26, 1996 (see Comp. Exh. 4). WHLI argues their good faith in working with the Agency to develop a closure and post-closure care plan that would be approved by the Agency.

Regarding the financial assurance, WHLI asserts that it had, in 1985 and 1988, secured financial assurance in the form of two letters of credit which eventually expired in 1992. WHLI/WHI Br. at 6.

WHLI argues that prior to 1990, Agency inspectors did not mention any overheight problem at the landfill. WHLI/WHI Br. at 3. When an aerial survey was performed in 1988 for WHLI as part of the planning for a proposed site expansion (see Comp. Exh. 1), the second landfill area (fill area number two) was "substantially higher in elevation than

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[10] The Board notes that during the April 26, 1990, inspection made by Townsend, Townsend included in a comment within his narrative report that WHLI/WHI had accepted hazardous waste from DK Manufacturing, in the form of contaminated degreaser filters, and that no manifest accompanied this shipment. Tr.3(b) at 56; see also Comp. Exh. 5.

[11] Even though the Board affirmed the hearing officer's ruling (see *infra* at 4) that complainant's exhibit 18, should not be entered into evidence, the Board did allow, in accordance with the hearing officer's ruling, the testimony concerning Burger's August 28, 1996, inspection into the record.

permitted." WHLI/WHI Br. at 3-4. Although WHLI does concede that it exceeded permitted dimensions, deposited wastes in unpermitted portions of the landfill, and has not timely initiated closure, WHLI believes that any penalty should be nominal since the Agency is at fault for not detecting any landfill dimension violation until it was pointed out to the Agency by WHLI personnel. WHLI/WHI Br. at 36, 27.

With regard to common maintenance problems, such as leachate seeps, inadequate daily cover, and blowing litter, WHLI asserts that such problems were routinely corrected by WHLI. WHLI/WHI Br. at 6. WHLI points out that leachate problems fall outside of the complaint. WHLI/WHI Br. at l3. Additionally, WHLI states that they duly paid the penalty of $2,500 in the administrative citation brought by the Agency, mainly for overheight problems, in AC 90-49. WHLI/WHI Br. at 7. Though the Macon County Circuit Court entered a preliminary injunction against WHLI in 1992, WHLI asserts the Board should acknowledge the fact that no permanent injunction was entered against WHLI, since the case was ultimately dismissed by the court. WHLI/WHI Br. at 7.

Discussion and Findings. *Count V: Sanitary Landfill Permit and Regulatory Violations*. Section 807.302 requires that a landfill comply with all conditions of each sanitary landfill permit be complied with by the landfill. Section 807.506(a) requires that the landfill operator initiate the treatment, the removal from the site, or the disposal of all wastes and waste residues from the waste site within 30 days after receipt of the final volume of waste and in accordance with the closure plan. Section 807.301 states that no person shall cause or allow the operation of a sanitary landfill unless each requirement of Subpart C (Sanitary Landfills) is performed.

The Board finds that the landfill was overheight as illustrated by the aerial survey on April 14, 1988, by several feet in the northeast corner, the southeast corner, and the southwest corner (Comp. Exh. 1). Additionally, on October 18, 1991, the survey showed that the maximum vertical elevations were exceeded for fill area number two (Comp. Exh. 13). WHLI admits that the landfill had exceeded the permitted elevations heights in its closure and post-closure care applications filed with the Agency in March 1991 and supplemented in March 1996 (Comp. Exh. 3). Testimony at hearing showed that the landfill remained overheight on February 27, 1997. Additionally, testimony clearly showed that the lateral boundaries had been exceeded by close to 97 feet. WHLI has been cited for overheight problems in the past as exemplified by the administrative citations. The Board finds that the landfill remains overheight and continues to violate the Act and corresponding regulations.

The Board finds that WHLI was not permitted to dispose of waste above and beyond the limits set forth in its sanitary landfill permit. Clearly, the landfill is in violation of Section 807.301 and 807.302 for violations of its sanitary landfill operating permit as well as the sanitary landfill regulations. As discussed in the paragraphs that follow, WHLI further did not initiate closure within 30 days after receipt of the final volume of waste and therefore violated Section 807.506(a). Accordingly, WHLI is in violation of Section 807.301, 807.302, and 807.506(a) of the Board's regulations and also Sections 21(d)(2) and 21(o)(9) of the Act.

Count VI: Sanitary Landfill Closure and Post-Closure Care Violations. Section 807.501(b) requires a closure plan for waste management sites. Additionally, Section 807.503 requires, generally, that a written closure plan with the minimal requirements listed in that section be a condition of the sanitary landfill operating permit. The disposal site is required to have a written post-closure plan, as well, in accordance with Section 807.523. Section 807.601(b) requires that waste disposal sites which accept wastes after March 1, 1985, are to have provided financial assurance with the Agency, and Section 807.602(b) states that such financial assurance must be given to the Agency in an amount equal to the cost estimate based on the closure and post-closure care plans.

WHLI submitted various closure and post-closure care plans on different dates which were all found to have been deficient and were, therefore, rejected by the Agency. Contrary to WHLI's argument that for five years the Agency did not react to WHLI's April 1991 submitted closure and post-closure care plan, the Agency indeed found that WHLI's submittal was deficient as illustrated by the Agency's letter of November 4, 1991. Specifically, 16 deficiencies were noted in that letter. See Comp. Exh. 2. WHLI did not resubmit information to the Agency until March 1996 and the Agency promptly responded to that resubmittal in June of that same year. If WHLI was unclear about the status of discussions between themselves and the Agency regarding the closure and post-closure care plans, it was WHLI's obligation to contact the Agency to determine what needed to be done and to promptly address the Agency's concerns.

WHLI's minimal efforts are further exemplified by the fact that WHLI did not obtain financial assurance after its letter of credit expired on March 1, 1992. Taylor testified that, as a result of WHLI's violation, WHLI gained an economic benefit. The Board agrees.

Accordingly, the Board finds that WHLI violated Sections 807.501(b), 807.503, 807.523, 807.601(b), and 807.602(b) of the Board's regulations. Based on these violations, the Board also finds WHLI in violation of Sections 21(d)(1) and 21.1(a) of the Act.

