ILLINOIS POLLUTION CONTROL BOARD
August 1, 1996

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND UAW LOCAL 974; AND CITIZENS FOR A BETTER ENVIRONMENT,	)	
Complainants,	)	
v.	)	
CATERPILLAR INC.,	)	PCB 94-240
Respondent,	)	(Citizens' Enforcement-Land, Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Party-in-Interest.	)	

KENNETH G. ANSPACH, JOHN D. DALTON, JEFFREY R. DIVER, KARL A. KARG, IV, DICK MCLRAYVEY, AND H. ALFRED RYAN APPEARED ON BEHALF OF COMPLAINANTS, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND UAW LOCAL 974;

STEFAN A. NOE APPEARED ON BEHALF OF COMPLAINANTS, CITIZENS FOR A BETTER ENVIRONMENT;

PERCY L. ANGELO, RUSSELL EGGERT, MICHAEL J. GERGEN, AND PATRICIA SHARKEY APPEARED ON BEHALF OF RESPONDENT, CATERPILLAR, INC.; and,

MICHELLE M. SIMCIK AND ELIZABETH WALLACE APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

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

This matter is before the Board on the citizens' enforcement action filed against Caterpillar, Inc. (respondent) concerning soil and groundwater contamination at respondent's East Peoria manufacturing facility (facility). The complainants are the International Union, United Automobile, Aerospace and Agricultural Implement Workers Of America (IUAW) and

UAW Local 974 (UAW) and Citizens For A Better Environment (CBE) (collectively, complainants). In a seven-count complaint filed September 1, 1994 the complainants allege that respondent committed seven violations of the Environmental Protection Act (Act) (415 ILCS 5/5 *et seq.)* and 14 violations of the corresponding Board regulations. The Board joined the Illinois Environmental Protection Agency (Agency) as a party-in-interest by Board order issued on November 3, 1994.

The alleged violations flow from respondent's discovery of soil and groundwater contamination which occurred as the result of a now-closed dry cleaning operation at the facility. More specifically, the alleged violations concern the way in which respondent, under the auspices of the Illinois Pre-Notice Program and the supervision of the Agency, managed the contaminated soil which was excavated from the ground. The complainants believe that respondent's remediation method violated the Resource Conservation and Recovery Act (RCRA) requirements which are, in large part, identical-in-substance to those in federal law and regulations.[1] The allegations also concern respondent's actions in contaminating and remediating the groundwater. Complainants seek declaratory and injunctive relief (including the right to participate in the cleanup) and the maximum civil penalties allowed by law, specifically $200 million to be paid to the Illinois Environmental Protection Trust Fund.

PROCEDURAL MATTERS AND BACKGROUND

Procedural Matters

Several procedural matters are pending before the Board which were filed by each of the parties throughout this proceeding. While the Board and the hearing officer ruled on numerous motions filed by the parties during the course of this action, these remaining motions are either pending from or relate to the hearing, or were taken with the case as they were filed. No other motions remain outstanding in this case. We address each of the matters individually below.

Complainants' Motions to Amend the Complaint. After the close of the hearings in this matter the complainants twice moved the Board to accept amendments to the complaint. On May 30, 1995 complainants filed a motion which proffered amendments to both the RCRA-related allegations and the groundwater allegations of the complaint. On July 6, 1995 the complainants requested permission to further amend the complaint on the issue of groundwater.

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[1] RCRA, which was adopted by Congress in 1976, established a comprehensive federal "cradle-to-grave" program regulating the generation, transportation, storage, treatment, and disposal of hazardous waste. Illinois subsequently enacted legislation authorizing a federally-equivalent State RCRA program in 1980. (See, *e.g.*, Section 20(a)(7) of the Act.) Illinois adopted implementing regulations which parallel federal rules at the direction of the legislature in order to receive federal authorization. (See, *e.g,*. Section 22.4 of the Act directing the Board to adopt "identical-in-substance" rules to USEPA RCRA rules.) The USEPA gave federal authorization for Illinois' program in 1982. (47 F.R. 21,043.)

As to the RCRA-related amendments, among other minor changes, the complainants request that we reduce the period of violation regarding Counts I and II by five months. The amendments were not disputed by respondent and are hereby accepted by the Board.

As to the groundwater-related amendments, complainants seek to make three major amendments. The first is a request that we strike altogether an allegation that respondent violated Section 12(d) of the Act, which is the general prohibition against contaminating the land in such manner so as to cause water pollution. Respondent does not object to this omission, but requests that we strike the allegation "with prejudice" as a full hearing on the merits has been completed. We grant the complainants' request to strike the Section 12(d) and agree that because the complainants have chosen to withdraw the allegation after having the full opportunity to present their case-in-chief, it is appropriate to grant the motion with prejudice.

Second, the complainants seek to amend their allegation concerning Section 12(a) of the Act by adding groundwater sampling information which shows that Class I and II groundwater standards were exceeded at the respondent site and that such exceedences demonstrate a violation of Section 12(a). We accept this amendment on the basis that Section 103.210(a) of the Board's procedural rules allows the amendment of pleadings to conform to proof adduced at hearing. (35 Ill. Adm. Code 103.210(a).) An amendment is appropriate under this provision so long as no undue surprise results that cannot be remedied by a continuance. Our review of the record shows that respondent received notice at the hearing that the complainants would seek to amend the complaint at the close of hearings and had full opportunity to request a continuance based on the anticipated amendment, which respondent did not do. Importantly, the amendment adding groundwater sampling information does not change the alleged violation, it only clarifies that the exceedence information adduced at hearing would be additionally used to support a Section 12(a) violation. (See Moore v. Roberts, 217 Ill. App. 3d 446, 577 N.E. 538 (4th Dist. 1991).)

Third, the complainants seek to add a new allegation that respondent violated Sections 620.115 and 620.405 of the Illinois Groundwater Quality Standards. (35 Ill. Adm. Code Sections 620.115 and 620.405.) These are the general prohibitions against violating any of the Part 620 groundwater quality standards. The complainants also argue this new allegation is necessary to conform the complaint to the proof presented during the hearing. Respondent opposes the addition of a new allegation on the grounds it is untimely and highly prejudicial. We do not accept this new allegation. We agree that respondent had no opportunity to present a defense and/or argue against any new remedies or penalties which may be associated with a violation of either Section 620.115 or 620.405. We do not believe it is appropriate for the complainants to raise a new theory of the case after hearing is over when complainants had full knowledge of Sections 620.115 and 620.405 at the time of the original pleading. These prohibitions were adopted in 1991 when the Board adopted groundwater quality standards for Illinois, and have been effective since that time. (In the Matter of: Groundwater Quality Standards, 35 Ill. Adm. Code 620, Final Order (November 7, 1991) 127 PCB 53.) Complainants have offered no reasoning or excuse for failing to bring these causes of action in

the original pleading. (Stringer Construction Co., Inc. v. Chicago Housing Authority, 206 Ill. App. 3d 250, 260, 563 N.E. 2d 819, 826 (1st Dist. 1990).)

Complainants' Oral Motion To Renew Motion To Strike Agency's Section 30. The Board added the Agency as a party-in-interest to this proceeding on November 3, 1994 and requested the Agency to submit an investigative report concerning the facts and the status of remediation of the facility pursuant to Section 30 of the Act. The Agency filed the report with the Board on March 27, 1995 and the complainants filed a motion to strike on March 28, 1995. We denied the motion on April 6, 1995 and subsequently on April 20, 1995 we denied a motion for reconsideration on this same point.

At hearing, the complainants renewed their objection to the Agency's Section 30 report and specifically requested reconsideration for a second time of the Board's decision declining to strike the report. (Tr. at 345 and 349.) Additionally, they renewed the motion in their post-hearing briefs. Complainants argue that the Board requested an investigation of the facts of the complaint and not an "endorsement" of the Illinois Pre-Notice Program. We see no new evidence, or other reason, to reconsider our decision. The motion is denied.

Complainant's Motion for Leave to File a Post-Hearing Brief in Excess of 25 Pages. On August 7, 1995 complainants moved the Board to file its post-hearing Reply Brief which is in excess of 25 pages. Section 101.104(b) of the Board's procedural rules requires that post-hearing briefs total only 25 pages unless leave of the Board is sought. We hereby grant the motion.

Respondent's Motion For Sanctions. On August 24, 1995 respondent filed a motion seeking monetary sanctions, specifically legal fees and expenses incurred as a result of alleged discovery abuses and for non-compliance with the Board's procedural rules. Pursuant to Illinois Supreme Court Rule 219, from which Board rule Section 101.280 of the Board's procedural rules is patterned, respondent argues that the Board has the discretion to impose sanctions upon parties for unreasonable noncompliance with pretrial procedures and that in this case, sanctions are warranted. Under Section 101.280, we may consider factors including, but not limited to, the relative severity of the refusal or failure to comply, the past history of the proceeding, and the degree to which the proceeding has been delayed or prejudiced by the alleged abuses.

Respondent urges the Board to enter a sanctions order against the complainants based on several pretrial matters which respondent believes were egregious and harmed respondent's preparation of its defense. The complainants' actions included: issuance of a 120-person witness list which was later stricken by the hearing officer; refusal to produce a witness for deposition; failure to identify witnesses prior to hearing; and identification of witnesses who were members of the various complainants' organizations whom were not knowledgeable about the facts of the case.

We do not agree with respondent that any of these actions are tantamount to sanctionable behavior. In determining whether sanctions are warranted, we are to consider

whether a hearing officer order or Board order was violated and we also may consider whether the complained-of actions demonstrate a deliberate and pronounced disregard for our jurisdiction's rules. (See Modine Manufacturing Company v. Pollution Control Board (2nd Dist. 1989) 192 Ill. App. 3d 511, 548 N.E. 2d 1145 and Valdivia v. Chicago and North Western Transportation Company, (1st Dist. 1980) 87 Ill. App. 3d 1123, 409 N.E. 2d 457.) While we certainly look to the severity of the conduct, we note that the goal of the discovery sanction is to promote discovery, and not necessarily to punish. (IEPA v. Celotex Corp. (3rd Dist. 1988) 168 Ill. App. 3d 592, 522 N.E. 2d 888.) In the past we have weighed all of these factors and upon appellate court remand, we monetarily sanctioned a party for refusal to comply with the two Board orders. (Grigoleit Company v. Illinois Pollution Control Board (4th Dist. 1993) 245 Ill. App. 3d 337, 613 N.E. 2d 371.) However, in this case, we do not believe the complainants' actions rise to sanctionable conduct.

On the issue of the 120-person witness list, the complainants argue that because respondent refused to stipulate to the admissibility of any documents pre-trial, they believed it may be necessary to call a large number of witnesses if foundation witnesses would be required during the hearing. When respondent filed a motion to compel with the hearing officer and UAW was ordered to file a more manageable witness list, UAW immediately submitted an amended list. UAW complied with the hearing officer's order. Further, none of the other issues are so egregious as to warrant sanctions.

The single allegation that UAW failed to produce another deponent for deposition on April 4, 1995, while admitted by UAW, is also insufficient to warrant sanctions. UAW specifically informed respondent that the deponent could not be present on that day and respondent proceeded at its own risk to set up a deposition for this witness knowing full well the witness would not be present. Respondent later moved for his appearance at a deposition, which was granted by the hearing officer, and this witness was subsequently deposed on April 26, 1995.

This matter proceeded toward hearing in a timely manner, particularly in light of the voluminous amount of documentation and the importance of the issues. The complaint was filed on September 1, 1994 and discovery began in December 1994 with the hearings held in May 1995. Despite respondent's assertion that it was harmed in its ability to prepare for hearing, respondent did not seek a continuance of the hearings or request an extension of the discovery schedule. None of the specific issues raised by respondent were so egregious that respondent was harmed in the presentation of its case. Further, there is no indication in the filings before the Board that the complainants disregarded or disobeyed any discovery order of the hearing officer or of the Board. In the absence of noncompliance with any order, we will not impose sanctions in this case.

