ILLINOIS POLLUTION CONTROL BOARD
February 16, 2006

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 03-191
	)	(Enforcement – Land)
COMMUNITY LANDFILL COMPANY, INC., an Illinois corporation, and the CITY OF MORRIS, an Illinois municipal corporation,	)	
	)	
Respondents.	)	

INTERIM OPINION AND ORDER OF THE BOARD (by N.J. Melas):

On April 17, 2003, the Office of the Attorney General, on behalf of the People of the State of Illinois (AGO), filed a one-count complaint against Community Landfill Company, Inc. and the City of Morris (respondents) alleging failure to provide adequate financial assurance for closure and post-closure operations. Community Landfill Company, Inc. (CLC) is the operator, and the City of Morris (Morris) the owner, of the Morris Community Landfill, a special waste and municipal solid waste landfill located at 1501 Ashley Road, Morris, Grundy County.

This order addresses the parties' counter-motions for summary judgment. The primary issue is whether both respondents failed to provide adequate financial assurance for waste disposal operations in violation of the Environmental Protection Act (Act) (415 ILCS 5/1 *et al.* (2004)) and Board regulations. This order also addresses CLC's motion to strike parts of the AGO's motion for summary judgment that seeks the Board to impose an interim and immediate remedy.

For the reasons set forth below, the Board grants CLC's motion to strike the requests for an interim remedy from the AGO's motion for summary judgment and strikes those parts. The Board then grants the AGO's motion for summary judgment and denies Morris' counter-motion. Today the Board orders the hearing officer to proceed expeditiously to hearing on the issue of remedy.

PROCEDURAL BACKGROUND

The Board accepted the complaint for hearing on May 1, 2003. On June 13, 2003, the City of Morris filed an "Answer and Affirmative Defenses" (Morris Ans.). The filing, however, contained no affirmative defenses.

On June 16, 2003, CLC filed an answer along with four affirmative defenses (CLC Ans.). On July 16, 2003, the AGO filed a reply and a motion to strike the affirmative defenses alleged

by CLC (Mot. to Strike). On August 1, 2003, CLC responded to the AGO's motion to strike (Resp.).

On October 16, 2003, the Board granted the AGO's motion to strike in part and denied the motion in part. The Board granted the AGO's motion to strike the alleged affirmative defense of estoppel. The Board also granted the AGO's motion to strike CLC's second, third and fourth alleged affirmative defenses. The Board denied the AGO's motion to strike *laches*.

The Environmental Protection Agency (Agency) has denied a supplemental permit application filed by CLC in a prior permit appeal before the Board due to inadequate financial assurance. On appeal by CLC and Morris, the Board upheld the denial of the permit applications due to the respondents' failure to provide adequate, compliant financial assurance. *See* CLC and Morris v. IEPA, PCB 01-170, slip op. at 22 (Dec. 6, 2001). In Community Landfill, PCB 01-170, the Board found that the Frontier Bonds did not meet the requirements of 35 Ill. Adm. Code 811.712(b). The Board's finding was confirmed on appeal. CLC v. PCB, 331 Ill. App. 3d 1056; 772 N.E. 2d 231 (May 15, 2002).

On July 21, 2005, the AGO moved the Board to grant summary judgment in its favor. On October 3, 2005, CLC responded and moved to strike portions of the AGO's motion for summary judgment. On October 4, 2005, Morris responded to the AGO's motion and filed a counter-motion for summary judgment. On October 18, 2005, the AGO made several filings, including a response to CLC's motion to strike and a response to the counter-motion for summary judgment. On that same day, the AGO moved the Board for leave to file a reply in support of the AGO's motion for summary judgment *instanter*. The AGO claimed that CLC misrepresented the issue of relief and stated that the misrepresentation could result in material prejudice if the AGO was not allowed to reply. The Board grants the motion and accepts the AGO's reply.

FACTUAL BACKGROUND

The Site

The Morris Community Landfill is approximately 119 acres in area, and is divided into two parcels, designated parcel "A," consisting of approximately 55 acres, and parcel "B," consisting of approximately 64 acres. Comp. at 2. CLC operates the Morris Community Landfill and manages the day-to-day operations of both parcels at that site. The respondents have arranged for and supervised the deposit of waste, including municipal solid waste, garbage, and special waste, into waste cells at the Morris Community Landfill since at least June 1, 2000 on parcels "A" and "B" of the landfill. Comp. at 2.

The Agency issued Significant Modification (SigMod) Permit Numbers 2000-155-LFM, covering Parcel A, and 2000-156-LFM, covering Parcel B, on August 4, 2000. Comp. at 3. On June 29, 2001, the Agency issued Permit Modification Number 2 for parcels A and B. On January 8, 2002, the Agency issued Permit Modification Number 3 for Parcel A. *Id*. The SigMod permits were issued to Morris, as owner, and CLC as operator. Pursuant to these permits, the respondents were to provide a total of $17,427,366 in financial assurance, beginning

in 2000. *See* Mot. Exh. A, p. 45, par. 6; Mot. Exh. B, p. 33, par. 6; CLC and Morris v . IEPA, PCB 01-48, 49 (cons.), slip op. at 29 (Apr. 5, 2001).

