

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF)
ILLINOIS, by KWAME RAOUL,)
Attorney General of the State of Illinois,)
)
Complainant,)
)
v.)
)
LANDFILL 33 LTD., an Illinois)
corporation, and WENDT FAMILY)
TRUST, an Illinois trust,)
)
Respondents.)

PCB 20-32
(Enforcement – Water)

NOTICE OF ELECTRONIC FILING

To: *See Service List*

PLEASE TAKE NOTICE that on the 21st day of September, 2020, the attached Post-Hearing Brief was filed with the Illinois Pollution Control Board, a true and correct copy of which is attached hereto and is hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS,
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CERTIFICATE OF SERVICE

I, DANIEL ROBERTSON, an Assistant Attorney General, do certify that I caused to be served this 21st day of September, 2020, the attached Post-Hearing Brief upon the persons listed on the Service List *via email*.

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POST-HEARING BRIEF

On February 24, 2020, the parties filed a Stipulation and Proposal for Settlement (“Settlement”) in this matter, along with a request for relief from the hearing requirement. On April 1, 2020, the Illinois Pollution Control Board (“Board”) received a request for public hearing on the Settlement. On August 19, 2020, the Board held a public hearing (“Hearing”). For the reasons below, the People of the State of Illinois, by Kwame Raoul (“People”), respectfully request that the Board accept the Settlement as filed.

FACTUAL BACKGROUND

Landfill Background

Landfill 33 LTD. (“Landfill 33”) operates a municipal solid waste landfill business located at 1713 South Willow Street, Effingham County (“Facility”). Complaint, page 2 (Filed Nov. 27, 2019). Wendt Family Trust owns the Facility. *Id.* Downhill from the south side of the landfill is a ditch that drains the south and part of the western slope of the landfill (“Ditch”). *Id.* at 3. At the bottom of the Ditch is an unnamed tributary to Salt Creek, and the last 20 feet of the Ditch merges

with the unnamed tributary. *Id.* On October 15, 1996, the Illinois EPA approved Landfill 33 Permit No. 1995-231-LFM (“Permit”), which has since been modified. *Id.* at 2. The Permit authorizes Landfill 33 to operate a leachate collection and treatment system at the Facility. *Id.*

Leachate Release

On or about May 29, 2017, a crack in one of the pipes attached to the leachate pumping system resulted in leachate overflowing downhill from the Facility into the Ditch and then into the unnamed tributary to Salt Creek. Complaint at 3. As a result of the leachate overflow, the Facility emitted an “odorous discharge” from the Ditch to the unnamed tributary downstream to Salt Creek, approximately 538 yards of the unnamed tributary to Salt Creek was affected, and an estimated 184 fish were killed. *Id.* at 3.

Leachate Clean-up and Compliance

On May 30, 2017, the Illinois EPA inspected the Facility in response to the leachate overflow. Complaint at 3. Within twenty-four hours of the Illinois EPA informing Respondents of the leachate overflow, Respondents had taken action to clean up leachate that had flowed from the Facility into the unnamed tributary to Salt Creek. Settlement at 4. This included, immediately upon notice from the Illinois EPA, contracting Andrews Engineering, who was at the Facility within several hours to perform the clean-up. August 19, 2020 Hearing Transcript (“Transcript”) at 19. Respondents also installed a “lock-out” system at the Facility which is designed to prevent leachate releases from the Facility, and placed the equipment for this system inside a locked shed on the Facility grounds. Settlement at 4. As an added preventative measure, Respondents further upgraded all pipelines for the Facility’s leachate control system from single to double-walled pipe for a total cost of \$255,135.50. *Id.* These steps were all taken prior to the People filing its Complaint.

LEGAL SUMMARY

Under Section 31(d)(2) of the Illinois Environmental Protection Act (“Act”), the parties may file with the Board a stipulation and proposed settlement. 415 ILCS 5/31(d)(2) (2018). The Board will consider the proposed settlement and stipulation agreement and the hearing record, if any. 35 Ill. Adm. Code 103.306. The Board may accept, suggest revisions in, or reject the proposed settlement and stipulation agreement, or direct initial or further hearings as it deems appropriate.

Id.

Section 103.302 of the Board’s procedural rules sets forth the required contents of stipulations and proposed settlements, which include:

- a) A full stipulation of all material facts pertaining to the nature, extent, and causes of the alleged violations proposed to be settled;
- b) The nature of the relevant parties’ operations and control equipment;
- c) Facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved, including:
 - 1) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
 - 2) the social and economic value of the pollution source;
 - 3) 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;
 - 4) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
 - 5) any subsequent compliance. [415 ILCS 5/33(c)]

- d) Details as to future plans for compliance, including a description of additional control measures and the dates for their implementation, if any; and
- e) The proposed penalty, if any, supported by factors in mitigation or aggravation of penalty, including the factors set forth in Section 42(h) of the Act [415 ILCS 5/42(h)].