Respondent's Oral Motion To Decide Case At Close Of Complainants' Case. Respondent made an oral motion to dismiss the case at the close of hearing based on the paucity of evidence presented in the complainants' case-in-chief. In light of the fact that this motion is one more properly brought before the Board rather than the hearing officer, respondent called one witness as part of its defense. (Tr. at 574-575.) Respondent stated that it would be moving the Board in writing to support the oral motion; however, no such motion was

forthcoming. As no written motion was ever filed with the Board, we will not address the oral motion.

Respondent's Motion To Strike Exhibit B Of Complainants' Brief. On July 14, 1995 respondent filed a motion to strike Exhibit B of complainants' post-hearing brief which was filed June 22, 1995. Exhibit B contains new toxicological information concerning the chemical constituents, PCE, TCE, DCE, and vinyl chloride. None of this information was introduced at the hearing, therefore, respondent's motion to strike is granted.

Respondent's Motion To Strike Complainants' Response To Surreply Brief. On September 27, 1995, respondent filed a motion to strike complainants' response to respondent's surreply brief which was filed September 12, 1995. We hereby deny the motion and have accepted all of the post-hearing briefs submitted in this matter.

Agency's Motion To File a Supplement to the Section 30 Investigative Report. The Agency filed its Section 30 investigative report on March 27, 1995 and subsequent to hearing, the Agency filed a motion for leave to file an addendum to the investigative report on August 16, 1995. Respondent has not objected to the report and the complainants have waived their objection; therefore, we accept the addendum.

Procedural Background

On September 20, 1994 respondent filed a motion to dismiss the complaint on the grounds that respondent had voluntarily entered the Pre-Notice Program and because cleanup was being performed pursuant to Agency supervision, the citizens' suit should have been barred. On November 3, 1994 the Board denied respondent's motion to dismiss finding nothing in the provisions of Section 22.2(m) of the Act authorizing the Pre-Notice Program that would prohibit a citizens' enforcement action such as this one. For its motion, respondent had argued that participation in the Pre-Notice Program was the substantial equivalent of obtaining full RCRA permitting, and we noted in our order that the parties were free to address the relationship between permitting and the Pre-Notice Program in this proceeding. Also in the order, pursuant to Section 30 of the Act, we asked that the Agency submit an investigation report addressing the facts and remediation status of the site, which the Agency did on March 27, 1995. The report was subsequently amended post-hearing on August 16, 1995. On March 28, 1995 the complainants filed a motion to strike the Agency's Section 30 report and concomitantly requested the right to enter the site and perform their own soil and groundwater sampling. On April 6, 1995 the Board denied both motions, and on April 20, 1995 we denied a motion for reconsideration on this same point.

This matter was assigned for hearing to Hearing Officer Rebecca A. Haffendon who heard and ruled on various discovery-related motions from both sides during the pendancy of this case. These numerous motions were filed from January 5, 1995 up through the dates of hearing on May 8-11, 1995. Hearing was held on May 8-11, 1995 in Peoria, Illinois. The complainants presented a total of 12 witnesses: two bargaining unit employees of respondent who testified generally about the site conditions and worker health and safety, seven adverse witnesses from Caterpillar, and three witnesses from the Agency. The adverse witnesses called by

complainants were: Timothy Williams (plant environmental engineer at the time of the discovery of contamination); Eric Michelfelder (a senior quality engineer for Caterpillar from July 1992 to July 1994 who testified regarding precipitation on the soil in Building Y-42); George Runyon (waste water treatment operator and staff engineer responsible for water-related regulations, reporting and special waste manifesting); Mark Hynes (current corporate environmental affairs manager and formerly the chemical engineer supervisor of the East Peoria facility from 1987 to 1992); James Heatwole (chemical engineering supervisor and environmental coordinator); and Bruce Clagg and Steve Wanner of Conestoga-Rovers Associates (consultants who testified regarding analytical date and monitoring wells concerning the groundwater). From the Agency, the complainants called: John Tripses (regional manager of the Peoria regional office); Marc Cummings (remedial project management section who testified regarding the groundwater contamination at the site); and Jim Moore (manager of the Corrective Action Unit in the Bureau of Land who testified regarding the closure plan and whether the soil is hazardous waste).

Respondent had full opportunity for direct and cross-examination of its employees when they were called to testify by the complainants. Respondent called one of its own witnesses in its defense. Respondent called Mark Hynes to testify regarding statutory mitigating factors (*i.e.*, Section 33(c) of the Act) and to provide general information about the facility. On the last day of hearing, the parties agreed to allow the deposition testimony of William Child, chief of the Agency's Bureau of Land, to stand as the testimony he would offer if he were called to testify at the hearing. (Tr. at 596; Resp. Exh. 4.) Mr. Child's testimony concerned the Illinois Pre-Notice Program and RCRA requirements.

Additionally, public comments were offered on the last day of hearing from six unionized employees of respondent. The public comments were offered in support of the Board finding respondent in violation of the Act and corresponding regulations.

Complainants filed a post-hearing brief on June 22, 1995 and respondent filed its post-hearing brief on July 25, 1995. The Board issued an order on August 3, 1995 granting an extension of time for complainants to file a post-hearing reply brief on August 4, 1995. Respondent filed a surreply brief on August 18, 1995. The complainants filed a response to the surreply on September 12, 1995.

FINDINGS OF FACT

The respondent is a major industry and employer in Illinois which contributes nearly $2 million to Illinois' tax base annually and which internationally markets the equipment it manufactures. (Tr. at 586.) The particular "pollution source" in question is a site located within the facility. Specifically, the source was an on-site dry cleaning operation which discontinued operations in 1976 and which experienced releases and spills of dry cleaning related chemicals which caused the soil and groundwater to be contaminated. The facility occupies 750 acres near the Illinois River at East Peoria, Illinois. (Tr. at 587 and Comp. Exh. 22 at UAW 1533.) The facility,

which has been part of the company since 1925, manufactures large track-type tractors (D-6 through D-11 model), pipe layers, undercarriages, and transmissions. (Tr. at 11; Hynes Tr. at 577.) The East Peoria facility makes total material purchases of over $300 million dollars, employs 4,475 employees and has a payroll in excess of $300 million dollars. (Hynes Tr. at 577-78 and 587.)

Initial Discovery of the Contaminated Soil

In November 1990 respondent was in the midst of renovating various buildings on-site as part of an updating project called the "Plant with a Future Program" (PWFP). The renovation included excavating under one of the buildings to replace the subflooring and in order to add more machinery. During excavation, respondent uncovered a brick catch basin under the flooring which respondent removed. (Tr. at 99 and 141-142; Comp. Exh. 12 at UAW 0267.) On November 6, 1990 the workers began to complain of "chemical odors, light-headedness, nausea, and headaches." (Comp. Exh. 8 at UAW O319; Comp. Exh. 12 at UAW 0267.) Respondent's environmental personnel were immediately notified and called to the site. The plant industrial hygienist monitored for airborne exposure and identified halogenated hydrocarbons showing the presence of contamination. (Comp. Exh. 12 at UAW 0267.) Respondent immediately shut down the excavation and partitioned off the area. (Tr. at 116-123, 139, and 260; Hynes Tr. at 288.)

Expedited laboratory analysis showed a presence of volatile organic compounds (VOCs) in the excavation walls. (Tr. at 121-122; Comp. Exh. 12 at UAW 0271; Comp. Br. at 9.) The chemical constituents were perchloroethylene (PCE), trichlorethylene (TCE), and 1,2 dichlorethylene (DCE). (Tr. at 261; Comp. Exh. 24 at UAW 3186; and Resp. Br. at 3.) Respondent immediately notified the National Response Center, the Illinois Emergency Services Disaster Agency and the Agency. (HO Exh. 1; Tr. at 126-27; Comp. Exh. 9C at UAW 2585; Comp. Exh. 12 at UAW 0271; Comp. Exh. 24 at UAW 3186.) Respondent also retained an environmental engineering firm (Eichlay Engineering) to perform additional sampling and evaluation. (Comp. Exh. 12 at UAW 0271.) In 1991 respondent subsequently hired the consulting firm of Conestoga-Rovers Associates (Conestoga) who has been overseeing the remediation. (Tr. at 487.)

There is no evidence or allegation in this case that the source of the contamination under Building HH is the result of a recent spill or of a current source of solvent contamination. (Comp. Exh. 22 at UAW 1534.) The evidence suggests, and it is not in dispute, that the contamination originated in the 1970s when Building HH's site was formerly used by respondent to dry-clean such materials as shop towels, aprons and gloves. Respondent discontinued the dry cleaning operations in 1976 prior to the adoption of federal RCRA requirements and prior to Illinois' implementation of a State RCRA program. (Tr. at 110-113.) Respondent did not maintain extensive records of spills, or any other release events at the likely time of contamination, and there is no argument or allegation that respondent was required to do so in the 1970s. Therefore, when the contamination under Building HH was discovered, respondent contacted several employees who were most likely to have some knowledge of the operating history of Building HH in order to determine what types of chemical releases may have occurred. (Tr. at 108.)

According to the employee interviews, there were instances of dry cleaning equipment accidents during operations. On one occasion, there was an accidental spill of a mixture of TCE and PCE. (Tr. at 107-108.) The evidence suggests that spills unrelated to the dry cleaning operations may also have occurred as a result of a metal chip reclamation process and also from drum storage. On December 21, 1990 respondent sent a letter to the Agency describing the possible sources of contamination:

> "normal filling operations were to take virgin perchloroethylene from an overhead tank and manually fill the dry cleaning units. This was a gravity operation. It was not unusual for the dry cleaning unit to overflow and release virgin perchloroethylene. This virgin material (not off-specification), which was accidentally spilled and not discarded, would be one source of the material found in the impacted soil." A second operating incident was that on at least one occasion the wrong solvent, trichloroethylene, was placed into the dry cleaning equipment. The result as degradation of the seals and ultimate failure of the piping system which resulted in a release of unused, virgin solvent. Again the material released was not off-specification and was spilled, not discarded. We believe that these two new pieces of information are relevant to the determination of the appropriate designation of the impacted soil. The presence of the chlorinated organics, we believe, is due to the accidental release of virgin, usable material. (Comp. Exh. 1 at 1; Tr. at 103-105, 108-110)

Respondent's Initial Response

Within days of the discovery of the contamination, on November 17, 1990, respondent entered the Pre-Notice Program and requested that the Agency provide review and evaluation services for its cleanup activity. (HO Exh. 1 at 1; Resp. Br. at 5.) According to respondent's environmental engineers, respondent entered the program to "ensure that [Caterpillar] handled the situation appropriately." (Tr. at 5.) The Illinois Pre-Notice Program is administered by the Agency's Division of Remediation Management and is statutorily authorized by Section 22.2(m) of the Act.[2] The Pre-Notice Program allows participants to voluntarily cleanup a site and as a condition for Agency involvement, the participant agrees to perform a work plan as approved by the Agency. (See Section 22.2(m)(1)(C).) According to Mr. Child, the Agency prefers to regulate cleanups, such as that conducted at the respondent's facility, pursuant to the Pre-Notice Program because it is efficient and cost-effective. Mr. Child explained:

> Under normal circumstances, if there's a way to spin these things [site cleanups] off into the Voluntary Program, we normally try to do that because it's not as procedurally rich as RCRA, and it's easier to get our end goal and achieve

[2] Section 22.2(m) was recently replaced by Illinois' new Brownfields' Site Remediation Program (Title XVII of the Act, enacted by P.A. 89-443, effective July 1, 1996) which similarly provides for voluntary cleanup of certain types of sites with Agency oversight, as well as risk-based technical guidelines for conducting the cleanups.

levels that are protective of human health and the environment. (Resp. Exh. 4, Child Dep. at 43-44.)

As part of the oversight, on November 17-19, 1990 the Agency inspected the site. As a result of this site investigation, the Agency approved a work/action plan and health and safety plan for completing the excavation, including a groundwater sampling program and accumulation of the contaminated media being excavated from under Building HH. (Comp. Exh. 9C at UAW 1585.) Additionally, while on-site, the Agency advised respondent that there was a 90-day accumulation limitation concerning the contaminated media and recommended a disposal procedure be developed before this time limit was exceeded. (*Id*.)