The respondents provided the Agency financial assurance of closure and post closure costs by way of three separate performance bonds underwritten by The Frontier Insurance Company. Comp. at 3; Mot., Exh. C. On June 1, 2000, the United States Treasury Department removed Frontier Insurance Company from the list of acceptable surety companies listed in the United States Department of Treasury publication "Circular 570." Comp. at 3.

REGULATORY FRAMEWORK

A short summary of the relevant statutes and rules follows. Section 21(d)(2) of the Act provides that "[n]o person shall . . . Conduct any waste-storage, waste-treatment, or waste-disposal operation . . . in violation of any regulations or standards adopted by the Board under this Act." 415 ILCS 5/21(d)(2) (2004). Section 811.700(f) of the Board's financial assurance regulations provides:

> On or after April 9, 1997, no person other than the State of Illinois, its agencies and institutions, shall conduct any disposal operation at an MSLF unit that requires a permit under subsection (d) of Section 21.1 of the Act, unless that person complies with the financial assurance requirements of this part." 35 Ill. Adm. Code 811.700(f).

Under Section 811.712(b), the surety company issuing the bond must be licensed by the Department of Insurance, pursuant to the Illinois Insurance Code, or at least licensed by the insurance department of one or more states and approved by the U.S. Department of the Treasury as an acceptable surety. 35 Ill. Adm. Code 811.712(b). Section 811.712 also provides that the U.S. Department of the Treasury lists acceptable sureties in its "Circular 570." *Id*.

SUMMARY JUDGMENT STANDARD

Section 101.516 of the Board's procedural rules regarding motions for summary judgment provides:

> If the record, including pleadings, depositions and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. 35 Ill. Adm. Code 101.516; *see also* 415 ILCS 5/26 (2004).

Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Putrill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). "Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless 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).

THE AGO'S MOTION FOR SUMMARY JUDGMENT

The AGO urges the Board to grant summary judgment in their favor and find the respondents in violation of the Act and the Board's financial assurance regulations. Further the AGO seeks an order requiring the respondents to cease and desist from further operations at the landfill and comply with the closure and post-closure financial assurance regulations, and finally to immediately set a date for hearing on the issue of civil penalty.

CLC, on the other hand, argues that genuine issues of material fact exist that preclude a finding of summary judgment at this time. CLC contends that while the Agency states that CLC and Morris have not provided adequate financial assurance, the Agency has made a claim on the very same bonds it claims are inadequate for closure and post-closure care. CLC Resp. at 5. CLC maintains that the Agency's conduct regarding the surety bonds is conflicting and confusing.

Respondents Conducted a Waste Disposal Operation

The AGO states that the respondents submitted reports to the Agency, signed by the Mayor of Morris and the President of CLC, acknowledging the receipt of solid waste at the landfill. Mot. at 8; citing Mot. Exh. H. The AGO further states that waste disposal has continued at the landfill through at least May 18, 2005. According to the AGO, the signed reports and continuing disposal demonstrate that CLC is the operator of the landfill, and was a recipient of the SigMod permits. Mot. at 8; citing CLC Ans. par. 5.

The AGO claims that Morris applied for the SigMod permits and provided a Frontier Insurance Company surety bond in the sum of $10,081,630.00 as principal. Mot. at 9. The AGO argues that Morris has profited from waste disposal at the site and has taken an active role in the permitting process. Mot. at 9. For these reasons, argues the AGO, both respondents operate the landfill.

Offensive Collateral Estoppel: Performance Bonds Not Listed in the Circular 570

The AGO contends that Section 811.712 of the Board's regulations requires that performance bonds used as financial assurance be listed in the U.S. Department of the Treasury "Circular 570." Mot. at 10; citing 35 Ill. Adm. Code 811.712. The AGO states that the Board has already found the Frontier Bonds noncompliant in PCB 01-170. For this reason, the AGO argues that collateral estoppel applies because: (1) the issue decided in PCB 01-170 is identical with the one presented here because the bonds are the same; (2) there was a final judgment on the merits; and (3) CLC and Morris were also parties to the proceeding in PCB 01-170. Mot. at 10-11; citing People v. CLC *et al*, PCB 03-191, slip op. at 4-5 (Oct. 16, 2003).

The AGO states there is no unfairness to apply offensive collateral estoppel here and it is reasonable because there is no further need to litigate the status of the Frontier Bonds. Mot. at 11-12. Therefore, claims the AGO, the Board should find that the AGO is entitled to judgment on this issue as a matter of law. Mot at 12.

