ILLINOIS POLLUTION CONTROL BOARD
February 15, 2001

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 98-148
	)	(Enforcement - Land)
DOREN POLAND, LLOYD YOHO, and BRIGGS INDUSTRIES, INC. a/k/a BRIGGS PLUMBING PRODUCTS, INC.,	)	
	)	
Respondents.	)	

BRIGGS INDUSTRIES, INC.,	)	
	)	
Third-Party Complainant,	)	
	)	
v.	)	PCB 98-148
	)	(Enforcement – Citizens, Land)
LOREN WEST and ABINGDON SALVAGE COMPANY, INC.,	)	(Third-Party Complaint)
	)	
Third-Party Respondents.	)	

ORDER OF THE BOARD (by E.Z. Kezelis):

This is an enforcement action involving waste generated by respondent Briggs Industries, Inc. (Briggs), a plumbing fixtures manufacturer, and disposed of at a permitted landfill (old landfill) and an unpermitted site (new landfill) adjacent to the old landfill in Abingdon, Knox County, Illinois. It is alleged that during the period 1979 until 1997, Briggs sent its process waste, which included ceramic material, vitreous china, and plaster molds, to the old and new landfills, and that the landfills were owned by corespondents Doren Poland (Poland) and Lloyd Yoho (Yoho). It is furthermore alleged that Poland and Yoho were engaged in business as Abingdon Salvage, first as a partnership and later as a corporation.

This matter is before the Board on an appeal by Briggs of a hearing officer order issued on December 20, 2000.[1] Briggs' appeal, together with a motion to allow appeal, was filed with

[1] The December 20, 2000 hearing officer order shall be referred to as "HO Ord. at ___." Briggs' appeal shall be referred to as "App. at ____." Complainant's response shall be referred to as "Resp. at ____." The transcript from the November 28 and 29, 2000 hearing shall be referred to as "Tr. at __."

the Board on January 2, 2001. Complainant's response was filed January 12, 2001. For the reasons stated below, the hearing officer's order is affirmed.

MOTION TO ALLOW APPEAL

As a preliminary matter, we note that Briggs' appeal and motion to allow appeal were filed on January 2, 2001, after the effective date of the Board's new procedural rules. As the Board noted in its December 21, 2000 opinion adopting them, the new procedural rules were to become effective on January 1, 2001, and were to apply to "all proceedings pending as of that date and to all proceedings initiated after that date." Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130 (December 21, 2000), R00-20, slip op. at 1. Under the new procedural rules, the Board, upon the filing of a written motion, may consider appeals from a ruling of the hearing officer. 35 Ill. Adm. Code 101.518. Briggs' motion to allow the appeal satisfied the requirement, and accordingly, its motion to allow appeal is granted.[2]

SUPPLEMENTAL DISCOVERY BEING SOUGHT

Background

At the November 28, 2000 hearing, corespondent Poland testified that some weeks earlier, several representatives of a Springfield engineering firm had appeared at the new landfill. Tr. at 218-19. According to Poland, they drilled three holes at the new landfill and inserted piping that protruded roughly two feet above the surface. Tr. at 221-22. Further testimony and statements on the record by counsel for complainant and Briggs revealed that Briggs' counsel had, in fact, retained Andrews Environmental Engineering (Andrews Engineering) of Springfield, Illinois, and that Andrews Engineering's representatives had drilled the holes and placed tile in the base of the protruding pipes in an effort to collect water samples. Tr. at 220-22.

Counsel for complainant then made an oral motion for an order compelling supplemental discovery. Tr. at 222. In support of his motion, complainant's counsel summarized the discovery requests, responses, and supplemental responses previously exchanged between the parties. In particular, complainant's counsel argued that while Andrews Engineering personnel had been identified as possible witnesses in response to an interrogatory, that same response had stated that no documents existed. Tr. at 223-24. According to counsel for complainant, while that might have been true when the last supplemental response had been submitted in September 2000, some report or other documents might well have been generated by Andrews Engineering's personnel since then, and complainant's counsel was entitled to copies. Tr. at 224-25.