The Agency also approved respondent's plans for storing the soil it was excavating from under Building HH. Respondent prepared soil staging areas in a neighboring building, Building X and constructed a "lean-to" against Building X. This lean-to is referred to as Building Y-42. (Tr. at 127-130, 150-153, 288-89; Comp. Exh. 8 at UAW 0296.) Building X is a large, fully enclosed, unused manufacturing building and Building Y-42 is a much smaller, partially open, roofed structure. The walls of Building Y-42 are four-foot high braced plywood walls lined with a high density polyethylene liner. (Comp. Exh. 12 at UAW 0274; Williams Tr. at 152-53, 179-180.) Both buildings in this "Building X soil staging area" have solid, concrete flooring covered by a felt-type material and a high density polyethylene liner sealed or welded over the top of the felt. (Williams Tr. at 213 and 217; Runyon Tr. at 268.) While staged in the Building X soil staging area, the soil was covered with visquene. The soil was dry when placed in storage. (*Id*. at 215-17.)

By November 18, 1990 respondent had excavated approximately 13,000 tons of soil from under Building HH removing the most heavily contaminated media. Agency field personnel were on-site to assist respondent in determining when to cease excavating soil. The Agency determined that respondent had excavated a sufficient amount of the contaminated soil and reached the "limit of contamination." (Resp. Br. at 6; Comp. Exh. 8 at UAW 0321; Hynes Tr. at 289-90.) Some over-excavation of the soil occurred in order to remove areas that had higher levels of contaminants. (*Id*. at 290.) All of the 13,000 tons were accumulated in the Building X soil staging area, some in temporary storage containers (roll-off boxes), and the remainder in piles on the floor of the buildings. [3]

Soil Investigation

As part of the Pre-Notice Program, the Agency's Cleanup Objectives Team and Coordinated Permit Review Committee set cleanup objectives (CUOs) which the soil in the ground must meet in order to be considered fully remediated. After excavation was completed in November 1990, soil sampling was conducted to determine the condition of the soil remaining in

[3] Pursuant to Board Rule 722.134(b) and 720.110, "hazardous wastes" may be accumulated on-site for 90 days before they must be shipped off-site. After the 90-day accumulation period, if the wastes remain on-site, they are "stored," triggering the requirement that the generator file a RCRA Part A application or obtain a RCRA Part B permit.

the ground. (Comp. Exh. 8 at UAW 0297.) Confirmatory sampling showed the presence of DCE, PCE, and TCE at levels requiring additional remediation to meet the CUOs. (*Id*. at 299 and Comp. Exh. 8 at UAW 0308.) The contaminant levels present in the soil are the following:

	Low	High
1,2 dichloroethylene	ND(5)	120 mg/kg
tetrachloroethylene	ND(5)	540 mg/kg
trichloroethylene	ND(5)	90 J mg/kg
vinyl chloride	ND(11)[4]	.27 mg/kg[5]

Respondent also took soil samples from the excavated soil samples. Two samples were subjected to the TCLP test to determine whether the soil was characteristically hazardous. [6] One sample passed the TCLP test; however, the second sample exceeded the parameter established for PCE. This sample was selected at the Agency's direction in order to obtain a representative sample of the reported release and the sampling area was chosen on the basis of the highest readings indicating the presence of contamination. Both the complainants and respondent agree that this single, grab sample is not a representative sample and that on this basis alone, it cannot be determined that the soil was characteristically hazardous. (Comp. Br. at 20 and Res. Br. at 38.) Respondent asserts that it did perform additional TCLP tests which were provided to the Agency in May 1992 as part of the closure plan and which show that the soil is not characteristically hazardous; however, according to respondent, this actual data is not in the record from hearing.[7]

At the same time the investigation and sampling activities were taking place in relation to the Building HH remediation, respondent was going through closure of neighboring

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[4] ND represents that the substance was not detected at the quantitation level indicated in parentheses. (HO Exh. 1 at Exh. A.)

[5] These sampling results were reported to the Agency in November 1994 and appear in the Agency's Section 30 investigative report. (HO Exh. 1 at Exh. A.) Regarding vinyl chloride specifically, there is no evidence that this constituent was released by Caterpillar. Instead, vinyl chloride is a degradation byproduct of the other chemicals in the soil and while there was one initial hit in 1990, vinyl chloride was later found detected in measurable quantities with a low of ND(11) to a high of 270 ug/kg. (Comp. Exh. 8 at UAW 0307; Comp. Exh. 17 at 5; Resp. Br. at 3; and HO Exh. 1 at 1, Att. A.)

[6] TCLP is the toxicity characteristic leaching procedure which is designed to determine the mobility of both organic and inorganic contaminants present in liquid, solid, and multiphasic wastes. (C.C. Lee, Ph.D., Environmental Engineering Dictionary, 391 (1992).)

[7] Though the closure plan was admitted as a respondent's exhibit, the documentation actually came from the complainants' files. Table 2.2 of the closure plan which contained the TCLP analysis was inadvertently omitted. Respondent states that while it does not believe it is respondent's burden to prove whether the soil is characteristically hazardous waste, it would provide this information if the Board does wish to see the results of the TCLP. (Sur. at 6, nn. 5 and 6.)

Building FA. As of the early 1980s, respondent had authorization via a RCRA Part A application to operate as an interim status hazardous waste management facility (HWMF) and use Building FA to store hazardous wastes generated on-site as part of manufacturing activities. (Resp. Exh. 1 at 1 of 5.) Respondent had decided to cease using Building FA and to cease operating as a RCRA facility altogether and, therefore, Building FA was going through RCRA closure pursuant to a work plan finally approved by the Agency in 1991. As part of closure, respondent was investigating and sampling the ground surrounding Building FA.

Subsequently, respondent initiated a supplemental sampling program which coordinated the sampling of both buildings. (Resp. Br. at 14.) Based on the results of the supplemental sampling program, respondent developed the "Building HH and FA Remedial Investigation Workplan" which was finalized in 1994.[8] This plan included additional sampling, evaluation of stratigraphy, installation and development of groundwater monitoring wells, collection of samples, and collection of hydrogeologic data. (See Comp. Exh. 24 and Comp. Exh. 27A at UAW 2124.) The purpose of this remedial investigation was primarily to characterize the site and any groundwater impact. (Comp. Exh. 27B at UAW 2150-2151.) Based upon the results, respondent was able to develop the remediation workplan for clean up of the contamination under Building HH which was approved by the Agency in 1994 and pursuant to which remediation activities were commenced. The results indicated that groundwater impact was more extensive than originally believed.

Groundwater Investigation

Within days after discovering contamination at Building HH, respondent began groundwater monitoring at 25-30 feet. (Comp. Exh. 12 at UAW 0274 and 0280.) A temporary monitoring well was placed downgradient of the excavation to detect the release outside of Building HH. Sampling the groundwater at 30 feet would provide a maximum amount of interception of the groundwater table. A groundwater sample was taken on November 11, 1990, and analytical results of November 12, 1990 reported PCE at 0.14 mg/L, TCE at 0.22 mg/L, and DCE at 0.56 mg/L. (Comp. Exh. 12 at UAW 0282-0283.)

On January 21, 1992 respondent submitted to the Agency its Phase I Groundwater Investigation Report, Building HH. (Comp. Exh. 26.) This report documents the installation in June and July 1991 of four "shallow" wells (about 20 feet) and one "deep" well (about 50 feet). (Comp. Exh. 26 at UAW 4144, 4146, 4236, and 4242.) All wells were located in subsoil with hydraulic conductivity greater than 1×10^{-4} cm/sec. (Comp. Exh. 26 at UAW 4159.) Each well was sampled twice, once in mid-July and once in mid-August, and the analyses were completed July through September 1991. (Comp. Exh. 26 at UAW 4166.)

[8] The original workplan was submitted in June 1993, and a series of comments were exchanged between respondent and the Agency. On February 23, 1994 respondent submitted revisions which were accepted by the Agency on March 21, 1994. (See Comp. Exhs. 21A and 21B.)

The Phase I Report states that VOCs were detected in the deep well and in three of the shallow wells. Exceedences of Class II standards included PCE and TCE at well MW4, DCE at wells MW1A (the deep well), MW3, and MW4, and vinyl chloride at wells MW3 and MW4. (Comp. Exh. 26 at UAW 4172.) The concentrations of these VOCs were relatively consistent between the two sampling rounds. (*Id*. at UAW4172.) The highest concentrations of DCE were detected in MW-1A, which is screened in the deep aquifer. (*Id.)* No VOCs were detected in the upgradient monitoring well, MW5. (*Id*. at UAW 4175.) The levels of vinyl chloride and DCE in the shallow aquifer are significantly greater than Class I or II standards and the levels in the deep aquifer vary from five to 10 times greater. Assessment of the Phase I data, as reported in respondent's "Work Plan, Remedial Investigation for Buildings FA and HH," indicated that the "Illinois River is the most likely discharge point for shallow groundwater in the area." (Comp. Exh. 27B at UAW 2133.)

Respondent proceeded to a second phase of groundwater sampling. Pursuant to the Agency-approved document, Work Plan Remedial Investigation, Buildings FA and HH, respondent combined groundwater sampling of both aquifers beneath Building HH together with soil sampling of the area near Building HH and neighboring Building FA. (See Exhs. 24 and 27.) Under the plan, respondent installed shallow and deep wells to determine subsurface stratigraphy. (Comp. Exh. 27A at pp. UAW 2153-2155, 2164; and Comp. Exh. 21B, fig. 4.2 and 4.3.)

The plan called for two phases of investigation, Phase 2A and 2B, and on October 6, 1994, after conducting the Phase 2A sampling but prior to submitting the Phase 2A final report, respondent submitted to the Agency its revised recommendations for the Phase 2B investigation. (Comp. Exh. 20.) The results of the Phase 2A investigation had revealed that the shallow groundwater was discharging not to the Illinois River as previously believed, but instead to the Branch A ditch, which is a drainage ditch between Building HH and Building FA and parallel to the Illinois River. A sewer trunkline is located between Building HH and the Branch A Ditch, and a high pressure gas line is located in an easement between Building FA and the Branch A Ditch. It was believed that both of these structures could potentially act as conduits for preferential groundwater flow. (Comp. Exh. 20 at 4.) Additionally, the Phase 2A investigation revealed the presence of a sand lens in the clay layer between the two water-bearing units, which indicated that the sub-surface geology had not been defined sufficiently to enable respondent to develop an appropriate remedial plan. (HO Exh. 1 at 5-6.)

Subsequently, on November 11, 1994 respondent submitted to the Agency information from the Phase 2A investigation including screening data. (Comp. Exh. 22.) The contaminant levels present in the groundwater are the following:

	Low	High
cis-1,2 dichloroethene	ND(1)	4099 µg/L
tetrachloroethene	ND(1)	7813 µg/L
trichloroethene	ND(1)	3382 µg/L

vinyl chloride	ND(3)	4541 µg/L[9]

The proposed Phase 2B investigation plan was revised, calling for the installation of nine additional shallow wells and five well clusters to characterize the deep aquifer. (HO Exh. at 5-6.) The revision also called for the installation of a potentiometric grid to further define the deep aquifer. This additional data was to determine the existence and extent of vertical and horizontal contamination in the two water-bearing units and to allow the Agency to develop CUOs for the groundwater and to modify CUOs for the soil if necessary. (*Id*. at 6.) Phase 2B was scheduled to be completed by March 1995. The Agency approved the revision on December 8, 1994. On March 17, 1995 further sampling data was submitted to the Agency.

Remediation

Two separate divisions within the Agency's Bureau of Land have been supervising respondent's remediation of the facility. (Moore Tr. at 517.) The Division of Remediation Management has been supervising the voluntary cleanup of the contaminated soil still remaining under Building HH and the groundwater remediation. The RCRA closure of the Building X soil staging area is being supervised by the Division of Land Pollution Control.