Hazardous Waste Violations (Counts I, II, IV, and VII). Complainant alleges various hazardous waste violations against WHLI in counts I, II, and IV. Complainant alleges violations of the transportation of hazardous waste against WHI in count VII of the complaint. Generally, these violations pertain to Section 723 and 724 of the Board's waste disposal regulations.

Argument. Complainant argues that WHLI transported and disposed of hazardous waste when they were not permitted to do so. Complainant asserts that the landfill's disposal of wastes containing excessive levels of methyl ethyl ketone and benzene violated the Act. Comp. Br. at 18. Further, complainant states that because the landfill did not have a permit to accept or dispose of hazardous wastes, the drums containing hazardous wastes were not legally disposed of at the landfill. Because the waste manifests and daily waste logs exemplified that 80 drums were accepted for disposal on April 9, 1992, complainant asserts that the drums seized during the search were the drums which had been transported by WHI from Bell Sports. Comp. Br. at 18. Complainant argues that WHLI accepted hazardous waste and should have

performed a "spot check" to determine that the special waste manifest was correct in what the manifest purported the waste to be. Comp. Br. at 19.

Complainant states that it does not matter how the waste got into the landfill, but that it likely still exists within the landfill. Comp. Br. at 23. Additionally, complainant asserts that even if WHLI believed the waste was not hazardous, this is immaterial and irrelevant since it was transported by WHI and disposed of in the landfill by WHLI.[12] Comp. Br. at 23. For these reasons, complainant requests a substantial penalty as discussed in more detail below.

WHLI argues that Bell Sports had the "capability of control" over its hazardous wastes and that Bell Sports, rather than WHLI, should incur liability for the unauthorized transportation and disposal of the hazardous wastes. WHLI asserts that it has never held itself out as "available for the disposal or transport of hazardous wastes." WHLI/WHI Br. at 7. WHLI states that it was not required to inspect, sample, analyze, or independently confirm that the character of wastes received from Bell Sports was in accordance with the requirements of the special waste stream permit or in accordance with what the manifests stated were contained within the shipments. WHLI/WHI Br. at 9. On the contrary, WHLI argues that Bell Sports, as the generator of the waste, was required to certify the waste content of each shipment as required by the manifest. WHLI/WHI Br. at 9-10.

Citing People v. A.J. Davinroy Contractors, 249 Ill. App. 3d 788, 618 N.E.2d 1282 (5th Dist. 1993), WHLI argues that complainant must show that the alleged polluter has the "capability of control" over the pollution or that the alleged polluter was in control of the premises where the pollution occurred. WHLI/WHI Br. at 17-22. Further, WHLI asserts that the State's regulatory system for special wastes does not support complainant's theory of liability in this matter. WHLI argues that each person in the chain of control over special wastes should not have to serve as a guarantor of all other persons "upstream" in the chain. WHLI/WHI Br. at 23.

In its reply brief, complainant asserts that the hazardous waste violations are *malum prohibitum*. Comp. Reply Br. at 12. Citing various caselaw, complainant asserts that lack of knowledge of an environmental discharge is not a defense to being found in violation of the Act. Comp. Reply Br. at 13-18.

Discussion and Findings. *Malum Prohibitum/ Mens Rea*. The Board will first address a question which is strongly argued by both parties: whether WHLI had to knowingly accept the hazardous wastes to be found liable under the hazardous waste regulations. In Davinroy Contractors, 249 Ill. App. 3d at 793, 618 N.E.2d at 1286, the Illinois Appellate Court stated the following:

> [T]he Act is *malum prohibitum*; for a violation to be found, it is not necessary to prove guilty knowledge or *mens rea*. Knowledge is not an element of a violation . . . lack of knowledge is not a defense . . .(Meadowlark Farms, Inc.

[12] Although complainant initially argued that the doctrine of strict liability should apply to this matter, complainant withdrew its theory of strict liability in its reply brief.

> v. Illinois Pollution Control Board, 17 Ill. App. 3d 851, 308 N.E.2d 829 (1974)). Nevertheless, the fact that guilty knowledge is not a necessary element of proof under the Act does not mean that alleged polluters are under a theory of strict liability. The State must show that the alleged polluter has the capability of control over the pollution or that the alleged polluter was in control of the premises where the pollution occurred. Phillips Petroleum Co. v. Pollution Control Board, 72 Ill. App. 3d 217, 220, 390 N.E.2d 620, 623 (2nd Dist. 1979).

Legal precedent is clear that lack of knowledge is not a defense to liability for violations of the Act. Therefore, WHLI did not have to knowingly dispose of the hazardous wastes into its landfill to be found in violation of the Act and Board regulations as alleged by complainant.

Accordingly, the Board must determine whether the alleged polluter, WHLI in this instance, had the "capability of control" over the pollution or whether the alleged polluter, WHLI, was in control of the premises where the pollution occurred. WHLI states that the liability referred to by the Davinroy court attaches only after a demonstration that WHI and WHLI possessed the requisite "capability of control" over the source of the discharge. WHLI/WHI Br. at 18. WHLI shift the "capability of control" to Bell Sports. WHLI additionally points out that it need not have taken any precautions to prevent hazardous wastes being transported onto the landfill for disposal at the landfill. Complainant, in its reply brief, however, points out that it is the "source" or "situs" of the pollutional discharge or release that is relevant, rather than the "source" or generator of the waste. Comp. Reply Br. at 16.

In determining whether WHLI had the "capability of control," the Board looks to the determinations made by the appellate court in previous cases. In Phillips Petroleum, 72 Ill. App. 3d at 218, 390 N.E.2d at 622, a railroad tank car was punctured in a train derailment, and anhydrous ammonia was released into the air. The Chicago and Northwestern Transportation Company maintained control over the car until the derailment. The Second District Appellate Court found that there was no evidence exemplifying that Phillips Petroleum Company was in violation of [Section 12(a) of] the Act since the train car was not under Phillips Petroleum Company's control during the time of the accident, but rather, under the control of the Chicago and Northwestern railway company. Phillips Petroleum, 72 Ill. App. 3d at 220-21, 390 N.E.2d at 623. The Phillips Petroleum Court stated that the record did not show any admissible evidence which indicated that Phillips Petroleum Company exercised "sufficient control over the source of the pollution in such a way to have caused, threatened, or allowed the pollution." Phillips Petroleum, 72 Ill. App. 3d at 220-21, 390 N.E.2d at 623.