Briggs' counsel, on the other hand, argued that Andrews Engineering had been retained in an effort to explore permitting and, ultimately, settlement, and that complainant's counsel was aware of that retainer. Tr. at 223. Briggs' counsel also argued that complainant's counsel should

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[2] A similar outcome with respect to allowing an appeal of a hearing officer's order would have resulted under the procedural rules previously in effect. See 35 Ill. Adm. Code 103.140 (1994).

have deposed the identified individuals, but did not, and that in any event there was no prejudice to the complainant because Briggs would not be calling either Andrews Engineering representative to testify at the hearing. Tr. at 226. When asked by the hearing officer whether any reports had been promulgated by Andrews Engineering, Briggs' counsel acknowledged that he had seen some kind of lab result of test samples from the wells that had been drilled. Tr. at 226.

After considering the arguments of the parties and written discovery previously exchanged between Briggs and complainant, the hearing officer granted the motion to compel and ordered Briggs to produce the materials sought by December 29, 2000. Tr. at 248-52. The hearing officer requested that the complainant formalize its motion in written form. *Id*. The complainant did so by filing a motion on December 5, 2000; Briggs filed its response to the motion to compel on December 11, 2000. On December 20, 2000, the hearing officer issued the order that is the subject of the present appeal before the Board. In it, the hearing officer reiterated that Briggs must produce the requested discovery materials by December 29, 2000. HO Ord. at 1. Instead, Briggs filed this appeal with the Board.

Documents Being Sought

In its appeal, Briggs identifies two documents as potentially subject to the hearing officer order, but, for the reasons summarized below, argues that neither warrants production. The documents at issue are:

1. a two-page letter dated October 26, 2000, from an Andrews Engineering employee (other than Mr. Rathsack or Mr. Liss) providing advice regarding obtaining an inert landfill permit for the new landfill; and

2. a four-page fax dated November 10, 2000, from Mr. Rathsack to respondent Briggs' attorney forwarding findings and leachate test results generated by an outside lab (not Andrews Engineering). App. at 6.

Parties' Arguments

As was noted by the parties during their arguments before the hearing officer, a significant amount of discovery had been conducted before the hearings began. In addition to taking several depositions, complainant also propounded interrogatories and document requests upon Briggs. Briggs supplemented its responses twice, most recently in a document dated September 6, 2000, and filed with the Board on September 8, 2000. See Briggs Industries, Inc.'s Second Supplemental Response to Complainant's First Set of Interrogatories (Sec. Supp. Resp.). One of the discovery requests at issue here was contained in an interrogatory propounded by complainant upon Briggs:

> INTERROGATORY NO. 19: Please identify by name and last known address of all opinion or conclusion witnesses that Briggs intends to offer at any hearing or trial of this cause. An opinion or conclusion witness is any person who will offer

any opinion or conclusion testimony. In addition, as to each of said opinion or conclusion witness, please state:

(a) The subject matter upon which the witness is expected to testify;
(b) The conclusions and opinions of the witness and the bases therefor;
(c) The qualifications of each witness; and
(d) If any of said witnesses have prepared any written reports, please provide copies as well.

ANSWER: Andrew Rathsack and Ken Liss of Andrews Environmental Engineering, Springfield, Illinois.

(a) Actual and potential harm due to alleged violations;
(b) Alleged violations pose negligible harm due to the nature of the material deposited in the "new landfill". The basis for these opinions are the documents exchanged between the parties during the discovery process, the educational background of these witnesses, and their experience in environmental matters;
(c) Qualifications attached; and
(d) None.

Sec. Supp. Resp. at 3-4.

Despite listing them as such, on appeal Briggs argues that Rathsack and Liss were not actually "opinion or conclusion" witnesses, because complainant never deposed them and they did not testify at hearing. App. at 3. Briggs also argues that even if the Board finds that Rathsack and Liss are opinion witnesses whose reports or other documents should have been produced, the proper remedy is not an order compelling production, but rather, an order barring their testimony, citing LoCoco v. XL Disposal Corp., 307 Ill. App. 3d 684, 691, 717 N.E.2d 823 (3rd Dist. 1999) and Warrender v. Millsop, 304 Ill. App. 3d 260, 268, 710 N.E.2d 512 (2nd Dist. 1999). App. at 3. Finally, Briggs argues that the Andrews Engineering representatives were consultants retained by its counsel for settlement purposes, and that accordingly, absent exceptional circumstances not present here, any documents they prepared are protected by the consultant's privilege. App. at 4-6.