In-Ground Soil Remediation. The contaminants located in the soil under Building HH are being removed by an in-situ soil vapor extraction system (SVE). (Moore Tr. at 509.) The SVE system employs aspiration tubes which pull air through the soil volatilizing the VOC contaminants into the vacuumed air. The VOCs are carried by the air stream which passes through carbon filters where they are absorbed. The filtered air is discharged into the atmosphere. (HO Exh. 1. at 3-4, 8.) The soil will not be considered fully remediated until soil sampling shows four quarterly samples showing the soil as meeting the established CUOs as established by the Agency's cleanup objectives team. The established CUOs are:

1,2 dichloroethylene	0.2 mg/kg
tetrachloroethylene	0.025 mg/kg
trichloroethylene	0.025 mg/kg
vinyl chloride	none established[10]

The in-situ SVE system was in place as of October 27, 1994 and began operating November 4, 1994. (HO Exh. 1 at 4.) The Agency's Section 30 investigative report indicates that because the amount of contamination under Building HH has not been measured, and because the efficiency of results from SVE systems is unpredictable, no proposed completion date was available at the time of the report. Another factor affecting completion of the soil cleanup is the extent of groundwater contamination. Respondent was notified as part of on-going discussions with

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[9] These sampling results were reported to the Agency in November of 1994 and appear in the Agency's Section 30 investigative report. (HO Exh. 1 at Exh. A.)

[10] No specific parameter was established for vinyl chloride; however, respondent agreed to adjust the SVE system to trap vinyl chloride as well as any other VOCs detected in the soil. (HO Exh. 1 at 7.)

the Agency in December 1990 and later in December 1994 that any additional contaminants found in the soil or the groundwater could alter the CUOs and that data would be reviewed to determine whether the CUOs require modification. (*Id*. at 4-5.) Though the Agency had not received results from the SVE system, and was expecting them as they became available, respondent had reported to the Agency that the system had "exceeded expectations" recovering VOCs. (*Id*.)

Closure of the Building X Soil Staging Area. Respondent has agreed to manage the 13,000 tons of contaminated soil stored in the Building X soil staging area and to decommission this area pursuant to RCRA closure standards for "clean closure" in Parts 724 and 725 of the Board's regulations. (See Resp. 2A at UAW 1532.) In this case, clean closure means that respondent will decommission the soil staging area by treating the accumulated soil to meet the appropriate CUOs, re-use the treated soil on-site as clean fill, and decontaminate and close the soil staging and treatment areas. As a result, all of the contaminated media will be removed from the soil and the Building X soil staging area. All structures and equipment will be decontaminated and all remediation-related items such as liners and worker clothing will be decontaminated and disposed of off-site in an appropriate manner, approved by the Agency. (See, *e.g.*, HO Exh. 1 at 9.) The Agency approved respondent's closure plans and subsequent amendments in 1992 and 1994.

The first phase of the closure plan involved removing VOC contamination from the 13,000 tons of soil to meet the same CUOs as established for the in-ground soil. Instead of the SVE system operating in-situ, however, the plan called for the excavated soil to be treated using an SVE system constructed within an above-ground treatment tank. The SVE system has been operated 24 hours a day and the treatment will be considered complete when all of the excavated soil meets the established CUOs. Respondent was required to provide quarterly assessments of the SVE system. (Resp. Exhs. 2A-2E.)

The next phase involved decommissioning the soil staging areas. This process includes off-site disposal as special waste of liners and temporary storage containers. (Tr. at 296-300.) Clothing and other similar items will be disposed of as special waste. All debris screened out of the soil prior to being treated by the SVE system will be off-site-disposed as nonhazardous special waste. (HO Exh. 1 at 7-8.) The carbon filters used in the SVE system will also be disposed of as hazardous waste. At final closure, the concrete floors, structures, and equipment will be steam-cleaned and triple-rinsed.

According to the Agency, respondent's plan, when achieved, will meet the standards for clean closure. Therefore, the Agency has not required post-closure care, which would normally be required for facilities that have not selected clean-closure. While there was some testimony at hearing concerning whether precipitation came into contact with the soil in the Building Y-42 portion of the Building X soil staging area, the Agency is not requiring that respondent monitor the groundwater under the Building X soil staging area. The Agency believes there has been no groundwater impact from the treatment units or soil storage and no real opportunity for any impact since the soil was lined and covered. (See Williams Tr. at 215-216 and Michelfelder Tr. at 229.)

As of the date of the hearing, the Building X soil staging areas had been disassembled and all of the contaminated media has either been treated or is in the treatment cells. (Tr. at 158; Hynes Tr. at 292, 293, 295.) The first set of quarterly reporting was due to be filed with the Agency by February 1, 1995. As of February 1, 1995 all debris had either been shipped off-site, or was scheduled for shipment to a permitted disposal facility. (HO Exh. 1 at 7.) Respondent's closure plan called for closure of the waste piles by September 1, 1995 and closure certification of the Building X soil staging area by November 1, 1995.

Groundwater Remediation. The Agency's Section 30 investigation report states that respondent has proposed a "trench intercept (pump and treat) treatment system to remedy the shallow [groundwater] unit," but that no groundwater treatment design plans have yet been submitted to the Agency. As of the hearing, the deep groundwater unit had not been characterized and no specific remedy had been proposed to the Agency.

In March 1995 respondent submitted a request to the Agency to receive approval for a groundwater management zone (GMZ) in order to manage the groundwater contamination related to subsurface contamination in the area of Building HH and Building FA. (Comp. Exh. 23.) Under Section 620.250, the Agency may grant approval for a three-dimensional region in order for the applicant to manage and mitigate groundwater impairment caused by the release of contaminants from the site. (In the Matter of: Groundwater Quality Standards (35 Ill. Adm. Code 620*)* R89-14(B), November 7, 1991, slip op. at 14-15.) While the goal of the GMZ is to remediate the groundwater so that it meets the groundwater quality standards of the class to which the waters belong, the GMZ serves to exempt the groundwater from the standards during the corrective action. If, however, after sufficient remediation has been demonstrated and groundwater monitoring continues to show that groundwater cannot achieve the class standards, the Agency may set alternative standards. (*Id*.) One basis for adopting the GMZ concept was to provide a companion to RCRA and Comprehensive Environmental Response Compensation Liability Act (CERCLA) regulations. (R89-14(B), slip op. at 15.)

On May 19, 1995 the Agency conditionally approved Parts I and II of the application to remediate PCE, TCE, DCE, vinyl chloride and 15 other constituents to achieve Part 620 groundwater quality standards. As part of the approval, respondent was to provide for continual monitoring and reporting, and a reporting schedule. (Add. at 1.) On July 18, 1995 respondent submitted Part III of its GMZ application, which is to be submitted at the completion of the site investigation, and the Agency was reviewing it at the time the addendum to the investigative report was submitted to the Board in August 1995. Part IV, which is a final report to be filed at the completion of the corrective action, was not filed at the time of the hearing or, of the Agency's investigation reports. (See, *e.g.*, Part 620, App. D.)

Respondent Permits. In order to operate as an HWMF, respondent had applied for and received permission via the RCRA Part A application to store and manage hazardous and solid waste in Building FA at some point in the early 1980s. Having decided to discontinue operating as a RCRA facility, respondent received approval to go into RCRA closure for Building FA in 1991. As a result, respondent never applied for the permanent Part B permit to continue storing and

managing hazardous waste past the interim status period which expired November 8, 1992. (Hynes Tr. at 310; Heatwole Test. Tr. at 320.)

In June 1993 respondent revised the Part A permit application to include respondent's management of the excavated contaminated media with hazardous waste within the Building X soil staging area. (Tr. at 164-165; see also Hynes Tr. at 312.) Respondent revised the Part A application, adding process code "SO3" (which is the code assigned by USEPA in the RCRA notification form for waste piles) and included the following narrative in the revision:

> No EPA hazardous waste code was specified for this item because it is contaminated environmental media. Caterpillar does not believe that this material is a hazardous waste, but we are managing the soil as a hazardous waste because it contains a hazardous constituent. This is an application of the "contained-in rule," therefore the mixture rule and the derived-from rules do not apply. Management of the contaminated media as a hazardous waste will cease once the hazardous constituents are removed. Removal of the hazardous constituents is being handled through an IEPA approved Closure Plan titled "Closure Plan, Building X Soil Staging Area, dated September 25, 1992." (Comp. 23 at UAW 2094.)

This Part A revision was filed in response to a compliance inquiry letter (CIL) respondent received from the Agency in April 1993. The CIL stated that the Agency conducted an inspection on December 15, 1992 and, based on that inspection, the Agency believed that respondent was in violation of several of the Board's regulations in Part 703, 722, 725 and 728. The CIL letter indicated that because the soil contained hazardous wastes which were stored in waste piles, respondent was obligated to amend the Part A application to reflect management of the hazardous waste on-site. The Agency's position is that while it is appropriate to conduct cleanup at a site pursuant to the auspices of the Pre-Notice Program, in this case the contaminated soil contains hazardous waste at least until such time as the soil is treated and the hazardous wastes are removed. Therefore, it is appropriate to amend the Part A application to reflect such management. (See Moore Test. Tr. 514-515.) The Agency's position is an application of the federal "contained-in rule" which is referenced in the portion of the permit application cited above. The Agency's view is that pursuant to the contained-in rule, the Agency must require environmental media such as soil or groundwater, which contains a listed hazardous waste, to be managed as a hazardous waste until the wastes can be removed to a *de minimis* level. (*Id.* at 567-68.)

The contained-in rule is not a promulgated rule, but is instead an "interpretation" of the RCRA hazardous waste identification rules for mixtures of solid wastes and listed hazardous wastes. Upheld by the D.C. Court of Appeals as a "reasonable interpretation" of the RCRA rules and part of a "coherent regulatory framework," the policy provides that if soil or groundwater is contaminated with a listed hazardous waste constituent, the USEPA is authorized to regulate the material "as if it were a hazardous waste" until the hazardous waste constituents are removed. (Chemical Waste Management Inc. v. EPA, 869 F.2d 1526, 1538-40 (D.C. Cir. 1989); see also the Jorling Letter, Resp. Exh. 3.) In recent rules proposed by USEPA on April 29, 1996 which

recommend codifying the contained-in rule, the USEPA states that either the USEPA or the State agency authorized to administer the "base" RCRA regulations, is similarly authorized to determine whether media "contains" hazardous wastes and when the media appropriately "exits" from regulation.[11] (61 Fed. Reg. 18780, 18795 (April 29, 1996).)

While respondent did eventually amend the Part A application in June 1993, respondent does not agree that the soil is hazardous waste, and has never agreed that its management of the contaminated media required amending the Part A application. Further, respondent does not agree that the Building X soil staging area was an unpermitted RCRA storage facility. Respondent's position is that the historical contamination is being remediated pursuant to Agency oversight and, therefore, no RCRA permits were necessary. (Comp. Exh. 9C at UAW 2585-2588.) When respondent added the contaminated soil to the Part A application, it did so subject to the understanding that the closure plan for the soil staging area would not be altered as a result. (*Id.* at UAW 2587-2588; see also Resp. Exh. 2D at 1 and Michelfelder Tr. at 245.) The Agency subsequently notified respondent on June 27, 1993 that it viewed respondent as having returned to compliance for all of the apparent violations raised in the CIL.[12] (Comp. Exh. 10.)

ALLEGATIONS OF THE COMPLAINT

The complaint, including amendments filed subsequent to hearing and accepted by the Board, is summarized below:

Violations of RCRA Environmental Protection Act Provisions and the RCRA Regulations

Count I: Section 21(e) for unlawful operation of a waste treatment, storage and disposal site.