Moreover, in Perkinson v. Pollution Control Board, 187 Ill. App. 3d 689, 543 N.E.2d 901 (3rd Dist. 1989), the appellate court affirmed the Board in a situation where vandals caused pollution at a hog farming operation without the landowner's consent or knowledge. The court reasoned that since there was nothing in the record to establish that the landowner had taken any precautions against vandalism, the landowner was properly found to be in violation of the Act, and therefore, properly fined. The court, in its reasoning, also cited Meadowlark Farms, 17 Ill. App. 3d 851, 308 N.E.2d 829. In that case, the owner was found

to have the capability of controlling the discharge that was responsible for water pollution caused by seepage through mine refuse piles even though such piles had been created by a prior landowner. See also Freeman Coal Mining Corp. v. Pollution Control Board, 21 Ill. App. 3d 157, 313 N.E.2d 616 (5th Dist. 1974); Bath v. Pollution Control Board, 10 Ill. App. 3d 507, 294 N.E.2d 778 (4th Dist. 1973) (owner of a landfill was held to be responsible for underground burning even though the cause was unknown and not the result of the owner's affirmative act); Hindman v. Pollution Control Board, 42 Ill. App. 3d 766, 356 N.E.2d 669 (5th Dist. 1976) (operator of a landfill was held accountable for a fire that was not started by either the operator or his employees).

The Board finds that WHLI had the "capability of control" over the disposal of the hazardous wastes into the landfill. Unlike the situation in Phillips Petroleum, WHLI did have the sufficient control over the "source" of the pollution because WHLI could have taken action to prevent hazardous wastes from being disposed of in the landfill. The Board notes that WHLI is not required *per se*, either by the special waste stream permit process or by the waste regulations, to take precautions to determine whether all wastes being accepted for transportation and disposal actually conform to any representations (or misrepresentations) made by a generator. However, the Board notes that WHLI is not prohibited from taking any action to protect itself from this type of liability.[13]

The Board believes this case is similar to the situation in Perkinson. Despite the vandalism which purportedly caused the pollution, the landowner was still found liable for the pollutional discharge since the "source" of the discharge occurred in the lagoons and on the land which the landowner controlled. This is similar to the instant matter because WHLI owns and controls the property where the hazardous wastes were deposited. Although another party created the hazardous waste, WHLI cannot point its finger at Bell Sports to escape liability for violations which occurred at and on the situs that WHLI controls. The Board finds that WHLI had the "capability of control" over the pollution at its landfill. In fact, it controlled which drums and waste went into the landfill. The Board also finds that WHLI controlled the premises where the pollution occurred. Having made these findings, the Board now turns to an analysis of the hazardous waste allegations.

Count I: RCRA Disposal Violations. Section 703.121(b) requires that a RCRA permit be obtained for any facility at which hazardous wastes are disposed. As evidenced by the testimony and exhibits, four of the seven samples from the 53 excavated drums exceeded the regulatory levels for methyl ethyl ketone and benzene. WHLI has not put forth any evidence into the record to persuade the Board that the samples analyzed by the Agency were not hazardous materials. Therefore, the Board finds that WHLI disposed of hazardous wastes at the landfill. Additionally, WHLI has admitted that it is not a facility which is permitted to accept or dispose of hazardous waste. Accordingly, based on the Board's findings and WHLI's admission, the Board finds WHLI has violated Section 703.121(b) as well as Section 21(f)(1) of the Act.

[13] For instance, WHLI could test incoming loads on a random or consecutive basis.

Count II: RCRA Operational Violations. Section 724.115(b) requires that an owner or operator [of a facility that accepts hazardous wastes for disposal] shall develop and follow written schedules for facility inspections and Section 724.173(a) requires that a written operating record be kept at the facility. For the owner/operator of a hazardous waste management facility, a written closure plan is required under Section 724.212(a)(1), a written closure cost estimate is required under Section 724.242(a), and financial assurance must be established for closure of such a facility pursuant to Section 724.243. WHLI admits that it has never maintained records regarding any receipt or disposal of hazardous wastes and never submitted a closure plan or financial assurance to the Agency for any hazardous waste management. Resp. to Sec. Request to Admit at 2. Accordingly, the Board finds that WHLI is in violation of Sections 724.115(b), 724.173(a), 724.212(a)(1), 724.242(a), and 724.243. WHLI is also in violation of Section 21(f)(2).

Count IV: RCRA Permit Violations. Section 703.121(a) states that a RCRA hazardous waste permit is required for any facility disposing of hazardous wastes. Section 703.150(a) requires that a facility subject to the requirements of a RCRA permit submit a Part A permit application to the Agency. Section 724.175 states that an annual report must be submitted to the Agency by March 1 of each year by an owner/operator [of a facility accepting hazardous wastes for disposal]. Section 724.191 requires that adequate groundwater compliance monitoring be done at facilities accepting hazardous waste. Section 724.218 requires written post-closure plans, Section 724.244 requires written detailed post-closure cost estimates, and Section 724.245 requires financial assurance for post-closure care. Section 724.401 states that a properly designed liner system is required for landfills being regulated under the hazardous waste operating requirements. Section 724.409 requires that the facility maintain adequate records to show the location of hazardous wastes in each cell and Section 724.414(b) prohibits the placement of bulk or non-containerized liquid hazardous waste or hazardous waste containing free liquids in any landfill.

Although not knowingly, because WHLI accepted hazardous waste for disposal without a permit as required by Section 703.121(a) on at least one occasion, WHLI is in violation of this section. WHLI has not filed a RCRA Part A application or any annual reports. There is no evidence in the record showing that groundwater monitoring is being conducted at the landfill. As discussed under count II above, WHLI has not submitted any written post-closure plans and cost estimates of financial assurance for its facility as required under the hazardous waste regulations. The Waste Hauling Landfill does not have a liner system in place as required by the above regulations. Additionally, there are no records which show that WHLI has adequate records exhibiting the location of hazardous wastes. Finally, because the samples tested by the Agency show that the hazardous wastes were free liquids that, once the drums were crushed, were able to filter throughout the other debris in the landfill, WHLI has violated this prohibition as listed in the hazardous waste regulations. Accordingly, the Board finds WHLI in violation of Sections 703.121(a), 703.150(a), 724.175, 724.191, 724.218, 724.244, 724.245, 724.401, 724.409, and 724.414(b) of the Board's regulations, as well as Sections 21(f)(1) and 21(f)(2) of the Act.