In response to the status of the Frontier bonds, CLC argues that the Agency's own conduct should preclude it from maintaining that financial assurance is not in place. CLC states that on January 27, 2004, almost a year after the present complaint was filed alleging that the respondents had failed to provide financial assurance, the Agency stated in a letter that Morris Community landfill "is providing financial assurance for closure and post-closure costs." CLC Resp. at 6; citing Resp. Exh. L. At the very least, argues CLC, the letter raises an issue of fact as to whether adequate financial assurance is in place.

Respondents' Failure to Provide Adequate Financial Assurance Continues

The AGO further states that the respondents have failed to substitute any adequate financial assurance even after the appellate court's 2002 ruling and the Illinois Supreme Court's denial of their petition for review. The AGO claims that by continuing to conduct waste operations at the facility after August 4, 2000, the respondents therefore violated Section 811.700(f). 35 Ill. Adm. Code 811.700(f). The AGO contends that the respondents have also failed to provide annual updates of closure or post-closure costs, or even to annually adjust estimates for inflation, in violation of Section 811.701(c) and their SigMod permits. Mot. at 13.

Because of the alleged violations of Board regulations, the AGO states the respondents also violated Section 21(d)(2) of the Act, the Act's prohibition against violating any of the Board's land pollution or refuse disposal regulations. 415 ILCS 5/21(d)(2) (2004).

Respondent's Violations Were Willful, Knowing, and Repeated

According to the AGO, the respondents' actions demonstrate a willful, knowing, and repeated violation of the Act and Board regulations. The AGO states that the respondents violated the financial assurance requirements of the Board's regulations and their permits since August 4, 2000. Since the Illinois Supreme Court's denial of their petition for leave to appeal on December 5, 2002, argues the AGO, the respondents have been aware that the Frontier Insurance Company bonds were noncompliant, yet continue to operate the landfill. Mot. at 15.

Requested Relief

The AGO specifically requests that a separate hearing be held on the issue of civil penalty. The AGO further requests that the Board order interim relief. The AGO asks the Board to order the respondents to cease and desist from transporting and depositing any additional waste at the landfill until they are fully compliant with their permits and the Board's financial assurance requirements. Further, the AGO asks that the Board find that the respondents' violations were willful, knowing, and repeated. The AGO asks the Board to order the respondents to immediately provide financial assurance, update the closure or post-closure costs in accordance with their permits, and initiate closure of parcels A and B of the landfill.

Regarding the requested relief, CLC states that if the Agency prevails, it will essentially be recovering "twice from the same allegation." CLC Resp. at 6.[1] CLC states that if the Agency prevails on its claim, the result is likely to be financial penalties to CLC and Morris. CLC continues that the Agency will also likely recover for the very closure and post-closure care for which it claims financial assurance has not been provided. According to CLC, this result would allow the Agency to recover twice from the same allegation and result in a contravention of its duty to use penalties only to enforce the Act, not to punish. CLC Resp. at 6.

The AGO moved to file a reply *instanter*, claiming that CLC confused the issue of relief, and stating that this misrepresentation could result in material prejudice. The AGO reiterates that the Agency has *not* recognized the Frontier Bonds as acceptable. Reply at 3.

The AGO states that there is nothing "unjust" about the AGO's requested relief. The AGO states that the Agency knew nothing about the "collateral" that CLC speaks of in the response, or that CLC and Frontier had agreed that CLC was not required to make payments on the bonds. The violation, claims the AGO, lies in that the respondents never substituted financial assurance once the Frontier Bonds were deemed noncompliant, and continued to operate the landfill. Reply at 4.

The AGO states that payment or performance by Frontier is not the relief the AGO seeks in the motion for summary judgment. The AGO contends that by continuing operations for three years after the Frontier Bonds were found noncompliant without providing alternate financial assurance, CLC has demonstrated a knowing, willful, and continued violation of the Act. Reply at 5.

For these reasons, the AGO argues it is entitled to an order requiring CLC and Morris to cease and desist from additional violations. CLC and Morris must also provide, states the AGO, new, compliant financial assurance.

MORRIS' COUNTER MOTION FOR SUMMARY JUDGMENT

Morris moves the Board for summary judgment in its favor because it did not "conduct" and disposal operation at the Morris Community Landfill, and because it has complied with Sections 811.706 and 811.717 of the Board's regulations. Morris Mot. at 2, 8; citing 35 Ill. Adm. Code 811.706, 811.717.

The AGO states that Morris' argument that it is not "'conducting a waste disposal operation' at the Morris Community Landfill . . . defies common sense, and is legally incorrect."

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[1] As discussed below, CLC references the Agency and the AGO interchangeably, at times, throughout pages 5-7 of CLC's response to the AGO's motion for summary judgment. For example, by stating "[i]f the Agency prevails on its claims . . ." the CLC is confusing the complainant in this proceeding. The Board nonetheless discusses CLC's arguments in the discussion section below.

Resp. at 1-2. The AGO contends that Morris has been permitted as either an "owner" or "operator" and actively participated in landfill decisions since 1974. AGO Resp. at 2. The AGO further states that Morris contracted with CLC on all permitting and financial assurance issues, and financially benefited from landfill operations. *Id*.