The facility constitutes a hazardous waste management facility and respondent violated the Act by disposing, treating and/or storing waste inside Building X from November 1990 to the present at a facility and in an area adjacent to Building X

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[11] These are the "HWIR-Media Rules." (61 F.R. 18780, 18784 (April 29, 1996).) These proposed rules identify "bright line" constituent concentrations that would determine when management under RCRA is no longer regulated and distinguish between (1) contaminated media that is eligible to exit because it is likely that they can be managed safely outside of Subtitle C; and (2) media that contain so much contamination that continued Subtitle C management is warranted. (61 Fed. Reg. 18780, 18788 (April 28, 1996).) The USEPA has recently extended the public comment period on these rules through August 28, 1996.

[12] Previously, on October 18, 1991, the Agency had inspected the site and found no RCRA violations. The 1991 investigation report concluded that even though there were "listed wastes" on-site in the piles stored in Building X, respondent did not need a permit based on a regulatory exemption in Section 725.101(c)(11). (Resp. Exh. 1 at 5 of 5.) The Agency subsequently determined that the exemption was not applicable.

[Building Y-42] from November 1990 to November 1992 without a revised Part A application.

Count II: Section 21(f) for operating a hazardous waste management facility without interim status.

The facility as an existing hazardous waste management facility, possessing RCRA Part authority to manage hazardous wastes, may retain interim status by amending the Part A application to include the waste piles in Building X as hazardous waste management units, or file a Part B permit. Respondent has not complied with the 35 Ill. Adm. Code Sections 703.153 through 155 and does not have interim status; therefore, respondent violated the Act when it disposed, treated and/or stored waste inside Building X from November 1990 to the present and adjacent to Building X [Building Y-42] from November 1990 to November 1992 without a revised Part A application.

Count III: Section 21(f)(1) and 35 Ill. Adm. Code 703.151 and 703.180 for constructing and operating a new hazardous waste management facility without a hazardous waste permit.

The waste piles and the storage areas in Building X and adjacent to Building X are new hazardous waste management facilities and respondent has not complied with the Act or these regulations when it constructed and operated the waste piles/storage without applying for a permit and for failing to submit a Part A and Part B permit, and failing to have a final, effective RCRA permit.

Count IV: Section 21(f)(2) and Sections 702.121(a) and (b), 703.126, 703.152(a), 703.154, 703.155(a)-(c) for operating in violation of Board hazardous waste regulations.

Since November 1990 respondent has conducted a hazardous waste disposal, treatment and/or storage operation and failed to perform several RCRA-requirements including failing to obtain post-closure care for the waste piles, failing to address groundwater monitoring, unsaturated zone monitoring and corrective action, and post-closure care under Part 724. This list also includes several additional regulatory provisions to those in Counts I through III which also prohibit operating a hazardous waste storage, treatment or disposal facility without either revising the Part A permit, obtaining a Part B permit or having a final, effective RCRA permit: 703.121(a) and (b), 703.126, 703.152(a), 703.154, 703.155(a) -(c).

Count V: Section 21(f)(3) and 703.121 for failure to apply for and obtain a post-closure permit.

Respondent as the owner/operator of hazardous waste management units was required to have a permit during the active life of the waste piles and post-

closure permits and respondent is in violation for failing to file for a post-closure permit.

Count VI: Section 21(f) for unlawful storage of hazardous waste in excess of the 90-day hazardous waste on-site accumulation limit.

Respondent stored the contaminated soil on-site for more than 90 days without a provisional variance or variance relief.

Water and Groundwater Violations of the Environmental Protection Act

Count VII: Section 12(a) for causing or allowing the discharge of any contaminants so as to cause water pollution.

The soil in the area in and around Building HH still contains PCE and other VOCs and PCE, TCE, DCE, and vinyl chloride have impacted and continues to impact the groundwater at the facility in exceedence of the Class I and Class II groundwater standards.

ARGUMENTS OF THE PARTIES

RCRA Compliance (Counts I through VI)

The Complainants' Arguments. The complainants argue: 1) that the contaminated soil should be classified as a hazardous waste under RCRA; and 2) when respondent discovered historically contaminated soil and began excavating it out of the ground, respondent became responsible for complying with those regulations and managing the contaminated media as "hazardous waste" pursuant to the RCRA permitting process. The complainants' argument is:

> Having determined the waste is hazardous, the question then arises as to the obligations and responsibilities of Caterpillar in managing the hazardous waste piles. A finding that the waste piles are within the hazardous waste regulations requires Caterpillar to properly store, treat, dispose or otherwise manage the waste in accordance with the regulations, to obtain the proper permitting authority to manage the waste and to assure proper closure of the waste piles. None of these things has Caterpillar done pursuant to applicable regulations. The ensuing hazardous waste violations inevitably follow from Caterpillar's failure to properly characterize its waste and follow applicable storage, treatment, disposal and permitting requirements. (Comp. Br. at 24.)

The Hazardous Waste Determination. Throughout the majority of this case, the complainants maintained that the soil itself satisfies the definition of solid waste and hazardous waste, and it is therefore a hazardous waste triggering full RCRA permitting and the regulatory requirements listed in Counts I through VI. They argue the soil is a listed waste pursuant to Section 721.133(d) because it contains four hazardous constituents, PCE, TCE, DCE,

and vinyl chloride which are listed in Section 721.133(f). (Comp. Br. at 19 and n.98.) They also believe that the soil is a listed waste under Section 721.131 because respondent has admitted, and the Agency agrees, that the solvents found in the soil are degreasing solvents. (Rep. Br. at 8, *citing* to Resp. Br. at 27.) Alternatively, the complainants argue the soil could be "characteristically" hazardous wastes because there is sufficient generator information concerning the origin of the contaminants to conclude the soil is hazardous waste and should thus be managed pursuant to RCRA permitting.[13] (Comp. Br. at 20.)

Ultimately, however, in their last brief, while the complainants did not concede their arguments that the soil qualifies as a listed hazardous waste pursuant to Section 721.133(d) or that it fits the definition of a characteristic waste, the complainants agreed that management of the soil is subject to RCRA pursuant to the contained-in rule. (Comp. Resp. to Cat. Sur. Reply Br. at 5-6.) Their position is that under any determination, there are hazardous waste constituents in the soil and the contained-in rule does not in any way lessen respondent's responsibility to manage the hazardous wastes within the soil pursuant to full permitting (*e.g.*, revising the RCRA Part A application and obtaining a RCRA B permit). (Resp. to Sur Reply Br. at 4-6.) The complainants argue that the contained-in rule is not a promulgated rule, has been subject to a great deal of litigation and it should not be used to allow hazardous waste constituents to "exit" from regulation.

Permitting Requirements. Complainants argue that respondent is an interim status facility and therefore, respondent was responsible for properly and timely revising its Part A application to reflect respondent's management of the hazardous waste constituents on-site and additionally in order to "extend" interim status protection over the Building X soil staging area. Pursuant to Section 703.152(a)(2), complainants urge that it was incumbent on respondent to have submitted an amended Part A application within 30 days of moving the contaminated media into Building X or alternatively, within 30 days of stockpiling the contaminated soil in Building Y-42. Complainants also allege that respondent failed to file for and obtain a finally effective RCRA Part B permit prior to constructing and using the Building X soil staging area as a new hazardous waste management facility. The complainants argue that as a consequence of having failed to either revise the Part A application or obtain a RCRA Part B permit, respondent violated the RCRA regulations set forth in Counts I through VI.

Respondent's Arguments. Respondent argues that the complainants have in no way satisfied their burden of proof in this enforcement action. Respondent asserts that complainants have not demonstrated that the contaminated soil is hazardous waste nor have they shown how RCRA permitting has been triggered. Respondent argues the soil is not hazardous waste therefore RCRA permitting does not apply. Respondent argues that instead respondent is voluntarily

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[13] The complainants point out that there is no evidence in the record that respondent tested the soil to determine if it was "characteristically" hazardous and that respondent failed to perform a proper hazardous waste determination altogether. They ask that any deficiency in the record should be weighed against respondent and argue the complainants can in no way produce evidence to show it is characteristic hazardous waste without having access to the site for sampling, access which respondent had opposed. (Reply Br. at 6 and n. 6.)

remediating historically contaminated soil and agrees that because there are hazardous waste constituents within the soil, it is appropriate to close the facility pursuant to RCRA closure standards. Respondent urges the Board to find that there is nothing inappropriate with remediating the facility under the Agency's supervision pursuant to the Pre-Notice Program and RCRA closure plans and that, in doing so, respondent is utilizing the most advanced cleanup technology and methods available. Respondent insists that a finding that full RCRA permitting is necessary would add a complex regulatory layer to the remediation process which would be exceptionally time-consuming, expensive, and inapposite to the goals of remediating the site which was contaminated pre-RCRA. Respondent argues that the Pre-Notice Program was designed to accommodate the very type of cleanup being undertaken at the facility.

The Hazardous Waste Determination. Respondent maintains it is the complainants' burden to prove the soil is hazardous waste, which they have not satisfied, and there is no evidence in this case to suggest the soil is in fact, hazardous. (Resp. Br. at 2 and 22.) Respondent argues that the soil itself is not hazardous waste and, therefore, the RCRA permitting requirements do not apply. Respondent argues the soil cannot be considered a listed waste merely it is mixed with hazardous wastes. Respondent points out that while Section 721.133(d) lists DCE, PCE, and TCE as hazardous waste, this section also has an explanatory "Board Note" which states that in order to be considered a listed waste, the constituent must be of a commercially pure grade and here, none of the constituents in question were pure. (Resp. Br. at 27.) Also, any solvent leak would have been a mixture of oils, greases, and dirt removed in the cleaning process. (Resp. Br. at 27.) Respondent further argues there is no evidence to suggest the soil is characteristically hazardous because there is only uncertain generator information and moreover, TCLP tests were performed which indicate the soil does not exhibit the characteristics of hazardous waste.[14]

Respondent argues that pursuant to the contained-in rule, it is permissible to manage the contaminated soil without full RCRA permitting as long as all of the hazardous waste constituents are removed as part of the treatment. According to respondent, the USEPA and the Agency have adopted the contained-in rule which allows cleanup of listed hazardous waste spills without full RCRA permitting as long as the media is treated to remove all but a *de minimis* level of wastes. (Resp. Br. at 35, *citing* Moore Test. Tr. At 555-60, 563-68 and Resp. Exh. 3 "the Jorling letter;" see also Child Dep. at 19-20.) Therefore, even if the soil did contain a listed waste, treatment of the soil pursuant to the cleanup levels established by the Agency and approved in a closure plan renders the soil nonhazardous because the SVE system is removing the hazardous materials from the soil. (Resp. at 35.) Respondent argues that in this case, the treatment method will remove all of the hazardous wastes and, therefore, the contaminated soil need not be RCRA-permitted.

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[14] The initial TCLP test from one grab sample did exceed the limit for PCE; however, this sample, respondent argues, was not a representative sample and should not be used to conclude the soil is hazardous. (Resp. Br. at 38.) The sample was taken at the direction of the Agency and it was deliberately biased because it was taken from the point suspected of having the highest concentrations. (Resp. Br. at 38; Sur. Reply Br. at 5.) Additionally, respondent argues that the TCLP tests provided in Table 2.2 of the closure plan demonstrates that respondent performed its obligation to characterize the soil and that the soil is not characteristically hazardous waste. (Sur. Reply Br. at 5-7.)

RCRA Closure Standards Renders Respondent in Full Compliance with RCRA. Respondent argues that although respondent has agreed to manage the contaminated media as if it were hazardous waste pursuant to the contained-in rule, respondent disputes that RCRA permitting is triggered. Respondent believes it is perfectly appropriate to manage the historically contaminated media pursuant to RCRA closure requirements. Respondent urges the Board to find that it is not only appropriate, but not unusual to do so. Agency personnel testified that RCRA closure plans are entirely appropriate for facilities which are not otherwise in the permitting system. (Resp. Br. at 39, citing Moore Test. Tr. At 502-503.) In support, respondent points to Mr. Child's deposition testimony:

> the permitting process itself takes years, a long time, a very, very long time to obtain an appropriate permit for these kinds of activities . . . And so to the extent that we can remove the paper requirement for a permit and replace that with an appropriate cleanup and making sure that the waste is cleaned up to a level that's totally protective of human health and the environment. And those kinds of issues are resolved using better utilization of resources not to worry about the short term permit and to spend our time working on the appropriate closure of the facility. (Resp. Exh. 4, Child Dep. At 28-29.)