Count VII: Hazardous Waste Treatment Violations. (Allegations against WHI only.) Section 723.111 forbids a transporter to transport hazardous waste without first having

received an EPA identification number from the United States Environmental Protection Agency (USEPA) Administrator. Section 723.120 states that a transporter shall not accept hazardous waste from a generator unless accompanied by a manifest which is signed by the transporter acknowledging the acceptance of such waste from the generator. Section 723.121 states that the transporter must deliver the entire quantity of hazardous waste to the designated facility on the manifest. Section 723.122 requires that the transporter keep a copy of the manifest for three years. Also, Section 21(g)(1)(2) requires that the transporter of hazardous waste should be registered and permitted with the Agency and it states that no transporter should violate any of the Board's regulations.

Since WHI is a transporter which transfers waste to the Waste Hauling Landfill, it is possible that WHI may have, on some occasions, transported hazardous waste to the landfill. However, the record contains no evidence that WHI transported any specific hazardous waste on any particular date. (See discussion below in WHLI/WHI v. Bell Sports.) Though the record clearly supports the fact that hazardous waste has been disposed of in the landfill at some point in time, the record does not show that WHI transported hazardous waste from Bell Sports or any other facility in violation of the above regulations. Accordingly, the Board does not find WHI in violation of any of the regulations cited in count VII.

WHLI/WHI v. Bell Sports

The Board will address the following issue in this section: whether Bell Sports is liable for the hazardous waste deposited into the Waste Hauling Landfill.

Argument. WHLI/WHI argue that the paint sludge generated by Bell Sports in early April 1992 and subsequently disposed of in the Waste Hauling Landfill, was hazardous waste for which Bell Sports did not properly dispose of in accordance with the hazardous waste regulations and the Act. Because of the direct and proximate cause of Bell Sports' actions, WHLI/WHI argue that Bell Sports caused hazardous wastes to be deposited into the landfill, and therefore, caused WHLI/WHI to be subject to potential civil penalties.

WHLI/WHI point out that the type of waste discovered in the drums extracted from the landfill along with the appearance, chemical characteristics, and location in which the landfill was operating at the time of the receipt of the drums from Bell Sports, all show that Bell Sports is liable for the hazardous wastes being deposited into the landfill.

WHLI/WHI further believe that the hearing officer acted improperly by allowing in the testimony of Townsend regarding alleged hazardous waste shipments received from DK Manufacturing. WHLI/WHI Cr-Clm. Br. at 16; see Tr.3(b) at 54-61. WHLI/WHI believe this testimony was improper since the solvents were not shown to be chemically the same as the samples of hazardous wastes extracted from the landfill on April 22, 1992, and the Board should have required Bell Sports to interplead DK Manufacturing. WHLI/WHI Cr-Clm Br. at 16; Tr.3(b) at 62-63. Though WHLI/WHI submit that the hearing officer improperly allowed Townsend to testify about the DK Manufacturing hazardous waste which was discovered at the landfill, the Board believes this information was properly admissible. As such, the Board will not overrule the hearing officer on this matter.

WHLI/WHI assert that the Board should find that only Bell Sports possessed and exercised the requisite capability of control over its wastes in such a way as to incur liability under the Act. WHLI/WHI Cross Br. at 18. WHLI/WHI request the Board to imposed against Bell Sports all hazardous waste violations and penalties assessed herein. WHLI/WHI seek exoneration from all hazardous waste counts and believe that Bell Sports should bear all responsibility for any civil penalties imposed with regard to the hazardous waste counts. WHLI/WHI Cr-Clm. Br. at 17, 18.

Bell Sports argues that the drums containing hazardous wastes found in the landfill did not originate from Bell Sports. Specifically, Bell Sports directs the Board to the evidence adduced at hearing: there were only 53 drums extracted, compared to the original 80 drums contained on the Bell Sports special waste truckload, while no other drums were in the vicinity of the area from which the drums were taken; the drums used by Bell Sports were only black drums rather than the varying colored drums found among the 53 extracted drums; the 53 drums did not contain the pre-printed Bell Sports waste label displaying the "Bell Sports" name; and WHLI had, in the past, received hazardous waste from at least one other company, DK Manufacturing. Bell Sp. Resp. Br. at 4-5, 6, 10-13.

Bell Sports asserts that WHLI/WHI cannot recover any costs, closure costs, or otherwise, from Bell Sports since WHLI/WHI failed to prove that the hazardous waste in the landfill was generated by Bell Sports. Bell Sp. Resp. Br. at 9. Bell Sports argues that WHLI/WHI's claim for monetary civil penalties must be dismissed since WHLI/WHI failed to show liability on the part of Bell Sports. Also, Bell Sports argues that WHLI/WHI failed to mitigate its damages. Bell Sp. Resp. Br. at 22.

Complainant also submitted an argument regarding the cross-claim. Complainant states that the fact that a cross-claim is filed by WHLI/WHI shows that such a cross-claim is premised on the fact that hazardous waste was indeed disposed of in the landfill. Comp. Resp. Br. at 1. Complainant wishes the Board to consider whether the Board is authorized by the Act to decide legal issues pleaded by the cross-claimants. Because the Board adopted the stipulation between complainant and Bell Sports, complainant argues that no further penalty can be legally imposed on Bell Sports. Comp. Resp. Br. at 2-3.

Discussion and Findings. The Board finds that Bell Sports is not liable for any violations as alleged and argued by WHLI/WHI. The record does not prove, as argued by WHLI/WHI, that Bell Sports was the generator of the hazardous wastes extracted from the Waste Hauling Landfill on April 22, 1992. The facts remain conflicting and inconclusive to allow the Board to shift any liability to Bell Sports. Making this finding, the Board dismisses this cross-claim and does not impose any penalty against Bell Sports.

Penalty

Since the Board has dismissed the cross-claim between WHLI/WHI and Bell Sports, there is no penalty to be assessed on the cross-claim. Similarly, WHI is not subject to a penalty as requested by complainant under count VII. Therefore, this penalty section pertains solely to the case between complainant and WHLI.