35 Ill. Adm. Code 103.302.

Following the compliance activities performed by Respondents, the only matter that remains to be determined by the parties is the civil penalty. In general, the Board favors settlements involving penalty issues. Illinois EPA v. Barry, PCB 88-71, page 5 (May 10, 1990).

**THE BOARD SHOULD ACCEPT THE STIPULATION
AND PROPOSAL FOR SETTLEMENT AS FILED**

The Settlement Meets the Content Requirements of 35 Ill. Adm. Code 103.302

“The prompt resolution of enforcement actions is a matter of substantial significance to the Board.” IEPA v. Loeb, PCB 91-123 (April 9, 1992). To this end, the parties negotiated and filed a Settlement with the Board to resolve this action. The Settlement addresses each of the five content requirements of Section 103.302 of the Board’s procedural rules. 35 Ill. Adm. Code 103.302. Specifically, the Settlement discusses the nature, extent and cause of the alleged violations proposed to be settled. Settlement at 4, 5, 6-7. The Settlement also addresses the nature of the relevant parties’ operations and control equipment. *Id.* at 2, 6-7. The parties address each of the factors of Section 33(c) of the Act, 415 ILCS 5/33(c) (2018). Settlement at 4-5. The Settlement also addresses future compliance. Settlement at 9. Finally, the Settlement includes a proposed penalty, supported by a discussion of each of the factors of Section 42(h) of the Act, 415 ILCS 5/42(h) (2018). Settlement at 5-7.

Summary of Public Comments

On September 2, 2020, the Board received a public comment filed by Dan Borries (“PC1”). Mr. Borries also spoke at the Hearing. The People address each of Mr. Borries’ concerns in the sections below.

An admission of guilt is not required.

Mr. Borries “demand[s] that there be an admission of guilt in this settlement.” PC1 at 1. However, 35 Ill. Adm. Code 103.302 does not require an admission of guilt, and settlements need not contain a finding of violation. Chemetco, Inc. v. Illinois Pollution Control Board, 140 Ill.App.3d 283, 286-287 (5th Dist. 1986); Archer Daniels Midland v. Pollution Control Board, 140 Ill.App.3d 823, 825 (3d Dist. 1986). The Board has also previously noted that settlements that do not contain a finding of violation but do impose a penalty and a compliance plan may more expeditiously facilitate the primary goal of enhancing the environment. Barry at 5, citing Chemetco, 140 Ill.App.3d at 288. No compliance plan was necessary in this case as the compliance work was performed prior to the Settlement being filed. Settlement at 4. For these reasons, the Board should not require an admission of guilt or a finding of violation as part of the Settlement.

The Respondents have Subsequently Complied with the Act and Board Regulations.

Mr. Borries stated at the Hearing that Respondents “did not at any time clean up the leachate out of the unnamed tributary.” Transcript at 11. Mr. Borries also stated that “several days after the fish kill” he observed “pooled up, black contaminated water setting in all of the low spots of this tributary.” Transcript at 12. It was only “two or three weeks after the fish kill” that “it rained enough that freshwater came down and washed it on down into Salt Creek.” *Id.* Mr. Borries supports these statements with a document attached to PC1 signed by himself and two other local landowners, and photographs which Mr. Borries states were taken up to “2 weeks after fishkill.”

PC1 at 4, 5-7. Mr. Borries does not state that there currently exists any contamination that still needs to be addressed.

The People appreciate that Mr. Borries wishes to ensure that the leachate release was adequately addressed. Dustin Burger, an Environmental Protection Specialist III in the Illinois EPA's Bureau of Land, visited the Facility on three occasions wherein he inspected areas impacted by the leachate release. Exhibit A, Affidavit of Dustin Burger ("Burger Affidavit"), ¶4. On May 30, 2017, Mr. Burger observed leachate in the Ditch, but did not observe leachate in the unnamed tributary for 50 feet in either direction where the Ditch met the tributary. *Id.* at ¶5. On June 1, 2017, Mr. Burger returned to the Facility, observed that the Ditch had been excavated, and that no leachate remained in the Ditch. *Id.* at ¶6. That same day, Brian Hayes, the Facility operator, showed Mr. Burger a video of the Ditch excavation work being performed. *Id.* at ¶7. On August 3, 2020, Mr. Burger returned to the Facility, and did not observe any leachate in the unnamed tributary from the area where the Ditch meets the tributary until where the tributary meets Salt Creek. *Id.* at ¶8.

