ILLINOIS POLLUTION CONTROL BOARD
May 18, 2006

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 05-139
	)	(Enforcement - Land)
BATH INCORPORATED, an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

JAMES L. MORGAN, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE COMPLAINANT.

OPINION AND ORDER OF THE BOARD (by A.S. Moore):

On January 25, 2005, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a one-count complaint (Comp.) against Bath Incorporated (Bath). The People allege that respondent is liable for past, present, and future response costs incurred by the State of Illinois (State) as a result of or arising out of releases and threatened releases from a landfill operated by Bath in Decatur, Macon County.

Today the Board decides an uncontested motion for summary judgment filed by the People against Bath on November 1, 2005. For the reasons discussed below, the Board grants the People's motion for summary judgment. The Board awards the People $2,838,368.53 in response costs, as well as punitive damages in the amount of $8,515,105.59, as provided for in Section 22.2(k) of the Environmental Protection Act (Act) (415 ILCS 5/22.2(k) (2004)).

This opinion and order first reviews the procedural history of this case. It then summarizes the People's complaint and their motion for summary judgment. Next, the opinion and order provides the Board's discussion of and conclusions on that motion before issuing its order.

PROCEDURAL HISTORY

On January 25, 2005, the People filed a one-count complaint (Comp.) seeking cost recovery from Bath. In an order dated February 3, 2005, the Board accepted the complaint for hearing. Bath filed no answer to the complaint. On November 1, 2005, the People filed a motion for summary judgment (Mot.). Bath filed no response to the motion.

THE PEOPLE'S COMPLAINT

The People allege that Bath is an Illinois corporation in good standing authorized to conduct business in the State. Comp. at 1. The People further allege that, at all times relevant to the complaint, Bath has operated a landfill located along the Sangamon River southwest of Decatur, Macon County (landfill). *Id*. The landfill began operation in 1918. Mot., Exh. D at 3. The landfill operated under a 1974 solid waste disposal permit (Mot., Exh. C-1) until it ceased accepting waste in 1991 under the terms of a consent order with the Illinois Attorney General. Mot., Exh. D. at 3. The People state that a variety of wastes, including hazardous substances, were disposed of in that landfill in the course of its operation. *Id*., citing 415 ILCS 5/3.215 (2004).

The People further allege that,

> for a period of time prior to 2002, contaminants, including hazardous substances, present in the waste disposed of at the Landfill have leached, escaped, and leaked from the Landfill into adjacent surface waters and ground water underneath and around the Landfill and onto and into the land surface and subsurface strata around and underneath the Landfill. Comp. at 2.

The People state that, on May 13, 2002, the Illinois Environmental Protection Agency (Agency) sent Bath a notice "requesting that it perform identified remedial actions" at the landfill. Comp. at 2, citing 415 ILCS 5/4(q) (2004). The People further state that "[r]espondent declined." *Id*. The People allege that "[t]he State has incurred and will continue to incur response costs, as defined by the Act, associated with the releases and threatened releases of hazardous substances" at the landfill. *Id*. Consequently, the People argue that Bath is a responsible party under the Act and is thus "liable for past, present, and future response costs, as defined by the Act, incurred by the State resulting from or arising out of the releases and threatened releases at the landfill." *Id*., citing 415 ILCS 5/22.2(f)(1-2) (2004).

STATUTORY PROVISIONS

Section 3.215 of the Act defines "hazardous substance" as:

> A) any substance designated pursuant to Section 311(b)(2)(A) of the Federal Water Pollution Control Act (P.L. 92-500), as amended, (B) any element, compound, mixture, solution, or substance designated pursuant to Section 102 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510), as amended, (C) any hazardous waste, (D) any toxic pollutant listed under Section 307(a) of the Federal Water Pollution Control Act (P.L. 92-500), as amended, (E) any hazardous air pollutant listed under Section 112 of the Clean Air Act (P.L. 95-95), as amended, (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator of the U.S. Environmental Protection Agency has taken action pursuant to Section 7 of the Toxic Substances Control Act (P.L. 94-469), as amended. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include

natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel or mixtures of natural gas and such synthetic gas.

