ILLINOIS POLLUTION CONTROL BOARD
August 2, 1984

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 83-17
RUSSELL BLISS, JERRY-RUSSELL BLISS, INC., a Missouri corporation, JAY COVERT, and ILLINOIS CENTRAL GULF RAILROAD, a Delaware corporation,	)	
Respondents.	)	

MR. VINCENT W. MORETH, ASSISTANT ATTORNEY GENERAL, APPEARED FOR THE COMPLAINANT;

MR. THOMAS J. IMMEL, ATTORNEY-AT-LAW, APPEARED FOR RESPONDENTS RUSSELL BLISS, JERRY-RUSSELL BLISS, INC., AND JAY COVERT;

OPINION AND ORDER OF THE BOARD (by Bill Forcade):

This matter comes before the Board on the five-count complaint filed February 4, 1983, by the Illinois Environmental Protection Agency ("Agency") against Russell Bliss ("Bliss"), Jerry-Russell Bliss, Inc. ("Bliss, Inc."), Jay Covert and Illinois Central Gulf Railroad ("ICG"). All four respondents are charged with various violations of the Act. Bliss, Bliss, Inc. and ICG are charged with violations of Chapter 9: Special Waste Hauling ("Chapter 9") regulations and Bliss, Inc. is charged with violating certain standard conditions of its special waste hauling permit. The complaint alleges an incident that occurred on April 14, 1982, when a tank truck with Bliss, Inc. insignia spread a partial load of contaminated oil on the ICG railroad yard in Venice, Illinois.

Hearing was held on January 4, 1984. On January 9, 1984, the Agency filed a motion to amend the complaint to correct typographical errors which the hearing officer granted. On February 24, 1984, the Agency filed a motion to amend the Record, which was also granted by the hearing officer. On February 27, 1984, the attorney for respondents Bliss, Bliss, Inc. and Covert filed a motion to dismiss with predjudice because hearing was not set within 90 days of filing the complaint, in violation of 35 Ill. Adm. Code 103.125. The Board, on March 21, 1984, denied the respondents' motion to dismiss because the issue was moot and no

prejudice had resulted from the delay. The Board finds further support for this ruling in George E. Hoffman & Sons, Inc. v. Pollution Control Board, 16 Ill. App. 3d 325, 306 N.E. 2d 330 (1974), where the court found that failure to comply with the hearing date requirement did not result in the loss of jurisdiction and dismissal. On May 25, 1984, attorney for respondents, Bliss, Covert and Bliss, Inc., filed a supplemental brief not in the briefing schedule. The Agency filed a motion to strike the additional pleading and the respondents filed a reply. While the Board generally frowns on such pleadings, no new arguments were presented. The Agency's motion in opposition to respondents' brief is denied.

Count I of the complaint charges all four respondents with causing or allowing the disposal of waste in violation of §21(a), (d), and (e) of the Act. Count II charges Bliss, Inc. and Russell Bliss, the corporation's president, with delivery of a special waste to a facility that was not permitted under Chapter 7: Solid Waste regulations in violation of Rule 302 (a) of Chapter 9. Count III charges ICG with accepting a special waste for disposal from a special waste hauler without a completed and signed Part V manifest in violation of Rule 302 (a) of Chapter 9. Count IV charges all four respondents with violating §12 (a) and (d) of the Act by causing or allowing the discharge of contaminants to enter the environment of the State so as to cause or tend to cause a water pollution hazard in Illinois. The final count, Count V, charges Bliss, Inc. with violating §21(d) of the Act by violating four of the standard conditions of its Illinois special waste hauling permit.

The evidence in this matter was the subject of numerous objections at hearing. The Agency called five witnesses and introduced a number of exhibits including photographs, lab reports, and documents. The hearing officer made a number of restrictive evidentiary rulings at the proceeding from which no offers of proof or appeals were made to the Board. Respondents Bliss, Bliss, Inc. and Covert presented no testimony in this matter at hearing. They did submit four lab reports into evidence. Respondent ICG did not appear at the hearing. The Board's disposition of the five-count complaint is based primarily on the sufficiency of the evidence and it is, therefore, important to review the evidence presented.