Penalty Analysis

Argument. Complainant requests that the Board direct WHLI to cease and desist from further violations and impose a monetary penalty of not more than the statutory maximum. Comp. at 6, 8, 13, 15, 16, 20; Comp. Br. at 23-24. Specifically, the requested monetary penalty totals $552,501. This amount is calculated based on $212,501 for overheight violations from 1987 through the present, $100,000 for lateral overfill from 1987 to the present, $90,000 for lack of closure and post-closure plans from 1988 to the present, $50,000 for lack of financial assurance from 1992 to the present, $50,000 for transportation of hazardous waste at least once, and $50,000 for acceptance of hazardous waste without a permit and for violations of at least 20 hazardous waste regulations. Comp. Br. at 35. Additionally, complainant requests the Board to order attorney fees and costs in the amount of $18,535. Comp. Br. at 24.

Specifically, complainant asks that the Board order WHLI to submit approvable closure and post-closure care plans for the landfill in accordance with the requirements listed in 35 Ill. Adm. Code 807. Complainant also requests that WHLI provide for financial assurance in the amount required by the regulations for the closure and post-closure care period. Complainant states that such plans must be formally approved by the Agency and that such plans must address the technical remedies concerning the overfill and hazardous wastes, as well as the leachate problems at the landfill. Comp. Br. at 24-25. Further, complainant points out that WHLI must either obtain local siting approval of the unpermitted expansion of the landfill or remove the overfill for appropriate disposal elsewhere. Comp. Reply Br. at 23. Complainant asserts that WHLI may choose the option it believes is most cost effective to remedy these violations. Comp. Reply Br. at 23. Moreover, complainant does not request that the landfill close in accordance with RCRA hazardous waste closure requirements. Comp. Br. at 25.

Complainant believes that under Section 42(h) of the Act (415 ILCS 5/42(h) (1996)), the evidence shows that the Board should order a full penalty as requested by complainant. Complainant argues that a penalty in this amount is appropriate due to violations of overheight, lateral overfill, lack of closure/post-closure plans, lack of financial assurance, transportation of hazardous waste, and acceptance of hazardous waste without a permit, during different timeframes. See Comp. Br. at 35.

WHLI suggests that, when the Board considers the Section 33(c) (415 ILCS 5/33(c) (1996)) factors to determine whether to impose a penalty, there are facts in this case which mitigate against the imposition of a penalty. Additionally, WHLI believes there are factors present in this matter which show that the penalty amount should be mitigated by the Board when analyzing a penalty pursuant to Section 42(h) (415 ILCS 5/42(h) (1996)). WHLI/WHI Br. at 24. WHLI states that it received ambiguous directions from the Agency regarding the height of the landfill. WHLI/WHI Br. at 25. Further, WHLI asserts that the Agency did not articulate a proper closure/post-closure care standard for the landfill. WHLI/WHI Br. at 27. WHLI believes that the Agency showed favoritism to Bell Sports in this action which placed WHLI at a disadvantage. WHLI/WHI Br. at 29. WHLI states that removal of the overheight would be unreasonably expensive. WHLI/WHI Br. at 33.

WHLI believes that counts I, II, and IV should be dismissed in their entirety, or that no penalty should be imposed, because the hazardous waste came from the Bell Sports shipment. WHLI/WHI Br. at 35. Although WHLI concedes that the permitted dimensions of the landfill are exceeded, they request a nominal penalty amount due to the Agency's misguidance and conduct. WHLI/WHI Br. at 36. Also, WHLI requests that a nominal penalty be imposed with regard to count VI since there were several years of Agency inaction and because WHLI lack revenue. Finally, WHLI asserts that count VII should be dismissed in its entirety, so that no penalty should be imposed. WHLI/WHI Br. at 34-35.

Discussion and Findings. In determining whether a penalty should be ordered against WHLI, the Board looks to the Section 33(c) factors. See 415 ILCS 5/33(c) (1996). Section 33(c) requires the Board to consider the following factors:

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. 415 ILCS 5/33(c) (1996).

While the Board sometimes applies the Section 33(c) factors to each and every alleged violation (see People v. ESG Watts (February 5, 1998), PCB 96-233), the Board does not do so in every case. Rather, the Board may apply the Section 33(c) factors to the totality of the alleged violations (see People v. ESG Watts (February 5, 1998), PCB 96-107, slip op. at 48). To determine whether a penalty is warranted in this case, the Board will weigh all of the facts and circumstances which bear upon the reasonableness of the violations against the Section 33(c) factors below.

Character and Degree of Injury to or Interference with the Protection of the Health, General Welfare, and Physical Property of the People. The testimony of the Agency inspectors and the inspection reports, which were entered as exhibits in this matter, convince the Board that the overheight, lateral overfill, continuing leachate problems, as well as the disposal of hazardous waste into an unpermitted hazardous waste facility, have seriously impacted the physical property and the livelihood of the citizens of the State. In particular, the landfill remains overheight by over 60 feet. Additionally, the landfill has expanded laterally beyond its originally permitted allowances by about 97 feet. Moreover, due to WHLI's failure

to provide proper closure and post-closure care plans along with the requisite financial assurance, WHLI has caused potential injury to the people of the State of Illinois. Accordingly, the Board concludes that this factor weighs in aggravation of the penalty to be imposed.

The Social and Economic Value of the Pollution Source. Typically, a pollution source has a social and economic value that must be weighed against the source's potential effect on the environment. Here, however, the value of this pollution source is no longer at issue with regard to its social and economic value since the landfill ceased operation in 1992 due to the issuance of a preliminary injunction by the Macon County Circuit Court. As a result of that injunction, the landfill eventually was covered with a two-foot cover in accordance with the court's order. Since then, the landfill has not accepted any more waste.

In this case, any social and economic value the landfill may have had is undermined by WHLI's continued failure to make the technical improvements necessary to control overheight, overfill, and hazardous waste disposal, as well as the failure to properly submit closure and post-closure plans and failure to properly fund its financial assurance obligation. The overheight and overfill continue to be problems today and this diminishes the social and economic value of the landfill.

Accordingly, the Board concludes that this factor weighs in aggravation of any penalty to be imposed.