Morris Did Not "Conduct Any Waste Disposal Operation"

Morris' Arguments

Morris' first argument in support of a Board granting summary judgment in its favor is that Morris did not "conduct any waste disposal operation" at the Morris Community Landfill. Morris contends that Section 21(d)(2) of the Act provides "no person shall . . . conduct any waste-storage, waste-treatment, or a waste-disposal operation . . . in violation of any regulations or standards adopted by the Board under this Act." 415 ILCS 5/21(d)(2) (2004). Therefore, according to Morris, by the plain language of the Act, the requirements of that section only apply to a person that "conducts" a waste disposal operation. Morris Mot. at 2. Morris contends that the well-settled rules of statutory construction provide that words must be given their plain and ordinary meaning. *Id*.; citing King v. First Capital Financial Services Corp., 215 Ill. 2d 1, 828 N.E.2d 1155, 1169 (2005).

Morris cites to the Black's Law Dictionary's definition of "conduct:" "to manage; direct; lead; have direction; carry on; regulate; do business." Morris Mot. at 2; citing Black's Law Dictionary, 295 (6th Ed. 1990). Morris states that based on the definition of "conduct," there is no question that Morris does not conduct a waste disposal operation because it is not managing, leading directing, carrying on, regulating or doing business as a waste disposal facility. Rather, argues Morris, it merely owns and is the fee titleholder of the property that CLC uses for waste disposal activities. Morris Mot. at 2.

Morris states that CLC is listed as the operator on the Agency-issued permits. Morris Mot. at 3. Further, argues Morris, Mr. Brian White, an affiant the AGO relied upon in support of the motion for summary judgment, states that the owner of a facility does not necessarily have to post closure and post closure financial assurance. Morris Mot. at 3, Exh. B at 37-38.

Morris states that the Board has held that where a waste disposal operation is owned and operated by separate entities, it is the operators of such sites, not the owners, who are responsible for posting of the requisite financial assurance. Morris Mot. at 7; citing People v. Wayne Berger and Berger Waste Management, PCB 94-373 (May 6, 1999). Morris notes that in Berger, the Board held that the owner of the landfill did not become the operator when it received title to the property and, consequently, was not liable for the financial assurance violation alleged in Section 21(d) of the Act.

Morris argues that like the owner company in Berger, and in accordance with the plain language of Section 21(d)(2) of the Act and Section 811.700(f) of the Board's regulations, Morris does not conduct a waste disposal operation at the site. Morris Mot. at 8.

The AGO's Response

According to the AGO, the Board should find that, as a matter of law, holding an Illinois EPA permit for waste disposal at a landfill constitutes "conducting a waste disposal operation." AGO Resp. at 2. The AGO states that Morris obtained 35 Agency permits, including modifications, regarding waste disposal at the Morris Community Landfill. *Id*. at 3. The AGO asserts that Agency records show that five permits issued to Morris show Morris as the "owner and operator." AGO Resp. at 4.

Above and beyond being a named operator of the landfill, the AGO states that joint action with CLC demonstrates that Morris was an active participant at the landfill. For example, the AGO notes that Morris applied for and received joint waste disposal permits with CLC, provided noncompliant financial assurance in excess of ten million dollars, litigated the validity of the Frontier Bonds along with CLC, and failed to replace the Frontier bonds with substitute financial assurance. The AGO also states that Morris benefited financially from the landfill operations. AGO Resp. at 6. These activities, claims the AGO, demonstrate that Morris was an active participant in the landfill.

The AGO contends that Wayne Berger is clearly distinguishable from the facts at hand. In Wayne Berger, the Board found that the landowner did not "conduct a waste disposal operation." Wayne Berger is distinguishable, however, because the operator transferred the property to the landowner after being cited for operational and financial assurance violations, no permit was transferred with ownership of the property, and the landowner was never issued any Agency-issued permits. AGO Resp. at 7; citing Wayne Berger, slip op. at 8.

In contrast, states the AGO, Morris is a permitee of 35 permits for waste disposal activities, five of which name Morris as "owner and operator." AGO Resp. at 7. Further, the AGO asserts that Morris did not acquire the landfill after the violations occurred. Rather, Morris has owned the Morris Community Landfill since its original development. *Id*.

The AGO states the rules of statutory construction dictate that the Act and Board regulations should be construed to affect their purpose and to avoid absurd results. AGO Resp. at 8; citing Mulligan v. Joliet Regional Port District, 123 Ill. 2d 303.313 (1988); Lionel Trepanier *et al.*, v. Speedway Wrecking Co., PCB 97-50 (Jan. 6, 2000).

The AGO first contends that the term "conduct" should be broadly construed. The AGO states that Morris is not only the owner of the property, but also of the Morris Community Landfill itself. AGO Resp. at 10. The AGO states that although Morris leased the landfill to CLC, it never conveyed the title to CLC. Rather, Morris has continued to be bound under subsequent permits, provided surety bonds, and appealed permit denials. AGO Resp. at 10.