On April 14, 1982, three employees of the Illinois Environmental Protection Agency observed a tanker truck enter Illinois from Missouri via the McKinley Bridge (R. 12-13). The truck cab had "Bliss Oil Inc., Ellisville, Missouri, 527-6666" painted on each door (R. 12-13). The truck had the Missouri license number 27-246 (R. 18). The Agency employees followed the truck into the ICG railyard in Venice, Illinois (R. 14). The truck began to spray a black liquid upon the ground the length of the yard until stopped by Agency employee, Patrick McCarthy and ICG employee, Mr. Heinline (R. 18). After stopping the vehicle, McCarthy showed the driver his Agency I.D. card and asked if he could take a sample of the liquid material that the truck sprayed

on the ground (R. 23). The driver, who identified himself as Jay Covert, refused to allow a sample to be taken from the truck (R.24), and told McCarthy that he would have to get permission from his boss. McCarthy then asked who his boss was and the driver indicated that he could contact his boss at the phone number on the side of the truck (R. 28). Numerous photographs were taken of the truck, clearly showing the license number, "Bliss, Inc." name, address and phone number painted on the cab, as well as the name "Jay" painted on the hood (Complainant's Exhibit Nos. 1, 5, 7a, and 9). These photographs show the truck standing in a large puddle of black liquid with more liquid dripping off the spray booms. Other photographs show a fresh path of black liquid with puddles through the ICG yard (Complainant's Exhibit Nos. 3a, 3b, 4a, and 4b). All photographic exhibits were admitted only against respondent Covert (R. 106-108).

After the driver refused to allow the contents of his tank truck to be sampled, McCarthy asked him if he had a special waste manifest or bill of lading for the load (R. 30). The driver told McCarthy that he had no such documents (R. 30). McCarthy then obtained a sample of the liquid by placing a lab-approved sampling container directly underneath the nozzle of the spray boom, thereby, catching the liquid that was dripping onto the ground (R. 31). Additional samples were collected from pools of black liquid formed around the wheels of the truck and in the path of sprayed liquid thoughout the yard (R. 31). Analysis of the samples by the Agency revealed that the liquid was composed of #2 fuel oil which was contaminated with between 10,600 and 10,900 micrograms per gram (parts per million) of trichloroethylene (TCE). TCE is listed as a toxic hazardous substance under Resource Conservation and Recovery Act regulations. 40 C.F.R. 261.31. The Board has adopted this federal listing in its waste disposal regulations at 35 Ill. Adm. Code 721, Appendix H. The contaminated oil had a flash point under 140° Fahrenheit (Complainant's Exhibit Nos. 11, 12, and 13). After taking these samples, McCarthy again attempted to determine the nature of the liquid material deposited in the yard by asking the driver what the origin of the material was. The driver again refused to respond to McCarthy's inquiries (R. 47). A number of photographs were taken by the Agency of the sampling sites and sampling procedure and were admitted against respondent, Jay Covert (Complainant's Exhibit Nos. 1, 2, 3a, 3b, 4a, 4b, 6a, 6b, and 7b).

Agency employee, Patrick McCarthy, testified that he recognized the driver of the tank truck as Jay Covert, a person known by McCarthy to be an employee and driver for Bliss, Inc. (R. 76-77). This identification was based on two photographs from the Agency's general files which were purported to be of Jay

Covert. These photographs were not produced at hearing (R. 77-78). The hearing officer admitted the testimony concerning how McCarthy made the identification and stated that questions directed at its reliability went to the weight to be attached to that identification, not its admissibility (R. 100).