The Suitability or Unsuitability of the Pollution Source to the Area. This factor requires the Board to look at the location of the Waste Hauling Landfill and determine its suitability to the area, including the question of priority of location. As to priority of location, the landfill has been in its present location since the early 1970's and is not able to move to another location.

This landfill is permitted as a sanitary waste landfill. However, the facility exceeds its lateral and vertical permitted contours. Moreover, the Board has found that the waste received has also included hazardous wastes. This landfill was never designed to accept hazardous waste, yet it presently contains such waste. The landfill in its present state is clearly not suitable to its location. The record is silent as to the stability of the landfill or whether the landfill can support the extra overheight and overfill. The record does not contain any information or sampling results as to whether any of the hazardous waste disposal has affected the underlying groundwater, leachate, or runoff. For these reasons, the Board finds that the landfill is unsuitable and that this factor weighs in aggravation of any penalty to be imposed.

Technical Practicability and Economic Reasonableness of Reducing or Eliminating Pollution. Complainant asserts that WHLI should either obtain local siting approval of the unpermitted expansion of the landfill or remove the overfill for appropriate disposal elsewhere. In performing either of these choices, complainant states that WHLI may choose the option they believe is most cost effective. Testimony reveals that the rough estimated cost to reduce the overheight and overfill ranges from $9 million to $20 million. Also, a siting petition for

expansion of the landfill has already been denied by the Macon County Board in 1991. This denial was unsuccessfully appealed to this Board in 1992. The Board notes that WHLI continued to accept and deposit more waste with the knowledge that it was exceeding its permitted dimensions at the landfill.

The hazardous waste which has been deposited in the landfill has not been removed. However, complainant is not asking the Board to require closure or cleanup in accordance with RCRA hazardous waste closure requirements. The fact that the landfill no longer accepts any waste eliminates the possibility that the landfill will further violate the requirements listed in its permit by accepting other shipments of hazardous waste. The costs of eliminating the environmental problems from this overfilled, overheight landfill which has accepted wastes for which it was not engineered may be high.

For these reasons the Board neither weighs this factor for, nor against, the imposition of a penalty.

Subsequent Compliance. The record shows that WHLI has not done anything to eliminate the overheight or overfill at the landfill. Further, the record shows that WHLI failed to respond to the 16 deficiencies listed in the November 4, 1991, Agency letter for four years. Moreover, a letter of credit for the financial assurance expired on March 1, 1992, and has since not been renewed. While WHLI has indeed attempted to submit closure plans through an outside consultant, such plans have not been perfected in accordance to the closure and post-closure care requirements.

Clearly WHLI has failed to fulfill the financial commitment which is necessary to protect the environment from the problems of this landfill. Overall, WHLI has not worked with the Agency to properly formulate a closure and post-closure plan. The Board accordingly finds that this factor weighs in aggravation of the penalty to be imposed.

Determination of Penalty Amount.

Having weighed all of the Section 33(c) factors against the facts and circumstances of this case above, the Board finds that a penalty should be imposed against WHLI. WHLI admitted to violations of overheight and overfill. Further, WHLI failed to submit and address proper closure and post-closure care plans as required by the Agency. Further, WHLI remains deficient on its letter of credit for the financial assurance requirements. Moreover, WHLI has accepted and disposed of hazardous waste without being permitted as a hazardous waste permit facility. For these reasons and others, the Board believes a penalty is appropriate in this matter. The Board now will determine the proper penalty amount.

In deciding an appropriate penalty amount, the Board must determine what type of action is best to ensure that WHLI achieves compliance with the Act and corresponding regulations. At the outset, the Board observes that although WHLI has been cited with administrative citations and circuit court injunctions, the landfill still remains in violation of the Act and other regulations.

The Board now considers the factors found at Section 42(h) of the Act. Section 42(h) provides:

> [T]he 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 thereunder or to secure relief therefrom 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) (1996).

The Duration and Gravity of the Violations. Regarding the duration of the offenses, the Board looks to various factors apparent in this situation. First, although WHLI has worked on its closure and post-closure submittals for the Agency at various times, it took WHLI four years to submit its most recent submittal to the Agency. An appropriate closure and post-closure plan has not been in place with the Agency since 1988. Second, with regard to the financial assurance, the testimony of John Taylor reiterated that WHLI had not received another letter of credit since 1992. Third, the landfill accepted more waste than was permitted causing the overheight and overfill; this began as early as 1987 and has continued through the present. Fourth, the landfill has accepted hazardous waste without a permit at least once which thereby caused additional violations of the hazardous waste regulations.

Regarding the gravity of the violations, the violations found by the Board in this matter are serious as well as lengthy. Again, WHLI's failure to provide and work with the Agency to timely arrive at an appropriate closure and post-closure care plan is irresponsible. WHLI's blatant failure since 1992 to provide the financial assurance necessary for an environmentally sound closure of this facility is irresponsible. The Board believes that the funding of the financial assurance is an obligation which every landfill owner owner/operator in Illinois owes the taxpayers of this State. Further, WHLI's overheight by over 60 feet and overfill by over

97 feet continued long after WHLI admitted they were exceeding their permitted requirements. Also, WHLI deposited hazardous waste into the landfill thereby aggravating the gravity of WHLI's other violations. This landfill was closed by the court in 1992 because WHLI did not adhere to the environmental regulations adopted by this State to protect and enhance the quality of the environment. Still, WHLI has taken little or no action to correct the violations or conditions at the landfill. The Board finds that these violations are individually, and collectively, serious and a threat to the environment and the general welfare of the public.

The Board concludes that this factor weighs in aggravation of the penalty to be imposed.

Due Diligence on the Part of the Violator. The Board believes that WHLI has not shown due diligence on its part to absolve itself of having to pay a penalty. Specifically, the Board looks at the fact that WHLI accepted waste consistently though the permitted height and widths were being exceeded. Also, it took WHLI four years to provide the Agency with supplemental information with regard to WHLI's closure/post-closure care plan. Even in the inspection reports, the Agency noted problems with leachate seeps, lack of groundwater monitoring, and problems with daily cover; however, WHLI did not address these problems so as to alleviate them altogether. While WHLI did indeed hire a consultant to help submit proper closure and post-closure care plans with the Agency this effort was not sufficiently diligent to bring about compliance with the appropriate regulations.