The AGO contends that pursuant to Morris' interpretation, Section 21(d) of the Act and regulations promulgated under it would only apply to the person physically disposing of the waste. Morris's approach, claims the AGO, would allow permitted owners to set up "operator" entities to avoid the consequences of violating the Board's landfill management regulations.

AGO's Resp. at 10. At the Morris Community Landfill neither the owner nor the operator of CLC has provided compliant financial assurance.

CLC's Response

CLC opposes Morris' counter-motion for summary judgment stating that it lacks legal foundation and must be denied. CLC states that Morris is not merely a fee title holder of the landfill, but rather an operator that is substantially involved in conducting the waste disposal operation. CLC Resp. at 1. CLC states that courts and the Board itself have broadly interpreted the definition of an operator depending "on the specific facts of the case as a whole." CLC Resp. at 2; citing People v. Bishop, 315 Ill. App. 3d 976, 978; 735 N.E.2d 754, 757 (5th Dist. 2000).

According to CLC, the Board's regulations are clear that "[t]he owner or operator shall provide financial assurance to the agency . . . ." CLC Resp. at 2; citing 35 Ill. Adm. Code 811.700(b). CLC's interpretation is that this Section does not limit the responsibility solely to either entity. Further, Morris has litigated financial assurance issues involving the Morris Community Landfill for years.

CLC also states that Morris' involvement in the permitting process and pledge of financial assurance qualify as substantial involvement in the operation of the landfill. CLC states that Morris has committed, in an addendum to a lease agreement, to treat leachate, condensate, and groundwater at the landfill. CLC Resp. at 3; Exh. 2; citing Bishop.

CLC contends that pursuant to Board rules, the operator, not the owner "is responsible for the operation of a leachate management system designed to handle all leachate as it drains from the collection system." CLC Resp. at 3; citing 35 Ill. Adm. Code 811.309(a). Therefore, by agreeing to treat leachate at the landfill, and providing financial assurance, Morris is an operator that conducts a waste treatment operation. CLC Resp. at 3. CLC states that at the very least, Morris' actions demonstrate a genuine issue of material fact making summary judgment inappropriate at this time. *Id*.

Morris' Reply

In its reply, Morris disputes the AGOs' arguments for several reasons. First, Morris states that the AGO's argument that Morris "conducts a waste disposal operation" simply because it was listed as an "owner and operator" on permits issued decades ago must fail. Morris contends that when it was issued permits in 1974 and supplemental permits in 1978, 1980, and 1989 that listed Morris as the "owner and operator," there was no obligation for a local unit of government to post any financial assurance. Even currently, Morris states that the financial assurance requirement under Section 807.601(a) does not apply to "any unit of local government. Morris Reply at 1; citing 35 Ill. Adm. Code 807.601(a).

Morris agrees that "whether one is an operator pursuant to the Act depends on the specific facts as a whole." Morris Reply at 2; citing Bishop, 315 Ill. App. 3d 976, 979, 735 N.E.2d 754, 757 (5th Dist. 2000). Morris states, however, that it has not conducted any disposal operation since 1982. Morris states no City of Morris employee has ever spread and compacted

waste, operated earth-moving equipment or conducted any other waste disposal operations at the landfill. Morris Reply at 3.

Agency employees, states Morris, concede that CLC is the entity that performs the day-to-day operations, not Morris. Morris contends that the record shows that Morris is not conducting a waste disposal operation, and thus, has no duty to post financial assurances for closure or post-closure care. Morris Reply at 5. Morris states that "merely contracting with an operator does not make the other contracting party the 'conductor' of a landfill operation." *Id*. at 6; citing Bishop, 735 N.E.2d 754, Termaat v. Anderson, *et al*., PCB 85-129 (Oct. 23, 1986), Berger, PCB 94-373. Likewise, Morris states, receiving financial benefit does not mean that Morris is conducting a waste disposal operation. Morris Reply at 7. Morris asserts that host fee agreements are common and that no local unit of government would ever vote in favor of siting a landfill if doing so would subject it to financial assurance requirements. *Id*. at 7-8. That argument, states Morris, is "disingenuous and ridiculous." *Id*. at 8.

Morris states that enforcing the Act and Board regulations to require owners *or* operators, but not both, to provide financial assurance does not produce absurd results. Morris Reply at 9. According to Morris, the law is clear that a unit of local government is exempt from the financial assurance requirements unless it conducted landfill operations after April 9, 1997. *Id*.; citing 35 Ill. Adm. Code 811.700(c), (f). According to Morris, the Board need only enforce the plain language of the statute and regulations to award summary judgment in favor of Morris. Morris Resp. at 10. Morris states that because it is excluded from posting financial assurance in this case, Morris has not committed any willful or repeated violations. For all of these reasons, Morris urges the Board to grant summary judgment in its favor. Morris Resp. at 11.