Section 3.395 of the Act defines "release" as:

any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, but excludes (a) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons; (b) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine; (c) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under Section 170 of such Act; and (d) the normal application of fertilizer. 415 ILCS 5/3.395 (2004).

Section 4(q) of the Act provides:

[t]he Agency shall have the authority to provide notice to any person who may be liable pursuant to Section 22.2(f) of this Act for a release or a substantial threat of a release of a hazardous substance or pesticide. Such notice shall include the identified response action and an opportunity for such person to perform the response action. 415 ILCS 5/4(q) (2004).

Section 22.2(f) of the Act provides:

(f) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (j) of this Section, the following persons shall be liable for all costs of removal or remedial action incurred by the State of Illinois or any unit of local government as a result of a release or substantial threat of a release of a hazardous substance or pesticide:

(1) the owner and operator of a facility or vessel from which there is a release or substantial threat of release of a hazardous substance or pesticide;

(2) any person who at the time of disposal, transport, storage or treatment of a hazardous substance or pesticide owned or operated the facility or vessel used for such disposal, transport, treatment or storage from which there was a release or substantial threat of a release of a hazardous substance or pesticide;

(3) any person who by contract, agreement, or otherwise has arranged with another party or entity for transport, storage, disposal or treatment of hazardous substances or pesticides owned, controlled

> or possessed by such person at a facility owned or operated by another party or entity from which facility there is a release or substantial threat of a release of such hazardous substances or pesticides. 415 ILCS 5/22.2(f) (2004).

Section 22.2(k) of the Act provides:

> If any person who is liable for a release or substantial threat of release of a hazardous substance or pesticide fails without sufficient cause to provide removal or remedial action upon or in accordance with a notice and request by the Agency or upon or in accordance with any order of the Board or any court, such person may be liable to the State for punitive damages in an amount at least equal to, and not more than 3 times, the amount of any costs incurred by the State of Illinois as a result of such failure to take such removal or remedial action. The punitive damages imposed by the Board shall be in addition to any costs recovered from such person pursuant to this Section and in addition to any other penalty or relief provided by this Act or any other law. Any monies received by the State pursuant to this subsection (k) shall be deposited in the Hazardous Waste Fund. 415 ILCS 5/22.2(k) (2004).

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

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

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358 (1998), citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

PEOPLE'S MOTION FOR SUMMARY JUDGMENT

Site Operations

The landfill, wedge-shaped and approximately 12 acres in size, is located on the southwest side of Decatur. Mot., Exh. D at 1. "The landfill is bounded to the north and northwest by the Sangamon River, to the south and southwest by woods and commercial property, and to the east by the Illinois Central Railroad tracks." *Id.* The Sangamon River has exposed landfill waste, and "[l]andfill leachate seeps have been observed entering the river." *Id.*

Also, waste items such as concrete, wood, and appliances protrude from all the side slopes of the landfill. *Id*. at 2. "The landfill does not have a liner or leachate collection system," and "[n]o closure plan has ever been approved for the site." *Id*. at 3.

The People's motion for summary judgment first states that Bath "is an Illinois corporation in good standing and authorized to do business in the State of Illinois." Mot. at 1, Comp. at 1. In support of this statement, the People submitted the Illinois Secretary of State's "Corporation File Data Report" indicating that status and reflecting an incorporation date of April 13, 1959. Mot., Exh. A.

The People next state that Bath "is the owner and operator" of a Macon County landfill. Mot. at 1. In support of this statement, the People submitted Agency correspondence dated November 14, 1974 and granting Bath a permit to operate a solid waste disposal site. Mot., Exh. C-1 (providing legal description of site in granting operating permit). The People also submitted a communication from the Agency dated December 9, 1988 and denying Bath's application for a closure and post-closure permit. Mot., Exh. C-2 (referring to #1158020001 in denying permit).

Hazardous Wastes and Constituents Released

The People further state that "[d]uring Respondent's operation of the landfill, Respondent disposed of a variety of wastes at the landfill." Mot. at 1, Comp. at 1. Specifically, "the landfill accepted municipal solid waste and construction and demolition debris." Mot., Exh. D at 3 (Site History). The People report that the landfill operated until 1991, when it stopped accepting waste under a Consent Order from the Illinois Attorney General's Office. *Id*.