Finally, it is respondent's contention that even if the Board finds that a revision to Part A was necessary, or that respondent was obligated to obtain a RCRA Part B permit, the Board should find that the closure documents satisfy any permitting requirement. Respondent points to the definition of "permit" as not only the actual permit, but any other "equivalent control document" issued by the Agency to implement the requirements of Parts 702, 703 and 705. (Resp. Br. at 39, *citing* Section 702.110.) Thus, the RCRA closure plans, the Pre-Notice cleanup agreements, and the workplans are all the substantial equivalent of any permit in this case. Respondent believes that obtaining the closure plan is the equivalent of amending the Part A application within the time period allowed to obtain interim status as the closure plan was submitted prior to expiration of interim status. (Resp. Br. at 40, n. 27.) Respondent also argues that because closure will meet clean closure standards pursuant to an approved closure plan, post-closure permits are not required. (Resp. Br. at 40, citing Section 703.159.)

Groundwater Contamination (Count VII)

Complainants' Arguments. The complainants argue that respondent violated Section 12(a) of the Act by causing or threatening to cause water pollution or a water pollution hazard. They argue that the groundwater units located on the site meet the regulatory definition of Class I Potable Resource Groundwater based on respondent's own reports and data, and that the evidence in this case shows exceedences of both the Class I and II groundwater standards for PCE, TCE, DCE, and vinyl chloride in these units. Complainants urge the Board to find respondent in continuing violation of Section 12(a) based on these exceedences and argue these exceedences demonstrate harm to one of the State's natural resources

The complainants argue that respondent itself admits to having spilled, leaked, and/or released the constituents which are in the soil located under Building HH and it is these same constituents which appear in the groundwater units under the respondent property. Respondent admits that it released these contaminants into the soil in the 1970s. Complainants argue that "Caterpillar's offense is in allowing the old solvents to continue to leak or escape into groundwater." (Reply Br. at 20.)

Complainants argue that Section 12(a) intended to make it a violation of the Act to cause or allow contaminants to enter protected environmental resources, such as the groundwater in this case, and to be present in prohibited concentrations. The record demonstrates that both the shallow and deep aquifer at the site contain hazardous waste constituents in excess of Board standards and these constituents have been detected in respondent's groundwater monitoring wells ever since their installation in 1991.

Complainants urge that the Board to find that the Agency's approval of a GMZ subsequent to hearing in this matter does not alter the nature of respondent's violation of Section 12(a). (Reply Br. at 20.) The complainants argue, "there is no Caterpillar groundwater cleanup plan in the record because none was submitted to the Agency until July 18, 1995, two months after the close of proofs." (Comp. Resp. to Add. at 2.)

Respondent's Arguments. Respondent argues there can be no violation of Section 12(a) of the Act without the showing of a discharge into the waters of the State or without a showing of harm. According to respondent, no expert witness was called by the complainants and there is, therefore, no evidence in this case that there has been a discharge into or other alteration of water, or that any such discharge has created a nuisance or rendered the waters harmful for use. (Resp. Br. at 46.) There is no evidence as to how the contamination in the soil might migrate or have adverse impacts on water.

Respondent further contends that even though there may be exceedences of groundwater standards, this does not equate to a violation. The complainants must prove that respondent caused, threatened, or allowed a release of a contaminant so as to cause a groundwater quality standard to be exceeded after November 25, 1991, the effective date of the Board's groundwater regulations. (Resp. Br. at 48.) In this case, there has been no expert testimony from the complainants nor any showing of any kind that any release has occurred after the date the regulations were adopted.

Even if the groundwater standards of Part 620 apply to respondent, respondent believes that because the corrective action is being overseen by the Agency through respondent's participation in the Pre-Notice Program, respondent should be exempted from the Class I and Class II standards. (Resp. Br. at 51) Respondent also argues the Agency's approval of a GMZ and respondent's participation in the Pre-Notice Program should eliminate any theoretical liability. (*Id.*)

ANALYSIS

Since the enactment of the Illinois Environmental Protection Act in 1970, Illinois environmental law, regulation, administration, and adjudication have matured to the point where corporate responsibility, regulatory flexibility, and voluntary risk-based cleanup are all major themes in environmental discussion and policy. This is a case which, in the context of current law, involves those themes.

After reviewing over 3,000 pages of record in this matter and voluminous briefs and motions, the Board determines that the salient facts are these: Respondent has owned and operated the facility since the early 1900s. During the 1970s, respondent operated an on-site dry cleaning operation which contributed to soil and groundwater contamination. The dry cleaning operation was closed prior to the enactment of federal and state laws concerning hazardous waste management and prior to the enactment of any of the remediation statutes such as the CERCLA and its state counterparts, or the corrective action provisions applicable to RCRA hazardous waste management facilities. All evidence suggests that the contamination, and the extent of contamination, was unknown to respondent until it began excavation as part of plant modernization activities. On the same day that the contamination was discovered, respondent reported the contamination to all of the appropriate authorities and immediately took steps toward abating the problem and remediating the site. Within 10 days, respondent requested the Agency's oversight in the Pre-Notice Program and began, under the supervision of the Agency, a very comprehensive and complicated cleanup process which continues today.

As is their constitutional and statutory right, Illinois citizens (more specifically the unionized employees of respondent in cooperation with CBE) have filed a citizens' enforcement action which asks the Board to penalize respondent in the amount of $200 million dollars for alleged violations of the Act. (Illinois Const. of 1970, Art. 11 Sec. 2; Section 31(b) of the Act.) While the parties have spent many lawyer-hours arguing this case and have posited various complex issues involving the federal and state regulatory scheme, the Board believes that the two questions before us are: Is respondent in violation of the Act (and corresponding regulations) for the method in which it has agreed with the Agency to clean the property or for the groundwater contamination that resulted from its prior dry cleaning operation? If so, is a penalty or other remedy appropriate?

RCRA Compliance

A major portion of complainants' case (Counts I through VI) was devoted to arguments that respondent is in violation of the State's RCRA requirements for the way in which it has agreed, with the Agency, to clean up the contaminated property.[15] While participation in the "voluntary" Pre-Notice Program does not provide a shield against citizen enforcement of the environmental laws of this State (see the Board order in this case issued on November 3, 1994), a participant in the program who has willingly sought the advice and counsel of the

[15] The complainants do not argue that respondent has contaminated the soil in violation of the Act. The RCRA portions of the complaint only concern respondent's management of the contaminated soil after it has been excavated from the ground.

Agency and who remediates contaminated property pursuant to consultation and agreement with the Agency is certainly entitled to some degree of consideration for such actions. Indeed, Board review of actions taken by facilities in reliance on Agency approval should not be so concerned with the specific application of the very letter of the law as it should be concerned with a good faith interpretation of the law.

RCRA, which generally applies to hazardous waste from "cradle to grave," does not neatly apply in all the circumstances presented by respondent's pollution source. Although respondent has been an existing HWMF since the 1980s, when the constituents of concern, PCE and TCE, had already spilled into the ground in the area under Building HH, neither respondent's facility nor these chemicals had been regulated pursuant to RCRA. RCRA was not adopted until 1976 and after its adoption, respondent's facility was brought under RCRA management and given authority to operate as an "interim status" facility. By this time, the dry cleaning operations had discontinued. Therefore, some 20 years later when respondent was in the process of making upgrades to its facility and discovered the pre-RCRA contamination, respondent was faced with making a decision as to whether RCRA applied to the instant situation, to what extent and how to respond to the contamination.

Given the complexity of RCRA law and regulation and the existence of the Illinois Pre-Notice Program, we find nothing inappropriate with the manner in which respondent and the Agency have agreed to apply RCRA to the instant situation. Respondent's management and remediation of the excavated contaminated soil pursuant to Agency-approved closure plans is, in our opinion, within the parameters of RCRA.

First, the Agency determined that because the contaminated soil "contained" hazardous waste constituents, it was appropriate pursuant to the contained-in rule that the soil be brought under the jurisdiction of the RCRA regulations. While respondent may not have agreed that the soil is hazardous waste, it did agree to the application of the contained-in rule and, accordingly, an application of RCRA. We find nothing inappropriate about the Agency's application of the contained-in rule. Faced with having to identify the exact type and listing of the constituents in the soil based on little information about incidents that happened pre-RCRA and over 20 years ago, the application of the contained-in rule is an appropriate decision and one well within the Agency's authority.

Once respondent and the Agency determined that RCRA is the appropriate management statute to apply to the excavated contaminated media, respondent and the Agency next charted a course of how to most effectively remove the contaminants from the soil. They determined that as an interim status HWMF, it was appropriate that respondent close the Building X soil staging area pursuant to the RCRA closure standards set forth in Parts 725 and 726 of the Board's rules. Additionally, the Agency later determined that respondent's Part A application should be amended to reflect the contaminated media stored within Building X. Respondent eventually complied with both requirements.

Although the complainants urge us to find that closure is not appropriate and that anything less than full permitting and compliance with all of the regulations delineated in

Counts I through VI is inadequate, we do not agree that RCRA dictates full permitting in respondent's circumstances. While one of the foundations of both federal and state RCRA programs is that a facility obtain a permanent Part B permit prior to managing hazardous waste at an HWMF, Congress, and accordingly our own State legislature, allowed existing facilities (such as the respondent's facility) to continue managing hazardous waste as "interim status" facilities as long as they submitted a "Part A application." (42 U.S.C Section 6925(e).) In this case, because respondent is an existing interim status facility, the Part B permit application requirement never triggered. When the termination of interim status approached (November 8, 1992 for this facility), respondent was faced with a choice of submitting the Part B application and continuing to operate as an HWMF, or to enter closure. Respondent elected closure and began decommissioning as an HWMF.

Therefore, when respondent began managing the excavated contaminated soil, respondent was already in closure for Building FA with no plans to continue operating as an HWMF. Rather than force respondent into the position of submitting the Part B permit application to manage the contaminated soil on site as a new HWMF or as a facility that intended to continue managing hazardous wastes into the future, the Agency determined that closure is the best method of managing the material. The evidence in this case suggests that the Agency closely reviewed the closure plans and required extensive revisions in order to meet the RCRA closure standards. We believe that the Agency's decision is appropriate.

Regarding the Agency's requirement that respondent amend the Part A application, the Agency notified respondent that the Part A application must be amended to reflect the management of the contaminated media within the Building X soil staging area. The Agency viewed the revision to the Part A application as a necessary requirement to accurately reflect the types of hazardous waste managed on site since the Part A application authorizes and limits management to only those constituents and hazardous waste management units identified on the Part A application. We agree that the Agency's requirement was appropriate, and we also agree with the complainants that respondent was responsible for amending Part A well in advance of the time it actually made the revision. Respondent excavated the contaminated soil in November 1990, and because respondent decided to store and manage it on-site rather than dispose of it all off-site, a revision to the RCRA Part A application was required to accurately reflect this material as it was being managed on the premises as if it were hazardous waste, rather than being shipped off-site.

Against this background we then turn to more detailed consideration of each of the counts of the complaint and address the alleged violations of the Act and the regulations

Permit Requirements. In Count I and Count VI, the complainants assert that respondent unlawfully operated a waste treatment, storage, and disposal site and stored hazardous waste on-site for longer than 90 days in violation of Sections 21(e) and 21(f)(1) and the corresponding regulations to these statutory provisions. Complainants' theory is that because respondent was an existing HWMF, respondent was responsible for revising the existing Part A application in order to cover the soil storage occurring in Building X and Building Y-42. We find that respondent was required, from the point of the excavated soil

removal from the ground, to either dispose the soil off-site within 90 days, or to revise the Part A application to include management of the contaminated soil. Respondent did eventually make the amendment in June 1993, however, respondent was obligated to amend the application much earlier in the process, from at least 90 days from the time it began storing the material on site.