Although the landfill had accepted hazardous wastes from DK Manufacturing prior to the hazardous waste finding on April 22, 1992, WHLI did not take any preventative steps to ensure that hazardous wastes were not deposited at the landfill in the future. As noted earlier, the Board opined that WHLI could indeed test the incoming waste on a random or consecutive basis so as to prevent any further acceptance of hazardous waste. Here, WHLI did not take any measure to prevent this type of action. The violator here, WHLI, has not shown any immediate due diligence on the problems continuously cited by the Agency over the years, or for the long-term commitment necessary to solve the problems at the landfill.

The Board finds that this factor weighs in aggravation of the penalty to be assessed.

Economic Benefit. This factor requires that the Board consider any economic benefits accrued by the violator because of a delay in compliance with the requirements. If the Board had before it an approved closure/post-closure care plan with estimates of the costs for closure and post-closure activities along with the foreseeable maintenance and monitoring costs, the Board might be better able to calculate an actual amount of economic benefit accrued to WHLI. However, the Board does not have any such evidence before it.

WHLI has undoubtedly saved an indeterminate amount of money by not complying with the posting of financial assurance when its credit expired in 1992. WHLI clearly benefited by not having complied with the financial assurance regulations. Also, because WHLI continued to pile its waste atop of an already-filled landfill and because WHLI accepted hazardous waste for which it was not permitted to accept, WHLI accrued economic benefits

which cannot be calculated based on the record before us. The record showed varying testimony, however, that removing excess waste will cost anywhere ranging from $9 million to $20 million. In this context, the Board finds that this factor weighs in aggravation of the penalty to be assessed.

Monetary Penalty Which Will Serve to Deter Further Violations. The Act requires that adverse effects upon the environment must be "fully considered and borne by those who cause them" (415 ILCS 5/2(b) (1996)). In previous administrative citations cited against WHLI, WHLI was required to pay a monetary amount which apparently did not deter violations for the future. In this matter, aside from ordering a cease and desist order, the only other type of remedy which the Board will impose is a monetary penalty. This penalty should serve as a great deterrent both for this landfill and other landfills who are out of compliance since it shows the seriousness of the violations and the ramifications for harming the environment.

Accordingly, the Board concludes that this factor weighs in aggravation of the penalty we would normally assess.

Number, Proximity in Time, and Gravity of Previously Adjudicated Violations by the Violator. In the past, the Agency has cited WHLI with three administrative citations, for which the Board has ordered payment of fines. Also, WHLI has been brought to circuit court for its violations of the Act and other regulations. The circuit court found exceedences of the vertical and lateral boundaries, uncovered refuse, improper cover, and leachate. Finding such violations, the circuit court ordered WHLI to cease and desist from all further violations. The record shows that many, if not all, of these violations continue today. WHLI has failed to address these continuing problems and the Board believes that this lack of initiative does not mitigate the amount of the penalty to be assessed against WHLI.

The Board finds that this factor weighs in aggravation of the penalty to be assessed.

Total Penalty.

The statutory maximum as set forth in Section 42(a) of the Act is $50,000 for any violation of the Act or Board regulations and an additional $10,000 for each day during which the violation continues. See 415 ILCS 5/42(a) (1996). For violations occurring before July 1, 1990, the Act required a statutory maximum of $10,000 for each violation and $1,000 per day during which the violation continues. See 415 ILCS 5/42(a) (1990).

In requesting a penalty of $552,501, complainant justifies the amount with the following general information: $33,334 for overheight violations from 1987 through April 25, 1990, based on $10,000 per each year of violation; $179,167 for overheight violations from April 27, 1990, to the present based on $25,000 per each year of violation; $100,000 for lateral overfill from 1987 to the present based on $10,000 per each year of violation; $90,000 for lack of closure and post-closure plans from 1988 to the present based on $10,000 per each year of violation; $50,000 for lack of financial assurance from 1992 to the present based on $10,000 per each year of violation; $50,000 for the transportation of hazardous waste at least once; and $50,000 for the acceptance of hazardous waste without a permit and violation of at

least 20 other hazardous waste regulations. Comp. Br. at 35. Though complainant does not specifically state its rationale in arriving at the above figures, the Board believes that complainant calculated the figures based on the statutory allowances pursuant to Section 42 of the Act.

In determining the correct penalty amount the Board looks to the statutory maximum as a starting point. In this case, the statutory maximum calculates out to be an exorbitant number; a number which the Board does not consider and will not impose as a penalty in this matter. While the Board does not believe that WHLI's violations rise to a level of egregiousness as other Board cases have in the past (see, *e.g.*, People v. ESG Watts (February 5, 1998) (February 19, 1998), PCB 96-233; People v. ESG Watts (February 5, 1998), PCB 96-107), the Board does believe that these violations were serious. The Board does, in making its penalty amount determination, look to the number of violations and the period of time over which such violations occurred. Also, the Board takes into consideration the economic benefit which WHLI has enjoyed as a result of not complying with the Act and Board regulations. The Board notes, however, that it will not consider complainant's requested $50,000 penalty amount for the transportation of hazardous waste since the Board did not find WHLI in violation of that allegation as discussed earlier in this opinion.

With regard to the overheight and lateral overfill, the Board determines that WHLI remained overheight and laterally overfilled for a period of at least 3,622 days. WHLI economically benefited from violating the contour limits since it was able to accept more waste while not being permitted to do so. When WHLI acknowledged that it was in violation of its permitted contour levels, WHLI applied to the Macon County Board for siting approval. Despite its failure to obtain siting approval from the Macon County Board, WHLI continued to violate the height and lateral contour limits of its permit. The Board notes that WHLI made the effort, though unsuccessful, to obtain siting approval. The record shows that the overheight and overfill began in at least 1987 and continued through the first date of hearing for a total of 3,622 days. Based on these circumstances, the Board imposes a penalty in the amount of $181,000 for the overheight and overfill violations.

With regard to the lack of closure and post-closure care plans, the Board determines that WHLI was in violation for 3,266 days. The Board previously found that WHLI did not submit its closure and post-closure care plans for four years between late 1991 and early 1996. The Board notes that WHLI made little effort to work with the Agency during that timeframe to submit closure plans to the Agency. The Board notes that WHLI did hire a consultant to try to correct and finalize its submittals of closure and post-closure care plans. The Board also takes note that WHLI attempted to make submittals of its closure plans to the Agency from 1988 to late 1991, though unsuccessfully. Based on the record before us, the Board imposes a penalty of $163,500 for the improper submittals of closure and post-closure care plans beginning in 1988 and ending on the date of hearing, the total amount of penalty for these violations is $163,500.