The People claim that these wastes and other materials contained Anthracene, Benzo(a)anthracene, Benzo(b)fluoranthene, Benzo(a)pyrene, Chrysene, Dibenzo(a)anthracene, Fluoranthene, Polychlorinated biphenyls (PCBs), Ideno(1,2,3-c, d)pyrene, lead, cadmium, and mercury. Mot. at 1-2; citing Mot., Exh. D at 13-15. The People further claim that the Environmental Protection Act identifies these as "hazardous substances." Mot. at 1-2; Comp. at 1; *see* 415 ILCS 5/ 3.215 (2004); *see, e.g*., 40 C.F.R. 261.33 (designating specified materials as hazardous waste under RCRA if discarded), 40 C.F.R. 302.4 (listing hazardous substances under § 102(a) of CERCLA). The People further claim that,

> [f]or a period of time prior to 2002, contaminants, including Anthracene, Benzo(a)anthracene, Benzo(b)fluoranthene, Benzo(a)pyrene, Chrysene, Di Benzo(a)anthracene, Fluoranthene, PCBs, Ideno(1, 2, 3-c, d)pyrene, Pyrene, Lead, Cadmium, and Mercury, present in the waste disposed of at the landfill have leached, escaped, and leaked from the landfill into the adjacent reach of the Sangamon River onto and into the land surface and subsurface strata around and underneath the landfill. Mot. at 2, citing Mot., Exh. D at 13-15.

In support of this claim, the People refer to the report containing findings of an investigation of the landfill site conducted by Earth Tech, Inc. and dated December 2001. *See* Mot., Exh. D.

Specifically, "four surface soil samples were collected immediately upslope of the riverbank to determine if the soil has been impacted by contaminants leaching from the landfill." Mot., Exh. D at 13. "The samples were collected from areas of observed soil staining associated with potential leachate seeps." *Id*.; *see* Mot., Exh. D, Figure 2 (sample locations). One surface soil sample exceeded Tier I sediment clean-up objectives for residential properties for the organics Anthracene, Benzo(a)anthracene, Benzo(b)fluoranthene, Benzo(a)pyrene, Chrysene, Dibenzo(a,h)anthracene, Fluoranthene, Polychlorinated biphenyls (PCBs), Ideno(1,2,3-c,d)pyrene, and Pyrene. Mot., Exh. D. at 14; Mot., Exh. D, Table 6. At least one of four surface soil samples exceeded Tier I residential criteria for the soil component to Class I groundwater for the following inorganics: antimony, barium, boron, cadmium, chromium, cobalt, copper, iron, lead, mercury, nickel, silver, and zinc. Mot., Exh. D at 13-14; Mot., Exh. D, Table 6; *see* 35 Ill. Adm. Code 742.APPENDIX B, TABLE A (Soil Remediation Objectives for Residential Properties).

Also, "[t]hree river sediment samples were collected just below the waterline to assess any impact from contaminants leaching from the landfill." Mot., Exh. D at 14; *see* Mot., Exh. D, Figure 2 (sample locations). "These locations were chosen to determine if runoff from the observed leachate seeps has impacted the quality of the river sediment." Mot., Exh. D at 14. At least one sediment soil sample exceeded Tier I sediment clean-up objectives for residential properties for the organics Benzo(a)anthracene, Benzo(b)fluoranthene, Benzo(a)pyrene, Chrysene, Ideno(1,2,3-c,d)pyrene, and Pyrene. Mot., Exh. D. at 14-15; Mot., Exh. D, Table 6.

In addition, three surface water/groundwater interface (SGI) samples "were collected along the riverbank to determine the quality of groundwater discharging to and mixing with the surface water in the Sangamon River. The sample locations were adjacent to the well point locations to correlate groundwater conditions with SGI conditions." Mot., Exh. D at 16; *see* Mot., Exh. D, Figure 2 (sample locations). All three SGI samples exceeded Tier I criteria for Class I groundwater for residential properties for lead and manganese. Mot., Exh. D, Table 8. At least one SGI sample exceeded Tier I criteria for Class I groundwater for residential properties for boron, cadmium, copper, iron, nickel, and zinc. *Id*.