A core concept of the policy is that the USEPA or state-authorized program may regulate media mixed with hazardous wastes because of the general principle that "a hazardous waste does not lose its hazardous character simply because it changes form or is combined with other substances." (CWM, Inc. v. USEPA, 869 F.2d at 1539.) We do not see any distinction presently in the law or the contained-in rule which would prevent revision of the RCRA Part A application, at least until such time as the hazardous wastes are removed. We do agree with respondent that the Agency did have a great deal of information concerning the type of material being managed on-site due to respondent's submittal of closure plans; however, we also believe that respondent's "equivalent control document" theory can not obviate the Permit A requirement. It is exceptionally important that the RCRA Part A application accurately reflect the hazardous waste management units on-site, and nothing in the law allows us to excuse this requirement. While we note that under the newly proposed HWIR-Media Rules (see n. 11) of April 29, 1996 the USEPA proposes a new control document called a remediation management plan which would replace the RCRA permit (61 F.R. at 18854), until these rules are adopted on the federal level or until we adopt similar rules in Illinois, we believe that the Part A requirement continues to apply.

Regarding the corresponding regulations, Count VI alleges that respondent failed to comply with Section 722.134 of the Board's rules which sets forth the prohibition against accumulating hazardous waste on-site for more than 90 days without a permit or variance relief. In Count IV, the complainants allege that respondent violated the following four related regulatory provisions: Section 703.121(a) for failing to obtain a RCRA permit prior to conducting any hazardous waste storage, treatment, or disposal of hazardous wastes; Section 703.152(a) for failing to amend the Part A application to indicate that hazardous waste is being stored in a waste pile; Section 703.154 for failing to refrain from storing hazardous waste, employing processes, and exceeding design capacities as specified in the initial Part A permit application; and Section 703.155 for failure to revise the Part A application to reflect the changes in process and storage in waste piles. For the same reasoning as above, respondent's failure to timely revise the Part A application brought about a violation of these related regulations as well.

Timing of the Violation. Regarding the time period of the violation, the complainants allege that the period of violation for Count I would be November 1990 to the present as to Building X, and for Building Y-42, from November 1990 to November 1992.[16] We do not

[16] The complaint originally stated that the period of time would be until May 1993; however, today, we accept the complainants' motion to amend which reduces the period of violation by five months, ending November 1992.

agree that there is a valid distinction between Building Y-42 and Building X, and, therefore, we find that there is no bifurcated time period.[17]

Therefore, the period of violation would begin running 120 days after respondent began storing the contaminated soil in the Building X soil staging area. This 120-day period includes the 90-day accumulation period set forth in Section 722.134 plus 30 days. Section 703.150(a)(2) requires that Part A application must be submitted 30 days after the date the owner or operator first becomes subject to the standards of Parts 725 and 726. Respondent was out of compliance with the statutory and regulatory requirements to amend the Part A application from March 1991 until November 1992. This time period would similarly apply to Count I and Count VI, and the regulatory provisions at issue in Count IV.

Interim Status. In Count II, respondent is charged with a violation of Section 21(f)(2) for failing to obtain the protection of interim status for the remediation/storage activities ongoing in the soil staging areas of Building X soil staging area.[18] As an existing HWMF, the complainants argue it was respondent's obligation to properly report "changes during interim status" to the Agency by timely revising the Part A application during the interim status period pursuant to Sections 703.152, 703.153(a)(2) and 703.155. The change would be respondent's storage and management of the contaminated media in the Building X soil staging area. Importantly, the crux of complainants' argument is that they believe respondent's subsequent modification of RCRA Part A application in June 1993 was a legal "nullity" since it occurred after the termination of interim status. Once interim status terminated by operation of law on November 8, 1992 pursuant to federal and state law, respondent could not extend the protection of interim status over the contaminated media.

We disagree with complainants' arguments and find that respondent did not violate Section 21(f)(2) and that it did not fail to comply with Sections 703.152 through 703.155. There was no need to "extend" the protection of interim status because as an existing RCRA facility going through closure, respondent had no intention of continuing to manage hazardous waste on-site. In anticipation of interim status termination, respondent could have either submitted a Part B permit application in order to continue operating as an existing HWMF, or elect closure. (See Section 725.212(d)(3)(A).) Our review of the record reflects that respondent had elected closure and was accordingly in the process of decommissioning

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[17] We believe respondent's amendment including the excavated contaminated media in the Part A application is sufficient to effectuate amendment to include all of the excavated soil regardless of its location in the Building X soil staging area. From the facts presented at hearing and the description of Building Y-42 in relation to Building X, these buildings together are all part of the same, contiguous soil staging area described as the Building X soil staging area. Accordingly, the revised Part A application would be effective as to both Building X and Building Y-42 and the period of violation would be the same for both buildings.

[18] The complainants similarly allege that there is a bifurcated timeframe for the periods of violations in relation to Building X and Building Y-42. (Comp. at 13.) Because we find that respondent is not in violation of Section 21(f)(2), we need not address the issue of timing of the violations.

Building FA pursuant to RCRA closure.[19] Therefore, in this case, regardless of the contaminated media management taking place in the Building X soil staging area, when the interim status expired on November 8, 1992, respondent had been in the process of closure for approximately two years.

The requirements incumbent on respondent, as determined by the Agency, were to amend the Part A and submit closure plans. This could have been effectuated by either amending the existing HWMF closure plan for Building FA pursuant to Section 725.212(c)(1)(C), which provides that the plan may be revised when unexpected events require modification, or submitting separate closure plans pursuant to Section 725.212(d)(3). (This latter provision allows the implementation of a closure plan after termination of interim status as long as the plan is submitted within 15 days after termination.) Under either scenario, the closure plans submitted for the Building X from May 6, 1992 through November 25, 1992 (Resp. Exh. 2A-2E), with additional amendments occurring on September 22, 1994 (HO Exh. 1 at 7) constitute valid, Agency-approved closure plans.

It is important to understand that the issue of extending interim status protection is separate from the issue of properly amending the Part A application. While a properly submitted Part A application did in fact grant a facility "interim status" to operate during the interim period (pursuant to interim status standards), it is no less incumbent that the Part A application be amended to show the management of the contaminated media even though the interim status period has terminated. The Part A application provides the Agency with basic information about a facility that is subject to the requirements of RCRA. The obligation to file a Part A application is independent of interim status. Interim status is the assignment of permit protections to a party who has submitted a Part A application. The RCRA regulations establish that facilities which filed a Part A application during a certain time period were given the protections of interim status; however, facilities that became subject to RCRA outside the regulatory time period for which interim status is assigned must also file a Part A application (and additionally a Part B application). We are persuaded that the Agency agrees with our approach to interpreting the interim status/closure requirements of RCRA as the Agency specifically requested respondent to amend the Part A application even after the expiration of interim status.

With regard to Count IV, complainants allege that respondent failed to comply with Section 703.155(b) when it failed to submit for review with the Agency, a revised Part A permit application to reflect the additional hazardous wastes being treated, stored, or disposed as a change during interim status. For all of the reasons set forth above, we agree that respondent did not violate this regulatory provision.

New HWMF Requirements. In Count III, the complainants argue that Section 21(f)(1) of the Act and Sections 703.151 and 703.180 required respondent to obtain both a revised Part A application and a Part B permit prior to construction and use of Building X for the storage

[19] Pursuant to Section 703.157(g), in order to continue operating as an existing HWMF, respondent would have had to submit its Part B permit by November 8, 1988.

and treatment of the contaminated media. The complainants allege Building X is a new HWMF and accordingly, respondent was required to simultaneously submit Part A and Part B of the permit application within 180 days prior to construction.

We find no violation of Section 21(f)(1), Sections 703.151, or 703.180. We do not believe that the Building X soil staging area is a new HWMF requiring separate permitting apart from the Part A application revised in June 1993 to include the contaminated media stored and managed in the Building X soil staging area. The respondent's facility, as a whole, is an existing HWMF which is undergoing closure pursuant to Agency-approved closure plans and, therefore, a Part B permit would not be necessary. It is sufficient that respondent amended the revised Part A as it did in June 1993, albeit late, and no further permitting is required. Because respondent is going through closure and the soil is being managed pursuant to the contained-in rule, the soil will exit from regulation once it is properly remediated; therefore, there is no environmental need for respondent to go through full RCRA permitting to obtain a Part B permit.

With regard to Count IV, the complainants additionally allege violations of Section 703.126 for respondent's failure to submit a Part A and Part B permit application prior to physical construction of a new hazardous waste management facility and failure to obtain a RCRA permit before construction. As we held above, the Building X soil staging area is not a new HWMF; therefore, no violations of these provisions occurred.

Post-Closure Care Permits. Pursuant to the allegations of Count V, respondent allegedly conducted a hazardous waste storage, treatment and disposal operation in violation of RCRA permit filing requirements of Section 703.121. This section provides that owners and operators of hazardous waste management units shall have a post closure permit unless clean closure occurs pursuant to Sections 703.159 and 703.160.

Under the circumstances of this case, we agree with the Agency and respondent that no post-closure permit is necessary for the Building X soil staging area because respondent is "clean closing" the site and Section 703.121 expressly exempts a facility from the post-closure permit requirement if closure-by-removal takes place. Pursuant to the closure-by-removal standards of Section 703.159 and 703.160, and an Agency-approved closure plan, respondent will be removing all waste and decontaminating the liners, the structure itself and the equipment. All concrete debris screened out of the soil was disposed of off-site as non-hazardous special waste and the liners and workers' clothing will also be disposed of as special waste. (HO Exh. 1 at 8.) The Agency further does not believe that groundwater monitoring should be required for the Building X soil staging area because, according to the Agency, the piles were lined, covered, and there has been no groundwater impact in relation to the activities ongoing in Building X. Additionally, we note that because the contaminated media is being managed pursuant to the contained-in rule, the soil, after it has been treated to remove all of the hazardous wastes, will exit hazardous waste regulation; therefore, it is permissible to use the soil on-site as clean fill material.

In Count IV, complainants allege that respondent violated Section 703.121(b) by failing to obtain a RCRA permit prior to conducting any hazardous waste storage, treatment, or disposal of hazardous wastes during the active life (including the closure period); failure to obtain a post-closure for the waste piles; or failing to address groundwater monitoring, unsaturated zone monitoring, corrective action, and post-closure care under Part 724. Because respondent is clean closing pursuant to an Agency-approved closure plan, we find no violations of this provision.

Groundwater Contamination

Turning to the next major issue of the case, Count VII alleges that respondent violated Section 12(a) of the Act from 1991 to the present. We must first make clear that we find it is possible to violate Section 12(a) of the Act by discharging contaminants so as to pollute groundwater. Pursuant to the Act, "waters" are defined to include groundwater. (Section 3.56 of the Act.) Therefore, a discharge which pollutes groundwater has polluted water in violation of Section 12(a) of the Act. We, therefore, must determine whether respondent has caused such a discharge.

Respondent's employee Williams testified that the contamination at the Building HH location resulted from a dry cleaning operation which was formerly at this location until 1976. Williams testified that there were accidental spills of dry cleaning chemicals. These spills include a spill of a mixture of TCE and PCE which resulted from TCE accidentally being placed in the dry cleaning equipment, and overflow releases of PCE. In a December 21, 1990 letter to Henry Konzelman at the Agency, Williams asserted that respondent's investigation revealed that the soil under Building HH was contaminated with solvents which resulted from the accidental release of virgin, usable material at the dry cleaning operation. (Comp. Exh. 1 at 1-2; see Tr. at 103-105, 108-110.)

Respondent discovered the contamination under Building HH on November 6, 1990. Respondent subsequently conducted sampling, the results of which were reported in its Phase I Report. The Phase I Report states that these same dry cleaning chemicals and/or their breakdown products were detected in the deep well, and in three of the shallow wells. Detected exceedences of at least Class II standards included PCE and TCE at MW4, DCE at wells MW1A (the deep well), MW3, MW 4, and vinyl chloride at wells MW3 and MW4. (Comp. Exh. 26 at UAW 4172.)