Respondent, Bliss, Inc., was issued special waste hauling permit No. 0186 for the period between January 27, 1982, through March 31, 1983, by the Illinois Environmental Protection Agency (R. 113-116). This permit consists of an application, letter of issuance and a list of standard conditions. These documents were admitted as Complainant's Exhibits Nos. 14 and 14a, as against Bliss, Inc. and Russell Bliss (R. 132-133). The relevant information from the permit indicates that the applicant was Jerry Russell Bliss, Inc., the president of the corporation was Russell Bliss, and that the telephone number of the corporation was (314) 527-6666. One of the vehicles listed on the permit application was a 1978 GMC tank and tanker truck, containing a 3,500 gallon tank bearing a Missouri license No. 27-246. The permit was signed by Russell Bliss on January 18, 1982, in his capacity as president (Complainant's Exhibit No. 14).

After the incident at the ICG yard, Jerry Russell Bliss, Inc. sent ICG a bill for $1,500 for delivery of 3,000 gallons of No. 2 oil on April 14, 1982 (Complainant's Exhibit No. 17). The invoice was imprinted with the name "Jerry Russell Bliss, Inc." and was prepared May 7, 1982. The ICG district manager, James M. Campagno, testified that ICG had a special contract with Jerry Russell Bliss, Inc. to provide road oiling, when needed, for dust control at the Venice ICG rail yard (R. 232-3). Campagno also testified that he had previously seen the invoice submitted by Bliss, Inc. and had approved payment for the oil (R. 212-213).

The Agency presented testimony regarding the geology, hydrology and soil conditions in and around the ICG rail yard. Perry C. Mann, an Agency geologist, utilized soil surveys, topographical maps, well-log data, as well as his general knowledge of the area as the basis for his testimony (R. 155-156). The witness made an on-site review of the ICG yard prior to the April 14, 1982, incident (R. 173). The site is typified by a soil association known as American Bottoms which consists of fine grained, silty Cahokia alluvium over the coarser sand and gravel Henry formation (R. 160). The Cahokia alluvium varies in thickness from zero to 20 feet deep and is thin or non-existant near the river and in low lying areas (R. 179). The abundant and perpetual groundwater in the area, in combination with the American Bottom soil association, gives rise to "leaky artesian conditions" which means that water levels can rise above the ground elevation (R. 160). The witness testified that he had personally observed this artesian effect elsewhere in the American Bottom region (R. 183).

The ICG yard is approximately 1,200 feet from the Mississippi River. Surface water tends to flow toward the west and southwest(R. 156). Utilizing well-log data, the witness

testified that the water level in the aquifer was at the same level as the Mississippi River (R. 159). Generally, groundwater in this area flows towards the south and southwest, or towards the river, depending on the seasonal variations of the flow (R.162-163). When the level of the river is high, this general flow pattern can be reversed away from the river (R. 177-178). Contaminants in the groundwater generally flow with the groundwater (R. 164). Regardless of the seasonal variations in the river flow, there is an abundant and perpetual source of groundwater in the American Bottom area (R. 163). The City of Venice, Illinois derives its municipal water supply from the Mississippi River (R. 184).

The respondents Covert, Bliss and Bliss, Inc. presented no testimony at the hearing (R. 234). In their brief, they characterized the Agency's case as deficient in key areas. In an enforcement case, the burden is on the complainant to prove the violations of the Act and Board regulations by a preponderance of the evidence. It is argued that the driver of the truck was not sufficiently identified as Jay Covert, the respondent in this case. Respondent Covert was not present at the hearing and Agency employee, McCarthy, testified that he utilized a hearsay source to make his initial identification (R. 76-78). The Board finds, however, that there is a sufficient basis in the record to conclude that the driver of the truck was Jay Covert, the respondent in this case, and that he was an employee of Bliss, Inc. at the time of the incident. In Ritenour v. Police Board of the City of Chicago, 53 Ill. App. 3d 877, 369 N.E. 2d 135 (1977), the court upheld an administrative agency's decision to discharge a police officer who was found guilty of shooting a street lamp in violation of police department rules. The evidence against Officer Ritenour was totally circumstancial and comprised of identification of Ritenour's license plate number with the "getaway" vehicle and comparison of ballistics data between the bullet in the street lamp and one of the officer's handguns. There was no occurrence witness to the incident and no one directly identified Ritenour as the man who shot the lamp. The court held that "the lack of direct identification testimony goes only to the weight that the circumstancial evidence should be given by the administrative agency, a determination of which is within the province of the agency." ID. at 882-883, 369 N.E. 2d at 139. The court also stated that the law makes "no legal distinction between direct and circumstancial evidence as to the weight and effect thereof." ID. No criminal-type of in court identification is required to satisfy the preponderance standard