WHLI's letter of credit expired on March 1, 1992. Once the letter of credit expired, WHLI did not make any effort to renew the letter of credit or obtain another letter of credit. As a result, WHLI lacked the financial assurance from March 1, 1992 through March 3, 1997,

the first date of hearing. This totals an amount of 1,546 days. WHLI accrued some sort of economic benefit by not having funded its financial assurance during those dates. The record does not contain information as to the amount of economic benefit gained by WHLI. Accordingly, the Board will impose a penalty of $77,500 for the period of time in which WHLI remained underfunded for its financial assurance requirements.

Finally, with regard to the hazardous waste violations, the Board has acknowledged in this opinion that WHLI has been in violation of accepting and depositing hazardous waste at least once due to the samples of hazardous wastes determined to be in the crushed drums. The Board has determined that WHLI was in violation of at least 18 hazardous waste violations as a result of this one-time hazardous waste acceptance and disposal in the landfill. The Board has already acknowledged that WHLI could have taken any type of preventative measures to ensure that hazardous wastes do not come into its landfill. Complainant requests $50,000 for all of the hazardous waste violations. The Board agrees that this amount is a proper penalty for the hazardous waste violations since it encompasses all of the 18 hazardous waste violations. The Board does not impose a greater penalty because the hazardous waste violations stem from a one-time occurrence of the acceptance and depositing of hazardous waste.

As a result of the discussion above, the Board imposes a total penalty amount of $472,000.

In addition to the monetary penalty, the Board orders WHLI to cease and desist from further violations of the Act and corresponding regulations, including the overheight, overfill, failure to submit proper closure and post-closure care plans, failure to provide financial assurance, and acceptance of hazardous waste without a permit, among other things. The Board orders that WHLI work with the Agency to arrive at agreeable solutions for final closure and post-closure care plans, as well as solutions to solve the overheight and overfill problems. The Board orders attorney fees and costs as discussed below.

Attorney Fees/Costs.

Complainant asserts that the evidence shows that WHLI committed violations that are willful, knowing, or repeated in accordance with Section 42(f) of the Act. Comp. Br. at 35-36. Therefore, complainant believes fees and costs should be ordered against WHLI. The total amount of attorney fees requested by complainant is $18,535.

WHLI/WHI believe that complainant improperly calculated its attorney fees based on a $120 per hour expense. WHLI/WHI assert that the employees at the Illinois Attorney General's Office are compensated far less than the amount requested for attorney fees in this case.

The Board finds that attorney fees are appropriate in this matter and, accordingly, finds that WHLI should pay complainant's requested attorney fees in the amount of $18,535. The violations determined by the Board today in this opinion and order exemplify that the violations were either "willful, knowing, or repeated." Finding so, the Board believes

attorney fees are warranted. The Board further believes that the expenses based on a $120 per hour fee, as explained in complainant's affidavits, are reasonable expenditures for the prosecution of this matter since the Board has previously found such fee to be reasonable in past cases. See People v. ESG Watts (February 5, 1998), PCB 96-107, slip op. at 54; see also People v. ESG Watts (May 4, 1995), PCB 94-127, slip op. at 18. Accordingly, the Board orders $18,535 to be paid to the Hazardous Waste Fund.

CONCLUSION

As explicitly discussed above, the Board finds WHLI in violation of certain sections of the Act and corresponding regulations pertaining to the sanitary landfill requirements and the Board finds WHLI in violation of certain sections of the Act and corresponding regulations pertaining to the hazardous waste disposal requirements. Accordingly, WHLI must pay a penalty in the amount of $472,000, as well as attorney fees and costs in the amount of $18,535. The cross-claim is dismissed.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. The Board finds that Waste Hauling Landfill, Inc. violated 35 Ill. Adm. Code 703.121(a), 703.121(b), 703.150(a), 724.115(b), 724.173(a), 724.175, 724.191, 724.212(a)(1), 724.218, 724.242(a), 724.243, 724.244, 724.245, 724.401, 724.409, 724.414(b), 807.301, 807.302, 807.501(b), 807.503, 807.506(a), 807.523, 807.601(b), and 807.602(b) (1992).

2. The Board finds that Waste Hauling Landfill, Inc. violated Sections 21(d)(1), 21(d)(2), 21(f)(1), 21(f)(2), 21(o)(9), and 21.1(a) (415 ILCS 21(d)(1), 21(d)(2), 21(f)(1), 21(f)(2), 21(o)(9),and 21.1(a) (1994)).

3. The Board orders WHLI to pay a penalty in the amount of $472,000, within 60 days of the date of this order. This payment must be made by certified check or money order payable to Treasurer of the State of Illinois, designated to the Environmental Protection Trust Fund, and should be sent by first class mail to:

   Illinois Environmental Protection Agency
   Fiscal Services Division
   1021 N. Grand Avenue East
   P.O. Box 19276
   Springfield, Illinois 62702-9276

4. The certified check or money order shall clearly indicate on its face, WHLI's federal employer identification number and that payment is directed to the Environmental Protection Trust Fund.

5. The Board orders WHLI to pay attorney fees and costs in the amount of $18,535 to the Attorney General's Office. Such payment shall be made within 60 days of the date of this order by certified check or money order payable to the Treasurer of the State of Illinois, designated for deposit to the Hazardous Waste Fund, and must be sent by first class mail to:

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

6. The certified check or money order shall clearly indicate on its face, the case name and number, WHLI's federal employer identification number, and that payment is directed to the Hazardous Waste Fund.

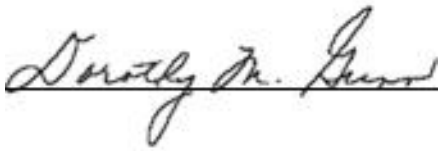
7. Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in Section 1003(a) of the Illinois Income Tax Act, (35 ILCS 5/1003 (1996)), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

8. WHLI must cease and desist from violations of the Act and Board regulations.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 21st day of May 1998 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board