Also, the site investigation included three well points "installed immediately upslope of where the limit of the waste intersects the riverbank. They were installed to assess the quality of groundwater migrating from the landfill to the river." Mot., Exh. D at 16; *see* Mot., Exh. D, Figure 2 (well point locations); Mot. Exh. D, Appendix F (including well point construction diagrams). Groundwater samples from all three well points exceeded Tier I criteria for Class I groundwater for residential properties for lead and manganese. Mot., Exh. D, Table 8. The groundwater sample from the second well point also exceeded those standards for boron, iron, and vanadium. *Id*.

2002 Notice to Remediate Under Section 4(q) of the Act

The People state that "[o]n May 13, 2002, Illinois EPA sent Respondent a notice pursuant to Section 4(q) of the Act, 415 ILCS 5/4(q) (2002), requesting that it perform identified remedial actions at the Facility. Mot. at 2; Comp. at 2; *see* 415 ILCS 5/4(q) (2002); Mot., Exh. E at 4-6 ("Identified Response Action"). In its conclusions of law contained in the notice, the Agency

stated that Bath "may be liable for some or all costs of removal or remedial action incurred by the State of Illinois" with regard to a release or substantial threat of a release of a hazardous substance or pesticide. Mot. Exh. E at 4, citing 415 ILCS 5/22.2(f) and 58.9(a).

That notice required a response within 30 days and stated that, "[i]f any party fails to so respond, the Illinois EPA will assume that such Party refuses to undertake these identified response actions and the Illinois EPA will proceed accordingly." Mot., Exh. E at 6. The notice further stated that any response in which Bath did not commit to undertake the response action would be considered a refusal to comply with the notice. *See id*. In the event that the State incurred costs for the response action, the notice stated that the Agency must submit a request for reimbursement to Bath and that the Agency reserved the right to bring an action to recover those costs. Mot., Exh. E at 10. Finally, the notice stated that,

> if any Party fails without sufficient cause to perform the identified response action in accordance with the terms and conditions of this Notice, the Party may be liable to the State of Illinois for punitive damages in an amount that its equal to three(3) times the amount of costs incurred by the State of Illinois as the result of that Party's failure to perform the identified response action. Mot., Exh. E at 12, citing 415 ILCS 5/22.2(k)(2004).

In a letter dated June 10, 2002, John P. Richardson of the Agency requested that Bath authorize access to Bath's site. Mot., Exh. F at 2. Referring to the notice the Agency had previously sent to Bath, Mr. Richardson stated that the Agency would conduct a response action at the Bath landfill if Bath elected not to perform the work described in the notice. *Id*.; *see* Mot., Exh. E at 4-6. In a response dated June 17, 2002, Bath's attorney stated that Bath had agreed to allow the Agency access to the Bath landfill but that "my client will not consent to a clean-up it is not believed is necessary." Mot., Exh. F at 2. On the basis of this correspondence, the People conclude that "Respondent did not respond to the request." Mot. at 2, citing Mot., Exh. F; Comp. at 2.

Agency Remediation Activities and Costs

The People claim that "[t]he State has incurred and will continue to incur response costs associated with the releases and threatened releases of hazardous substances at the Facility." Mot. at 2, citing Mot., Exh. G. On the Agency's behalf beginning in August 2002, Earth Tech performed landfill cover improvement construction activities performed at the site. Mot., Exh. G.

> "The cover improvements consisted of six major tasks: [e]xcavation and regrading activites; [i]nstallation of a landfill gas venting system; [p]lacement of final cover materials consisting of low permeability soils and protective/vegetative soil; [c]onstruction of riverbank stablization measures; [c]onstruction of ditches, berms, and culverts; [and] [s]eeding the regraded surface of the landfill and protecting it with erosion controls." Mot., Exh. G at 3.