In the present case, a man driving a tank truck with the Bliss, Inc. insignia identified himself as Jay Covert, the name "Jay" was painted on the hood of the vehicle, the driver indicated he worked for Bliss, Inc. Bliss, Inc. sent an invoice to ICG for an April 14, 1982, delivery of "road oil," and an agency employee recognized the driver from photographs in the Agency's general files (R. 12-13, 24-28, 77-78).

Enforcement and variance proceedings brought before the Board are civil in nature. The burden of proof in a civil proceeding is the preponderance standard. Arrington v. Walter E. Heller International Corp., 30 Ill. App. 3d 631, 333 N.E. 2d 50 (1975); Ritenour v. Police Board of the City of Chicago, supra; Drezner v. Civil Service Commission, 398 Ill. 219, 75 N.E. 2d 303 (1947).Board orders are afforded direct review in the Appellate Court and the standard of review is that a Board order shall be invalid if it is against the manifest weight of the evidence. Ill. Rev. Stat. 1981, ch. 111½, par. 1041. The preponderance standard requires that the proposition proved is one that has been found to be more probably true than not. Estate of Ragen, 34 Ill. Dec. 523, 398 N.E. 2d 198, 79 Ill. App. 3d 8 (1979). In the present case, the Agency presented relevant and credible eyewitness testimony, along with corroborating photographic and documentary exhibits, that identified the driver of the truck as the respondent, Jay Covert. The evidence presented also shows that Covert's conduct was directed and authorized by his employer, Bliss, Inc. The respondent presented no evidence or defense at hearing. The Board finds that the Agency has met its burden of proof that the driver of the truck was the respondent, Jay Covert, and that he was an employee and authorized agent of Bliss, Inc. on the date of the incident.

Respondents, Russell Bliss and Bliss, Inc. contend that the Agency never proved the existence of the corporation and that this should result in their dismissal. A review of the record and evidentiary exhibits, however, provide a sound basis for finding that Jerry-Russell Bliss, Inc. existed at the time of the incident and that Russell Bliss was the president. Complainant's Exhibit Nos. 14 and 14a consist of an Illinois Environmental Protection Agency Special Waste Hauling permit issued to the applicant, Jerry-Russell Bliss, Inc. for the period between January 27, 1982, and March 31, 1983. Russell Bliss signed the application in his capacity as president. The document was entered into evidence against Bliss, Inc. and Russell Bliss (R. 116, 133). The authenticity of this document was not questioned at hearing. Testimony was given by Joseph Campagno, an ICG employee, as to the existence of the Bliss corporation and the contractual arrangement between Bliss, Inc. and ICG (R. 232-3). Complainant's Exhibit No. 17, an invoice for the oil delivered to ICG, is printed on a Jerry-Russell Bliss, Inc. letterhead and is further evidence of the existence of the corporation on the date in question and the contractual relationship between the respondents (R. 232). The Board finds that the respondent corporation existed on April 14, 1982, and that Russell Bliss was the corporation president.