Morris Has Complied With All Financial Assurance Requirements

Morris' second argument in support of a finding of summary judgment in its favor is that Morris has complied with the financial assurance requirements of Sections 811.706 and 811.717 of the Board's procedural rules. 35 Ill. Adm. Code 811.706, 811.717.

Morris disputes the AGO's argument that Morris has failed to provide financial assurance in compliance with one of the ten mechanisms, a surety bond guaranteeing performance under subsection 811.706(a)(3), set forth in Section 811.706(a). Morris states that it "can and would provide financial assurance in compliance with the mechanism set forth in Section 811.717," which is the local government guarantee. Morris contends that because it could comply with Section 811.706 through the posting of local government guarantee to perform closure and post closure activities, the Board should find there is no genuine issue of material fact that Morris can and will comply with all rules and regulations and grant summary judgment in its favor.

The AGO claims that Morris' argument that it has offered, or could offer, the Agency financial assurance in the form of a local government guarantee is misleading and false. In fact, states the AGO, neither respondent has provided financial assurance in the form of any of the ten mechanisms in Section 811.706. It is not enough for Morris to say that it "can and would" provide the local government guarantee as the method of financial assurance. Morris simply has not met the requirements of Section 811.716 or 811.717. AGO Resp. at 15.

The AGO again state that Morris' failure to provide compliant financial assurance since August 8, 2000 to the present, especially subsequent to the Illinois Supreme Court's ruling that the Frontier Bonds were noncompliant on December 5, 2002, demonstrates that the alleged violations are knowing, willful, and repeated. AGO Resp. at 16.

CLC'S MOTION TO STRIKE PARTS OF THE AGO'S MOTION FOR SUMMARY JUDGMENT

CLC moves the Board to strike portions of the AGO's motion for summary judgment in which CLC claims the AGO alleged continuing violations and separate relief beyond that which is set forth in the initial complaint. Mot. to Strike at 1-2. CLC asks the Board to strike both allegations that disposal operations continued at the landfill (Mot. at 4, par. 7, 8, par. 17), and a request that the Board order CLC to cease and desist from transporting or depositing any additional material at the landfill (Mot. to Strike at 16, par. 38(3)).

In general, the AGO contends that CLC's motion to strike is untimely. The AGO argues that CLC was granted an extension of time to respond *only* to Morris' counter motion for summary judgment. The AGO contends, therefore, that CLC's motion to strike should be denied as untimely.

Allegations of Continuing Disposal Operations

CLC states that the Board's procedural rules require the AGO to move to amend the complaint and to provide just and reasonable cause for the amendments. Mot. to Strike at 2; citing People v. Petco Petroleum Corp., PCB 05-66, slip op. at 3 (May 19, 2005). Regarding the new request for relief, CLC contends that while the Board's procedural rules allow the moving party to "move the Board for summary judgment for all or any part of the relief sought," the relief the AGO seeks is newly pled. Mot. to Strike at 3; citing 35 Ill. Adm. Code 101.516(a).

The AGO responds that the motion for summary judgment does not seek to add any additional violations. For this reason, CLC's reliance on Petco Petroleum is not applicable. Resp. at 3; citing Petco Petroleum, PCB 05-66. The AGO states that also included in its motion is a request for specific interim relief. The AGO states that the Board's orders that accept matters for hearing demonstrate that the Board encourages such a request. Resp. at 3.

Request for Cease and Desist Order

Further, contends CLC, while the Board does have the power to issue a cease and desist order, it may only do so upon issuing a final order. 415 ILCS 5/33(a) and (b) (2004). CLC states that a cease and desist order is premature. CLC, therefore, asks the Board to strike the AGO's request for a cease and desist order.

The AGO states that nothing in the Act prevents the Board from issuing a cease and desist order after a finding of liability, but before issuing a final order. Resp. at 4. The AGO claims that the language of Section 33 of the Act stating ". . . the Board shall issue and enter

such final order, or make such final determination . . .” assumes that there will be cases where only certain issues are determined. Resp. at 5; citing 415 ILCS 5/33 (2004). The AGO cites Section 33(b) of the Act that states “such order may include a direction to cease and desist from violations of this Act . . . ,” which allows the Board to issue cease and desist orders dealing with those certain issues. *Id*.

As an example of where the Board has granted partial summary judgment prior to hearing on penalty, the AGO cites to People v. Michael Stringini, PCB 01-43 (Oct. 16, 2003). Resp. at 5-6; citing also Krautsack v. Patel *et al*., PCB 95-143 (Aug. 21, 1997) (granting partial summary judgment, ordering the respondents to cease and desist from further violations, and ordering a respondent to remediate the site, but deferring the Board’s final decision on civil penalty). Finally, the AGO states that the appellate courts have recognized that the Act has “conferred upon the . . . Board those powers that are reasonably necessary to accomplish the legislative purpose of the administrative agency . . . and necessarily the power to order compliance with the Act.” Resp. at 6; citing Discovery South Group Ltd. v. PCB, 275 Ill. App. 3d 547 (1st Dist. 1995).