In response, complainant notes that the two newly identified documents described above were not disclosed until this appeal was filed, more than a month after the hearing was conducted. Resp. at 4. Complainant argues that the Board's consideration of this appeal should be made in the context of our newly revised procedural rules. Resp. at 2. Among other things, complainant argues, the new rules reiterate that the scope of discovery is very broad, and imposes a duty to seasonably supplement responses, as do Supreme Court Rules 213(i) and 214. See Ill. Adm. Code 101.616(a), 101.616(h). Accordingly, complainant argues that Briggs was obligated to supplement its discovery responses once responsive documents were generated by the Andrews Engineering representatives and came into Briggs' custody or control. Resp. at 2. Complainant also argues that no authority exists to allow a party to withhold reports generated by identified witnesses, simply on the grounds that the party elects not to call the witness. Resp.

at 4. Finally, complainant argues that other interrogatories asked, more generally, whether documents existed upon which Briggs intended to rely at hearing, and asked for a description and explanation of those documents. Briggs neither disclosed nor produced these newly identified documents, and only claimed privilege after complainant learned of the work of the Andrews Engineering representatives during Poland's testimony during the course of the hearing. Resp. at 4-5. Given that complainant made extensive inquiries of the various witnesses regarding permit issues and the conditions of the new landfill, complainant argues that the two documents were likely used by respondent during the course of the hearing. Resp. at 4.

After carefully reviewing the parties' arguments, the Board finds that during the course of discovery, Briggs identified two individuals at Andrews Engineering as its possible opinion or conclusion witnesses. Therefore, Briggs was obligated to seasonably supplement its discovery response by disclosing any reports they may have subsequently provided to Briggs. If a third Andrews Engineering witness became known to Briggs after supplementing its answer to Interrogatory No. 19 in September 2000, then Briggs had an obligation to disclose that witness's identity as well. Briggs' later decision not to call any Andrews Engineering representatives at the hearing did not transform the status Briggs itself ascribed to them when answering Interrogatory No. 19 – that of opinion or conclusion witnesses.

Second, the Board finds that the two Andrews Engineering documents described by Briggs in this appeal fall within the term "report" as that term was used in Interrogatory No. 19. Moreover, it appears the two documents should have been disclosed in response to Interrogatory Nos. 16 and 17, which asked for a description of any documents and other materials upon which Briggs intended to rely at hearing.

Third, the Board rejects Briggs' claim that the two documents should be protected from production because of a consultant's privilege. Briggs specifically listed two Andrews Engineering representatives as possible witnesses at hearing, and even described the general subject matter of their expected testimony in its September 2000 supplemental answer to Interrogatory No. 19. If Briggs had identified the Andrews Engineering witnesses as consultants (persons specially retained in anticipation of litigation or preparation for trial but not to be called at trial pursuant to Illinois Supreme Court Rule 201(b)(3)), then their documents could indeed be subject to a claim of consultant's privilege. Briggs did not do so before trial, and it could not do so in hindsight.

REMEDY

Finally, we turn to the question of remedy. Briggs argues that the proper remedy is to bar its Andrews Engineering witnesses from testifying. Indeed, in several recent cases, inadequately disclosed experts have been barred from testifying. See, *e.g.*, LoCoco v. XL Disposal Corp., 307 Ill. App. 3d 684, 691, 717 N.E.2d 823 (3rd Dist. 1999) and Warrender v. Millsop, 304 Ill. App. 3d 260, 268, 710 N.E.2d 512 (2nd Dist. 1999). In this case, however, Briggs had already decided it did not wish to call them as witnesses. Tr. at 226. Accordingly, Briggs' offer that its witnesses be barred is a hollow one.

Instead, we direct Briggs to produce to complainant the two reports it identified in this appeal. These documents shall be produced within seven days of the date of this order. If Briggs has received any other documents from Andrews Engineering that are responsive to discovery requests, they shall be disclosed within seven days of the date of this order.

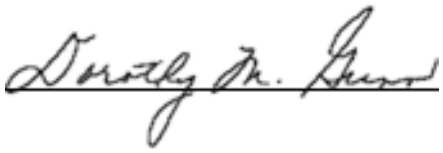
The Board is well aware that the hearing in this matter was concluded on November 29, 2000, and that the parties are in the midst of completing a posthearing briefing schedule. Accordingly, the hearing officer is directed to schedule a status conference at his earliest convenience in order to address any scheduling or other matters that may require attention in light of this order.

CONCLUSION

The Board affirms the hearing officer's ruling. Briggs is hereby ordered to produce the documents to complainant within seven days of the date of this order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 15th day of February 2001 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board