Among other tasks, construction activities included excavation of 69,983 cubic yards of waste, approximately 45,000 cubic yards of which had been located outside the east and west boundaries of the property. Mot., Exh. G at 6. The project placed 63,622 cubic yards of low-permeability layer material to a total thickness of 24 inches. Mot., Exh. G at 7. Atop that clay material, the project placed 35,625 cubic yards of topsoil to a minimum thickness of 18 inches. Mot., Exh. G at 8. Following these steps, "[a] surface water management system was constructed to control drainage, minimize the potential for erosion of the cover, and minimize long-term maintenance." Mot., Exh. G at 9. After describing its construction quality assurance activities, Earth Tech stated that "the final cover improvement work was constructed in conformance with the project documents, as modified and approved and in conformance with generally accepted construction practices." Mot., Exh. G at 18; Mot., Exh. G, Appendix A-1 (construction quality assurance officer's affidavit).

The People assert that, through June 30, 2005, the costs of remedial action at the Bath landfill site totaled $2,838,368.53. Mot. at 2, citing Mot., Exh. H (affidavit of Agency's Manager of Financial Administration in the Bureau of Land). The Agency itemizes these costs as $2,665,636.06 in contractual professional services; $28,458.80 in contractual laboratory services; $1,814,38 in other contractual expenses; $142,429.77 in personal services, fringe benefits, indirect, and allocated costs; and $29.52 in travel and automotive expenses. Mot., Exh. H at 1.

The People conclude by arguing that there remain no genuine issues of material fact with regard to Bath's liability for the Agency's costs. Mot. at 2-3. Specifically, the People argue that there is no genuine issue of material fact that the "Anthracene, Benzo(a)anthracene, Benzo(b)fluoranthene, Benzo(a)pyrene, Chrysene, Di Benzo(a)anthracene, Fluoranthene, PCBs, Ideno(1,2,3-c, d)pyrene, Lead, Cadmium, and Mercury are hazardous substances as defined by Section 3.215 of the Act." Mot. at 3, citing 415 ILCS 5/3.215 (2004). The People further argue that the leaching, seeping, and discharging revealed in Earth Tech's site investigation report constitute the release or threatened release of hazardous substances as defined by Section 3.395 of the Act. Mot. at 3, citing 415 ILCS 5/3.395 (2004). The People also claim that, as the owner and operator of the landfill, Bath is a responsible party under the Act and is thus liable for the State's response costs resulting from releases and threatened releases at the Landfill. Mot. at 3, citing 415 ILCS 5/22.2(f) (2004).

Treble Damage Request

The People further argue that there are also no issues of material fact necessary to establish that Bath is also liable for treble damages because it failed to comply with the Agency's May 13, 2002 notice and failed also to provide sufficient cause for its refusal to comply with the terms of that notice. Mot. at 3, citing 415 ILCS 5/4(q), 22.2(k) (2004).

Costs Request

Both in their complaint and motion for summary judgment, the People have requested that the Board award the People their costs. Comp. at 3, Mot. at 4.

DISCUSSION

Response Action Costs Award

Under Section 103.204(d) of the Board's procedural rules, Bath had 60 days after receipt of the People's complaint to file an answer. 35 Ill. Adm. Code 103.204(d). "All material allegations of the complaint will be taken as admitted if no answer is filed." *Id*. In addition, Section 101.500(d) of the Board's procedural rules provides that "[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response if filed, the party will be deemed to have waived objection to the granting of the motion." 35 Ill. Adm. Code 101.500(d). While Bath's failure to answer the complaint has caused the material allegations of the complaint to be taken as admitted, and Bath's failure to respond to the People's motion for summary judgment has waived any objection to the Board granting that motion, the Board will briefly review the motion and the evidence and arguments offered in its support.

The Board finds that the record demonstrates that Bath is the owner and operator of the landfill at issue in this proceeding. The landfill accepted waste under a 1974 permit until it ceased accepting waste in 1991. Mot., Exhs. C-1, C-2, D, E. As the owner and operator of the landfill, Bath may be liable for costs of remedial action performed by the State of Illinois. *See* 415 ILCS 5.22.2(f) (2004).