The AGO states that the interim relief requested is the only way for respondents to come into compliance with the Act. Resp. at 6. In fact, the AGO contends that the Board should deny CLC’s motion to strike and order the respondents to come into compliance on an expedited basis. *Id*. at 7.

BOARD DISCUSSION

Board Analysis of CLC’s Motion to Strike

The Board grants CLC’s motion to strike both the AGO’s allegations of continuing disposal operations as well as the AGO’s request for an interim order requiring CLC to cease and desist from further violations of the Act. The Board disagrees with CLC’s argument that the AGO has alleged new violations. Rather, the Board finds that the AGO’s allegations that disposal operations have continued at the landfill are allegations of continuing violations, not newly pled violations.

The Board further finds it is premature to rule on the issues of penalty or attorney fees at this time. Under Section 33 of the Act, a Board order may include a direction to cease and desist from violations of the act or any rule adopted under this Act, but only after determining the reasonableness of the emissions. *See* 415 ILCS 5/33(a)-(c) (2004). As held in the past, the Board looks to the factors in Section 33(c) and Section 42(h) of the Act (415 ILCS 5/42 (2004)) in determining and assessing penalties and each of those factors require factual determinations. People v. CLC, PCB 97-193, *slip op.* at 10 (Apr. 5, 2001). The Board has previously found that “the factors are not appropriately discussed in an order on cross motions for summary judgment.” CLC, PCB 97-193, *slip op.* at 10 (Apr. 5, 2001); *see also* People v. J & F Hauling, Inc., PCB 02-201 (June 6, 2002). After today’s finding of violations, the Board will consider factors such as the duration of the violations, and whether they are continuing, in its remedy analysis.

The parties may address the economic benefits gained by respondent, the duration of the violations, as well as the remaining factors under Section 42(h) of the Act (415 ILCS 5/42 (2004)) at hearing and in final briefs on the issue of remedy. Further, whether a respondent's violations were willful, knowing, and repeated are considered in deciding whether to award a complainant attorney fees. For this reason, the Board grants CLC's motion and strikes references to the AGO's requests for relief from the summary judgment pleading.

Board Analysis of Cross Motions for Summary Judgment

The Board finds that there are no genuine issues of material fact regarding the alleged violations. Therefore summary judgment is appropriate and the Board grants summary judgment in favor of the complainant for the reasons discussed in more detail below.

This case involves a single alleged violation of the Act and two violations of corresponding Board regulations. Section 21(d)(2) of the Act prohibits any person from conducting a waste disposal operation in violation of any Board regulations. *See* 415 ILCS 5/21(d)(2) (2004). The Board regulations at issue are: (1) the requirement for any person conducting any disposal operations to comply with the financial assurance requirements (35 Ill. Adm. Code 811.700(f)); and (2) that any surety bonds must provided by a surety company approved by the U.S. Department of Treasury as an acceptable surety in its list of acceptable sureties, known as the "Circular 570" (35 Ill. Adm. Code 712(b)).

Therefore, the issue is what constitutes "conduct" in determining whether CLC and Morris conducted any waste-disposal operations at the Morris Community Landfill. The Board addresses the counter motions together and grants summary judgment in favor of the AGO, finding that both CLC and Morris violated the Act and Board regulations that require any person conducting disposal operations to comply with the financial assurance requirement mandating that surety bonds must be licensed as an acceptable surety in the U.S. Department of Treasury's Circular 570.

CLC and Morris Conducted Waste Disposal Operations

The Board is persuaded by the AGO's argument that the Board takes a broad view of what types of activities might constitute "operating" a waste disposal site. People v. Poland, Yoho, and Briggs Ind., Inc., *et al.*, PCB 98-148, slip op. at 18 (Sept. 6, 2001). The Board does not, however, adopt the AGO's position that as a matter of law, holding an Illinois EPA permit for waste disposal at a landfill constitutes "conducting a waste disposal operation" (AGO Resp. at 2). Like the court in Bishop, the Board looks beyond the permit to the specific facts of the case as a whole. *See* Bishop, 735 N.E.2d at 757-58.

For example, in Briggs, PCB 98-148, the Board found that Briggs was involved in the day-to-day operations of the site. Briggs was responsible for half of the bulldozing expenses and half of the engineering fees. The record showed that Briggs did not even profit from disposal activities at the unpermitted site, but despite the fees paid, the arrangement was still a "good deal" for Briggs. While the facts of Briggs are distinguishable in some ways from the facts at

hand, similarities may be drawn since the Board typically "looks beyond the permit" to day-to-day operations and maintenance.

In Termaat, Boone County and the City of Belvedere, listed as owners of the landfill at issue, had assumed responsibility to assure proper closure and post-closure care of the site, used the tipping fees and, when necessary, other public funds to pay for all site operations. In comparison, the Board considered the activities of an independent contractor who actually operated the site. The contractor performed limited services under the direction of the City and County and had little discretion in performing his duties. The Board concluded that the contractor's responsibility "do not rise to the level of an operator conducting a waste disposal operation as anticipated in the Act and Board regulation." Termaat, PCB 85-129 slip op. at 5.