Beyond compliance activities, Respondents have also taken preventative steps to protect against future releases. As noted by Mr. Borries, Respondents spent \$255,135.50 on upgrades to the Facility's leachate control system pipelines. PC1 at 2; Settlement at 4. This is in addition to installing the Facility's "lock-out" system and placing control equipment for the system inside a locked shed on the Facility grounds. Settlement at 4.

The facts show that Respondents took the necessary steps to regain compliance with the Act and regulations, that Respondents further took additional preventative measures, and that no further compliance is necessary. The People therefore respectfully request that the Board accept the Settlement as filed without ordering additional compliance measures.

The Landfill is suitable for the area in which it is located.

Mr. Borries states that the “Facility is not in a suitable area” and that “[d]ue to the Landfill’s location and current elevation it is impossible for the Landfill not to have any adverse effects on the adjacent property owners or the natural waters of Illinois that surround the operation.” PC1 at 2. Mr. Borries concedes that the Facility was already in the area when he moved there. Transcript at 8.

The concern raised here by Mr. Borries, regarding the location of the Facility, is not at issue in this proceeding. Regardless, the authority for landfill siting rests with the local county board or municipal governing body. 415 ILCS 4/39.2 (2018). Any challenge to a local siting approval was to be made within 35 days of the local siting approval, and only by third parties who participated in the public hearing conducted by the county board or governing body. 415 ILCS 4/40.1(b) (2018).¹ As stated above, the Facility has been permitted since 1996. Complaint at 2. The Permit authorizes Landfill 33 to operate a leachate collection and treatment system at the Facility. *Id.* The Board should therefore find the Facility suitable for the area in which it is located.

The Duration and Gravity of the Violation.

Mr. Borries cites to a report stating that additional fish would have been recovered were it “not for limited visibility caused by the fluid.” PC1 at 2. Mr. Borries does not include the referenced report with his public comment. The comment, however, does not refute the language in the Settlement, which acknowledges that “*at least* 184 predominantly small to very small fish”

¹ A proposed landfill host agreement regarding expansion of the Facility is currently being considered by the Effingham County Board, and Mr. Borries has participated in that process. Teutopolis Press, County Board Postpones Landfill Debate to October, July 17, 2020 <https://www.teutopolispress.com/news/20200717/county-board-postpones-landfill-debate-to-october> (Available as of Sept. 21, 2020).

died as a result of the leachate release. Settlement at 6 (emphasis added). Further, as stated in the Settlement and at the Hearing, Respondents were diligent in responding to and remediating the alleged violations of the Complaint. Settlement at 4; Transcript at 19-21; *see also* Burger Affidavit at ¶6-7.

Respondents were Diligent in Attempting to Comply with the Act and Regulations.

Mr. Borries next states that “[t]here is no documentation or pictures to support the clean up” of the unnamed tributary system. PC1 at 2. Mr. Borries provides no support for why such documentation needs to be included in the Settlement, and indeed, settlements are routinely filed that do not include detailed documents in support. Nevertheless, as stated above, an inspector for the Illinois EPA inspected the Facility three times. The inspector observed on June 1, 2017 that excavation work had been performed on the Ditch and that no leachate was present in the Ditch. Burger Affidavit at ¶6. On August 3, 2017, the same inspector observed no leachate in the unnamed tributary, when the tributary bed was dry, from the area where the Ditch enters the tributary up to where the tributary merges into Salt Creek. *Id.* at ¶8.

The Amount of Monetary Penalty will Serve to Deter Further Violations.

Mr. Borries states that the \$18,000 proposed civil penalty is “a slap on the wrist for the seriousness of what they allowed to happen.” Transcript at 12. Mr. Borries is correct that each count of the Complaint allows for a \$50,000 civil penalty per violation and \$10,000 per day of each violation. *Id.* However, these are the maximum amounts allowed pursuant to the Act, 415 ILCS 5/42(a) (2018), and the Act requires the consideration of multiple factors in determining what the appropriate civil penalty should be. 415 ILCS 5/42(h) (2018). “[T]he severity of the penalty should bear some relationship to the seriousness of the infraction or conduct.” Barry at 9. Further, a sincere desire to cooperate should be noted and encouraged by the Board. *Id.* at 13.

Generally, it is the Board that considers the Section 42(h) factors when determining an appropriate civil penalty. 415 ILCS 5/42(h) (2018). And the Board has previously acknowledged concerns that openly delineating the factors that were considered in reaching a proposed stipulated penalty may, in certain cases, potentially reveal settlement strategies to potential respondents. IEPA v. Borden Chemical, PCB 81-132, page 3 (May 18, 1984). Nevertheless, as part of the requirements for filing the Settlement, the parties included an analysis of the eight factors of Section 42(h) in arriving at a civil penalty of \$18,000.00. Settlement at 5-8.