While respondent expended significant resources in removing over 13,000 tons of the contaminated soil in 1990 significant soil contamination remained under Building HH. PCE remained in concentrations up to 550mg/kg, TCE up to 57 mg/kg, and DCE up to 140 mg/kg. (Comp. Exh 25 at UAW 3576.) Respondent stated in one of its groundwater monitoring reports that the contamination was "above and within the saturated zone beneath Building HH." (Comp. Exh 26, UAW 4139, 4143.)

Over 20 years ago, the Board and the appellate court addressed the issue of "discharge". In Meadowlark Farms, Inc. v. Illinois Pollution Control Board, 308 N.E.2d

829, 17 Ill.App.3d 851, (5th Dist. 1974), the Board found that Meadowlark Farms violated Section 12(a) of the Act when a refuse pile of mine-related wastes was found to have caused a fishkill in a creek adjacent to the property. While Meadowlark Farms did not originally own the property and it was a prior landowner that had created the refuse pile between 1943 and 1957, Meadowlark owned the surface estate of the property when the fishkill occurred in 1972. In reaching the conclusion that Meadowlark Farms had violated Section 12(a) of the Act, the Board found that Meadowlark Farms had ownership of the surface rights of the property which was the source of the violation, that the evidence showed that the pollution had its source on that property, that fish were killed, and that Meadowlark Farms had the capability of controlling the discharge. (*Id*. at 836.) On appeal, the court found that "[t]he unquestioned pollution proved sufficiently that petitioner allowed the discharge within the meaning of Section 12(a)." (See Freeman Coal Mining Corporation v. Illinois Pollution Control Board, 313 N.E.2d 616, 21 Ill. App.3d 157 (5th Dist. 1974).)

The only major distinction between Meadowlark Farms and this case, is that Meadowlark itself did not place the contaminants in the refuse pile, whereas here, respondent clearly admits responsibility for the releases that occurred from the dry cleaning operations in the 1970s. Since that time Section 12(a) of the Act has been in force and effect and it is uncontroverted that respondent has owned and controlled the site since 1925. We believe respondent must be ultimately responsible for any resulting impact such releases may have caused to the environment. While respondent has certainly taken steps to remediate the groundwater situation, respondent's responsibility is evident and we can reach no other conclusion but to find respondent in violation of Section 12(a) of the Act.

We observe that the constituents released by respondent, which have discharged into the groundwater, also resulted in the exceedences of Class I groundwater quality standards in both the shallow and deep aquifers. As is pointed out by complainants, respondent, in its Phase I groundwater investigation report defined the existence of the shallow and deep aquifers. Both of these aquifers satisfy the regulatory definition of Class I groundwater found at 35 Ill. Adm. Code 620.210. Further, the Phase I groundwater report documented exceedences of Class II groundwater standards for PCE, TCE, DCE, and vinyl chloride in the shallow aquifer, and exceedence of Class II groundwater standards for DCE in the deep aquifer. Because Class II groundwater standards are less stringent than Class I groundwater standards, this necessarily indicates that Class I standards have likewise been exceeded.

The Part 620 standards of the Board's groundwater quality regulations establish a classification scheme for groundwater which is designed to protect them from degradation and to protect the continued viability of Illinois' groundwater resources. Though not adopted pursuant to the Act, but to the Illinois Groundwater Protection Act (IGPA), the IGPA directs the Board to adopt regulations "establishing comprehensive water quality standards which are specifically for the protection of groundwater." (Groundwater Quality Standards: 35 Ill. Adm. Code 620, (November 7, 1991), 127 PCB 53.) The IGPA further declares groundwater to be a resource, the protection of which is essential to the social and economic well-being of the people of Illinois, and which is of vital importance to their general health, safety, and welfare. (*Id*.) In this case, we find that exceedences of the Part 620 standards, therefore,

constitutes degradation of one of the State's water resources and indicates the presence of water pollution caused by respondent.

REQUESTED RELIEF

For the alleged violations, complainants ask that we assess the maximum civil penalties, specifically $200 million, impose a cease and desist order, and direct that complainants be allowed to participate in the future remediation efforts. Complainants further request that we monitor respondent's remaining remediation.

While the Board has found violations, the Board does not believe that any monetary civil penalty is warranted under the facts of this case, nor is any other remedy necessary to bring about respondent's compliance with the Act or regulations. Based on the record before us, respondent is presently in compliance with all RCRA requirements that apply to this site and has obtained GMZ approval from the Agency in order to fully remediate the groundwater. Given the clear evidence that respondent had self-reported its contamination within days of its discovery and has done everything the Agency has requested it to do to remediate the site, we find that the substantial monetary penalty requested by complainants is wholly unjustified.

The purpose of a monetary penalty is to aid in the enforcement of the Act and to advance compliance. Under the facts of this case, that purpose would be frustrated by the ordering of the requested monetary penalty. In consideration of the Section 33(c) factors of the Act which we are to apply when determining an appropriate remedy (*i.e.*, character and degree of injury; social and economic value of the pollution source; technical practicability and economic reasonableness of control; and subsequent compliance), the evidence before us shows that respondent is remediating the site in a manner which is environmentally sound and approved by government authorities. Upon discovery of the contamination respondent immediately notified the appropriate state authorities and began working to remediate. Respondent was fully within the "regulatory awareness" of the Agency since the excavated soil in the Building X soil staging area was being managed pursuant to RCRA closure requirements and Agency-approval. Respondent fully participated in the Pre-Notice Program with close supervision by the Agency.

Specifically regarding the RCRA allegations, although respondent may have been remiss in not amending the Part A application earlier than it did, by the time this complaint was filed, respondent had in fact amended the application as requested by the Agency. Where, as here, cooperation is shown, compliance has been achieved, and the imposition of a civil penalty would in no way aid enforcement or advance compliance, a fine is not appropriate. (See, *e.g.*, Park Crematory v. Illinois Pollution Control Board, (1st Dist.) 264 Ill. App. 3d 498, 637 N.E.2d 520, 523.) Despite any disagreement on respondent's part concerning the necessity of amending the Part A application, respondent eventually amended the application and fully complied with RCRA. The issues in this case were, at times, elusive. When determining whether a penalty is appropriate, we find it significant that respondent timely recognized the importance of cleaning up the contaminated environmental media pursuant to RCRA.

Given the complexity of environmental law and regulation, particularly RCRA law and regulation, we have found nothing inappropriate with the manner in which respondent and the Agency have agreed to apply RCRA to the instant situation. But for the period of time respondent had not revised the Part A application, respondent's remediation of the contaminated soil is clearly within the parameters of RCRA. The Agency's approval of respondent's remediation plan is a legitimate exercise of its authority to implement the RCRA program statewide. In exercising our own authority to oversee questions of pollution control, we find no valid reason to sanction respondent as requested by the complainants. In fact, to do so may have a chilling effect on all legitimate attempts to voluntarily remediate contaminated property.

More importantly, we do not believe that it is sound public policy to attach a substantial monetary penalty to a voluntary cleanup, especially when the evidence shows that the contamination was historical in nature, occurring before RCRA became effective. This is not to say that RCRA does not apply to the soil at the point of removal from the ground, as we have found here, but that to assess a penalty under the facts of this case would be tantamount to punishing respondent for removing long-ago contaminated soil from the ground and laboring side-by-side with the Agency to ascertain the correct way to remediate it in a way that is protective to human health and the environment. Such monetary penalty would serve only to discourage the cleanup of contaminated property. We do not wish to adopt a policy which would serve to discourage respondent or any site owner or operator from reporting environmental contamination and then taking steps, in concert with government, to respond by removing and remediating the contamination.

Regarding the violation we have found concerning groundwater, we likewise are not inclined to assess any monetary penalty or any other remedy. While there may be some unexplained delays in respondent's remediation of groundwater at the site, we find that respondent has generally proceeded in an acceptable manner in remedying the groundwater contamination at the site. Since the discovery of the contamination, respondent has been in the voluntary cleanup program and has been working with the Agency in developing its remediation strategy.

In considering whether a remedy is appropriate, the Board must look to the current status of the site and the steps that have already been taken toward remediating the contamination present at the site. As discussed previously, respondent has applied for a GMZ for the site as outlined in the Board's groundwater regulations at 35 Ill. Adm. Code 620.250. This requires Agency approval of a groundwater corrective action plan "to mitigate impairment caused by the release of contaminants from a site." (35 Ill. Adm. Code 620.250(a).) It further requires the Agency to "review the on-going adequacy of controls and continued management at the site." (35 Ill. Adm. Code 620.250(c).)

We believe that it is appropriate for respondent to continue to remediate the groundwater under the Agency's continuing and detailed oversight pursuant to the GMZ process. Because the Agency will be closely overseeing the remediation pursuant to the GMZ

process, it is unnecessary for the Board to issue a cease and desist order, or other detailed remediation order. Although the GMZ was granted post-hearing, the existence of the GMZ demonstrates that respondent is actively remediating the groundwater in order to achieve the Part 620 standards. Therefore, no remedy that the Board can fashion will aid in enforcement or bring about compliance with the Act or corresponding regulations, when respondent is currently taking all available steps pursuant to appropriate Agency oversight, to remedy the groundwater problem on its site.

Finally, we wish to address the complainants concerns about the lack of opportunity for public participation in Illinois' Pre-Notice Program. As a remedy, they have requested that we provide them a direct role in the remediation process at the East Peoria facility and believe that without our requiring full RCRA permitting (and thus the opportunity for public notice and comment provided in the RCRA regulations), that decisions made pursuant to the Pre-Notice Program will always lie outside of both the public and the Board's review. However, we believe that the citizens already have a role in Illinois' system of environmental governance and that they possess one of the strongest tools available in the Environmental Protection Act.

Under Section 31(b) of the Act, the complainants have filed this citizens' enforcement action bringing to our attention (and to that of the public) the remediation management methods employed at this particular facility and to an existing groundwater problem. In doing so, the complainants have performed the function of private attorneys general, safeguarding their important voice in Illinois' process and serving a vital function in ensuring environmental protection. We need not drape a complex layer of RCRA regulation over the voluntary cleanup program in order to give citizens a public forum in which to express their concerns for any particular site. While there may not necessarily be direct appeal rights or opportunity for public comment written into the Illinois Pre-Notice Program, the Environmental Protection Act provides no shield against citizen suits in spite of a site's participation in the voluntary cleanup program. The Act's citizen suit provision has long been a viable tool for accessing a public forum in which to present evidence concerning regulatory noncompliance and environmental harm, as these citizens have demonstrated, by filing this citizen suit before the Board. In the appropriate case, where the site owner/operator is outside the parameters of the law or appropriate regulatory approval of the Agency or the Board, the citizen suit provisions could result in penalties or any other necessary remedy to bring about compliance. However, this is not such a case.

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

ORDER

We find that respondent properly managed the excavated soil containing hazardous waste pursuant to Illinois RCRA closure requirements. However, because respondent was responsible for amending its Part A Application to reflect the management of media with hazardous waste constituents, respondent was out of compliance for approximately a two-year period. Therefore, we find respondent in violation of Sections 21(e) and 21(f)(1) of the Act

and the corresponding regulations: Sections 722.134, 703.121(a), 703.152(a), 703.154, 703.155.

Concerning the groundwater count of the complaint, Count VII, we find that respondent discharged contaminants into the groundwater of this State in violation of the prohibition against water pollution in Section 12(a) of the Act.

Regarding the remedies requested in this case, the Board finds that no civil penalty or any other remedy is warranted based on the facts of this case. Respondent was fully in compliance with the RCRA requirements applicable to the East Peoria facility for almost one year prior to the filing of this citizen suit, and has voluntarily committed to an appropriate RCRA closure plan pursuant to the Pre-Notice Program. Additionally, respondent is presently remediating its groundwater contamination problem pursuant to a groundwater management zone as granted by the Agency.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order were adopted on the _____ day of _____, 1996, by a vote of_____.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board