In looking at the facts of the case and considering what is anticipated by the Act and Board regulations to be the behavior of an operator conducting a waste disposal operation, the Board finds both parties responsible for operating the site and, therefore, conducting the waste disposal operation that is Morris Community Landfill. While there must be at least one site operator, the Act does not prohibit more than one party from operating a site. In this case, the Board finds that both parties participated in the operations.

While Morris may not actively conduct the day-to-day operations at the landfill, Morris also does not "passively own land upon which waste disposal operations are (or have been) conducted." Morris Resp. at 7. Morris financed the operation, litigated in conjunction with CLC, as well as profited from and treated the leachate from the Morris Community Landfill. While these activities alone may not constitute "operating" a waste disposal site, Morris also had discretion regarding the decisions at the site and took responsibility for some of the ancillary site operations such as the treatment of leachate from the landfill. The Board finds that the grand sum of Morris' conduct rises to the level of "operation" as anticipated by the Board in using that term in Section 811.700(f).

Compliance With Financial Assurance Requirements

The Board disagrees with Morris' argument that it has complied with any or all financial assurance requirements. The *capacity to comply* is not relevant, only actual compliance with the Act and the Boards' requirements. It is undisputed that neither Morris nor CLC have provided adequate financial assurance.

Offensive Collateral Estoppel Applies

On October 16, 2003, the Board found that the issue of whether the Frontier bonds complied with Board regulations has been previously adjudicated and resolved in a permit appeal involving the same parties before the Board. People v. CLC and Morris, PCB 03-191 (Oct. 16, 2003); referring to Community Landfill, PCB 01-170. The Board reiterates here that the respondents' noncompliance with financial assurance requirements, the same as alleged in this enforcement matter, has already been resolved.

The Board also notes that *res judicata*, the rule that a final judgment by a court of competent jurisdiction is a bar to subsequent action involving the same claim,[2] does not apply between PCB 01-170 and this proceeding because there is no required identity of causes of action. "An enforcement case and a permit appeal are not the same 'cause of action,' primarily because of the different inquiry involved in each." ESG Watts, Inc., v. IEPA, PCB 97-210, slip op. at 4 (July 23, 1998). On the other hand, and as discussed in the Board's October 16, 2003 order, collateral estoppel *can* apply to preclude relitigation of a specific issue, even where the requirements of *res judicata* are not met. *See Id*.

In Community Landfill, PCB 01-170, the Board affirmed the Agency's decision denying CLC's SigMod permit request. The Board found that because Frontier was removed from the Circular 570 list on June 1, 2000, the Agency properly denied CLC's permit application on May 11, 2001. Community Landfill, slip op. at 13. The Agency's denial letter identified its reason for denying the permit with respect to financial assurance as CLC's noncompliance with Sections 811.700(f) and 811.712(b). Community Landfill, slip op. at 9.

The purpose of financial assurance is to provide a guarantee to the State that funds will be available in the event a landfill owner or operator fails to perform needed closure and postclosure or to address any other environmental problems that may occur during and after the operating life of the landfill. People v. ESG Watts, Inc., PCB 96-233, slip op. at 11 (Apr. 16, 1998); citing 35 Ill. Adm. Code 807.603. Inadequate financial assurance could cause the State, at taxpayer expense, to clean up or even close a facility. *See* People v. ESG Watts, Inc., PCB 96-237
(Feb. 19, 1998). The Board finds the alleged violations of Section 21(d)(2) of the Act and Sections 811.700(f) and 811.712(b) of the Board's regulations, and grants the AGO's motion for summary judgment. Accordingly, Morris' counter-motion for summary judgment is denied.

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

ORDER

1. The Board grants Community Landfill Corporation's motion to strike and strikes the requests for an interim remedy from the AGO's motion for summary judgment.

2. The Board grants the AGO's motion for summary judgment in part, finding that Community Landfill Corporation and the City of Morris violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2004)), and Sections 811.700(f) and 811.712(b) of the Board's regulations. 35 Ill. Adm. Code 811.700(f), 811.712(b).

3. The Board denies the City of Morris' counter motion for summary judgment.

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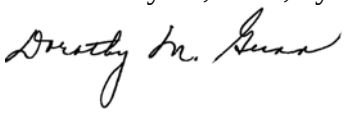
[2] *Black's Law Dictionary*, West Publishing Co., 6th Edition, 1996.

4. The Board directs the parties to hearing on the specific issue of remedy, including penalty, costs, and attorney fees, if appropriate. The parties are only to present evidence that is relevant under Sections 33(c), 42(f) and 42(h) of the Act (415 ILCS 5/33(c), 42(f), (h) (2004)). The Board directs the parties to provide specific figures and justifications for any proposed penalty.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on February 16, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board