The Board further finds that that the record demonstrates that, at some time prior to 2002, the substances Anthracene, Benzo(a)anthracene, Benzo(b)fluoranthene, Benzo(a)pyrene, Chrysene, Dibenzo(a,h)anthracene, Fluoranthene, Polychlorinated biphenyls (PCBs), Ideno(1,2,3-c,d)pyrene, Pyrene, Lead, Cadmium, and Mercury have leached, seeped, or discharged from the Bath landfill. Mot., Exh. D at 13-17. In addition, the Board finds that the record shows that the leaching, seeping, and discharging of these substances constitute a release or threatened release as those terms are defined by the Act. *See* 415 ILCS 5/3.395 (2004). The Board further finds that the record shows that these substances include hazardous substances, as that term is defined by the Act. *See* 415 ILCS 5/3.215 (2004).

The Board also finds that the record shows that the Agency sent Bath a notice authorized by the Act requesting that Bath perform specified response action at the Bath landfill. Mot., Exh. E; *see* 415 ILCS 5/4(q) (2004). The Board notes that that notice states "[t]he Illinois EPA reserves the right to bring an action against any of the Parties pursuant to the Act for recovery of all response and oversight costs incurred by the State of Illinois relative to this notice . . . ." Mot., Exh. E at 10.

The Board finds that the record shows that the State beginning in August 2002 has incurred response cost associated with the release or threatened release of hazardous substances from the Bath landfill. Mot., Exh. G. The Board finds that the record shows that the amount of those response costs borne by the State was $2,838,368.53. Mot., Exh. H.

The Board finds that there is no genuine issue of material fact with regard to allegations in the complaint and that the People are entitled to judgment as a matter of law. The Board finds that Bath is liable to the Agency for reimbursement of the cost of the response action undertaken

at the Bath landfill in the amount of $2,838,368.53. Consequently, the Board below orders Bath to reimburse the Agency for its response action costs in the amount of $2,838,368.53.

Punitive Damages Award

Both in their complaint and their motion for summary judgment, the People have requested that the Board find Bath liable for punitive damages equal to three times the incurred response costs. Comp. at 3, Mot. at 4. Section 22.2(k) of the Act provides that if Bath, as a party liable for a release or threatened release of a hazardous substance, fails without sufficient cause to conduct a response action in response to an Agency request, it may be liable "to the State for punitive damages in an amount at least equal to, and not more than 3 times, the amount of any costs incurred by the State of Illinois as a result of failure to take such removal or remedial action." 415 ILCS 5/22.2(k) (2004).

As the Board found above, the record shows that the Agency on May 17, 2002, sent Bath a notice authorized by the Act requesting that it perform specified response action at the Bath landfill. Mot., Exh. E; *see* 415 ILCS 5/4(q) (2004). The Board notes that this notice referred to an environmental assessment demonstrating the presence of hazardous substances at the Bath site. Mot., Exh. E at 2-3. The Board further notes that the notice specified actions required to address the presence of hazardous substances there. Mot., Exh. E at 3-5. Finally, the Board also notes that the notice stated that Bath may be liable for punitive damages in an amount three times the State's costs if it failed without sufficient cause to perform the identified response action. Mot., Exh. E at 12 ("FAILURE TO COMPLY WITH THIS NOTICE").

The record shows that, after sending Bath notice under Section 4(q) of the Act, the Agency in a letter dated June 10, 2002 sought authorization for access to the Bath site. Mot., Exh. F at 3. In addition, that letter stated that the Agency would conduct a response action if Bath opted not to perform work identified in the Section 4(q) notice. *Id*. Acknowledging receipt of the Agency's letter, Bath's attorney stated "my client will not consent to a clean-up it is not believed is necessary." *Id*. at 2.