Notably, the factors in Section 42(h) are not exhaustive, and other factors that may be considered include a respondent's willingness to settle a case versus the expense of prolonged litigation. Barry at 34, citing 123 Cong. Rec. 39190-39191 (1977), remarks of Sen. Muskie citing letter from EPA Assistant Administrators of Enforcement of Dec. 14, 1977 (“[P]enalties assessed by judges should be sufficiently higher than penalties to which the Agency would have agreed in settlement to encourage violators to settle.”). The Board and Illinois courts have also taken into consideration a respondent's good faith, *i.e.*, “behavior which reflects diligence and which is reasonably directed towards the goal of achieving compliance.” Barry at 26. Good faith efforts include hiring engineers to clean up pollution and installing pollution control equipment at considerable expense, both of which occurred in this case. *Id.*; *see also* Settlement at 4 (installing upgrades at an expense of \$255,135.50), Transcript at 19 (hiring environmental consulting firm to address the leachate overflow).

Mr. Borries does not provide any new facts for consideration of a higher penalty in this matter. Further, any additional penalty may result in the voiding of the Settlement, sending the parties to litigation and disrupting the People's prosecutorial discretion to settle cases where such settlements are in the best interest of the State.

Previously Adjudicated Violations of the Act.

Mr. Borries states to “[p]lease reference prior violations.” PC1 at 2. However, Mr. Borries does not state what the previous violations are that should be referenced. Without specific reference, the People are unable to respond to Mr. Borries’ statement.

CONCLUSION

The People appreciate the concerns raised by Mr. Borries regarding the Settlement, and note that the preventative measures implemented by Respondents and the Settlement language itself are intended to prevent future similar violations at the Facility. However, the Settlement meets the content requirements of 35 Ill. Adm. Code 103.302, there is no further work to be performed, and the proposed civil penalty is appropriate given the circumstances of this case. In the interest of judicial efficiency, therefore, the People respectfully request that the Board accept the Settlement as filed.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

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DATE: September 21, 2020

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EXHIBIT A

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AFFIDAVIT OF DUSTIN BURGER

I, DUSTIN BURGER, certify under penalty of perjury pursuant to Section 1-109 of the Illinois Code of Civil Procedure, 735 ILCS 5/1-109 (2018), that the statements set forth in this affidavit are true and correct, and further state that if called upon to testify in this matter, I would competently testify as follows:

1. I am employed by the Illinois Environmental Protection Agency (“Illinois EPA”) as an Environmental Protection Specialist III in its Bureau of Land (“BOL”) Field Operations Section in the Illinois EPA’s Springfield Office, which is located at 1021 N. Grand Avenue East, Springfield, Illinois. I have been employed by the Illinois EPA in this capacity for 29 years.

2. As part of the BOL Field Operations Section of the Illinois EPA, my duties include, but are not limited to, inspecting locations within my assigned region for violations of the Illinois Environmental Protection Act (“Act”) and related statutes and regulations, including Illinois Pollution Control Board regulations, and Illinois EPA-issued permits; requesting documentation to demonstrate compliance with the Act and related statutes and regulations, and Illinois EPA-

issued permits; taking samples and photographing site conditions, and writing reports of my observations and findings.

3. In my capacity as an Illinois EPA Inspector, I conducted inspections of a landfill site located at 1713 South Willow Street, Effingham County ("Site") on May 30, 2017, June 1, 2017 and August 3, 2017.

4. As part of the May 30, 2017 inspection, I inspected the south side of the Site where there is a ditch that drains from the south and western slope of the Site landfill ("Ditch"). The last 20 feet of the Ditch drains into an unnamed tributary to Salt Creek.

5. During the May 30, 2017 inspection, I observed leachate in the Ditch leading up to the unnamed tributary. I did not observe any leachate upstream or downstream in the tributary for 50 feet in either direction from where the Ditch met the tributary. It appeared that the tributary, which was running with water at the time, had either diluted or carried the leachate downstream into Salt Creek.

6. During the June 1, 2017 inspection, I observed that the Ditch appeared to have been excavated, and I did not observe any leachate in the Ditch. I also did not observe any leachate in the area where the Ditch merged with the unnamed tributary.

7. Also during the June 1, 2017 inspection, the Site operator, Brian Hayes, showed me documentary evidence in the form of a video. In the video, I observed workers remediating what I recognized to be the leachate in the Ditch, by using a portable pump to extract the leachate from the Ditch into the front bucket of a loader.

8. During the August 3, 2020 inspection, I walked the unnamed tributary from the area where the Ditch meets the tributary until where the tributary meets Salt Creek. The tributary bed was dry and I did not observe any leachate.

9. Based on my observations at the Site at the time of my August 3, 2020 inspection, the leachate that I observed during my May 30, 2020 inspection had been removed, and no leachate remained in the Ditch or unnamed tributary.

Dustin Burger

Dustin Burger