The Board cannot give weight to this bald assertion from Bath's counsel that clean-up was unnecessary. The Agency's Section 4(q) notice described erosion that had exposed waste including steel drums, tires, and plastic. Mot., Exh. E at 3. The notice also stated that "[w]aste items, including appliances, glass, metal, and concrete, are present in the river." *Id*. The Board can hardly imagine clearer indications than these that a clean-up of the Bath site was necessary. In addition, the notice described downgradient groundwater samples that exceeded numerous groundwater quality objectives and a riverbank soil sample that showed "elevated levels of PCB, lead, and asbestos." *Id*. Ultimately, the notice referred to the presence at the site of compounds and elements considered as hazardous substances under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *Id*. at 3-4; *see* 415 ILCS 5/3.215 (2004) (defining "hazardous substance" in part as those substances so designated under CERCLA).

In determining whether to exercise its discretion to impose punitive damages on Bath, the Board must determine whether Bath had "sufficient cause" for failing to conduct a response

action according to the Agency's section 4(q) notice. *See* 415 ILCS 5/22.2(k) (2004). In City of Quincy v. Carlson, 517 N.E.2d 33 (4th Dist. 1987), the city challenged the Section 4(q) notice provision and the risk of punitive damages as a violation of its right to due process. *Id*. at 35. Ultimately, the court upheld the provision, stating that its "sufficient cause" language allows parties an opportunity to mount a good-faith defense to the imposition of punitive damages. *Id*. The provision "may be constitutionally interpreted to mean that treble damages may not be assessed if the party opposing such damages had an objectively reasonable basis for believing that the EPA's order was either invalid or inapplicable to it." *Id*., citing Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 391 (8th Cir. 1987) (upholding federal equivalent).

The record reveals no objectively reasonable basis on which Bath could have believed that the Agency's Section 4(q) notice was either invalid or inapplicable. Bath has failed to answer both the People's complaint and the People's motion for summary judgment. The record contains no documentary or other support for Bath's assertion, in response to the Section 4(q) notice, that clean-up was not "necessary." In fact, the record, demonstrating numerous exceedences of Tier I remediation objectives and Class I groundwater standards and exposed landfill waste, clearly establishes that the Bath Landfill constituted a threat of harm to human health and the environment. Accordingly, the Board concludes that Bath did not have "sufficient cause" under the Act for failing to provide remedial action consistent with the Agency's notice. *See* 415 ILCS 5/22.2(k) (2004). The Board thus finds the record in this case justifies assessing "punitive damages in an mount at least equal to, and not more than 3 times, the amount of any costs incurred by the State of Illinois as a result of such failure to take such removal or remedial action" (*id*.). The People have requested punitive damages in an amount equal to three times the State's response costs, and the only evidence in the record highlights Bath's indifference to the effects of its landfill operations and to the resulting pollution. The Board below orders Bath to pay $8,515,105.59 in punitive damages.

Costs Request

Although the People in their complaint and motion for summary judgment have requested that the Board award the People their costs (Comp. at 3, Mot. at 4), the Board finds that the record does not now show either the amount of litigation costs borne by the People or the basis on which the Board may award them. Consequently, the Board denies the People's request for costs for lack of information.

CONCLUSION

The Board grants the People's motion for summary judgment against Bath. Below, the Board orders Bath to reimburse the Agency for response action costs in the amount of $2,838,368.53 and orders Bath to pay $8,515,105.59 in punitive damages.

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

ORDER

1. The Board hereby grants the People's motion for summary judgment against Bath.

2. The Board orders Bath to reimburse the Illinois Environmental Protection Agency in the amount of $2,838,368.53 for costs incurred in the cleanup of the Bath landfill located in Decatur, Macon County.

3. The Board orders Bath to pay punitive damages in the amount of $8,515,105.59 for failing without sufficient cause to conduct a response action according to a Section 4(q) notice from the Agency.

4. Payment must be made in the form of a certified check or money order or electronic funds transfer, payable to the Hazardous Waste Fund. The case number, name, and Bath's social security number or federal employer number should also be included on the check or money order. If submitting an electronic funds transfer, the electronic funds transfer must be made in accordance to the specific instructions provided to Bath.

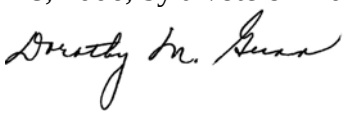
5. The check or money order shall be sent to:

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

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2004); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 18, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board