While the burden of proof remains with the Agency throughout an enforcement proceeding, the burden of going forward with the evidence can shift from the complainant to the respondents after a prima facie case has been established. Arrington v. Walter E. Heller International Corp., supra. Once the Agency has presented a sufficient quantum of evidence to prove a

proposition, the burden of going forward with the evidence shifts to the respondents to disprove the proposition. In the present case, the Agency presented sufficient evidence to prove that the driver of the vehicle was the respondent, Jay Covert, and that respondent, Bliss, Inc., was in existence at the time of the incident on April 14, 1982. The respondents, Covert and Bliss, Inc., did not present any evidence on these issues. They never asserted nor did they try to prove that the driver of the vehicle was not Jay Covert, the respondent, or that there was no corporation in existence on April 14, 1982. The Board must find, in this situation, that the Agency's propositions are proved by the preponderance of the evidence.

WASTE AND SPECIAL WASTE VIOLATIONS

Counts I, II and III are all based on alleged violations of the Act and Board regulations regarding the transport and disposal of waste or special waste. Section 3 of the Act contains the following relevant definitions:

> (gg) "WASTE" means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Clean Water Act or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 921) or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87) or the rules and regulations thereunder or any law or rule or regulations adopted by the State of Illinois pursuant thereto.
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> (g) "HAZARDOUS WASTE" means a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed, and which has been identified, by characteristics or listing, as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976, P.L. 94-580; or pursuant to Board Regulations.
>
> (ff) "SPECIAL WASTE" means any industrial process waste, pollution control waste or hazardous waste.

> (e) "DISPOSAL" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.
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> (n) "OPEN DUMPING" means the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.
>
> (s) "REFUSE" means waste.

Ill. Rev. Stat. 1981, ch. 111½, paragraph 1003.

In order to prove violations of §21(a), (d) and (e) of the Act, rule 302(a) and 302(b), it is necessary to present sufficient evidence that the material released at the ICG rail yard was indeed a "waste." Hazardous wastes and special wastes are subsets of the larger category of waste. Evidence was presented by the Agency that the material released from the tank truck possessed hazardous characteristics. Lab analysis of the samples showed that it contained over 10,000 ppm of TCE, a listed hazardous substance under RCRA regulations. 40 C.F.R. 261.31. TCE is listed in Board regulations as a hazardous constituent at 35 Ill. Adm. Code 721, Appendix H. It also had a flashpoint less that 140° Fahrenheit. An examination of the record shows, however, that there is insufficient evidence for the Board to make a determination that the substance released at the ICG yard was a waste as defined by the Act. No evidence was presented as to the material's origin or prior use.

In Safety - Kleen Corp. v. EPA, PCB 80-12, 39 PCB 38 (July 10, 1980), the issue before the Board was whether flammable solvents distributed as part of a rental degreasing system were "waste" and therefore regulated under Chapter 9. The Board found that the solvents, while flammable and possibly hazardous to public safety, were not waste. The Appellate Court affirmed the Board's decision, without an opinion, in Environmental Protection Agency v. Pollution Control Board, 427 N.E. 2d 1053 (1981). To become a waste, a substance must be discarded. Through the rental system, Safety-Kleen maintained control over the solvents at all times. Safety-Kleen recovered the used solvents and recycled them. The solvents were never discarded and never became waste. Once a material has been discarded, however,it becomes a waste regardless of how future owners use the material.

The Agency argues that the material is hazardous and was "discarded" when it left the spray-boom of the truck. This release, it is argued, rendered the substance a waste. To Bliss, Inc., however, the material was not discarded but was being utilized as part of a valuable service. The next step of the

analysis to determine whether the substance was a waste would be to determine if the material had been discarded and rendered a waste by the previous owners of the material. The relevant area of inquiry is the source where Bliss, Inc. obtained the oil prior to the release at the ICG yard. The record is silent on this issue even though this evidence could have been obtained by the Agency's attorney through the various discovery tools available under the Board's procedural regulations. To hold that the release of a substance from a spray-boom renders it a waste, might result in a total ban on the legitimate and useful practice of road oiling for dust control. The Agency further argues that the hazardous nature of the substance somehow creates the presumption that it is a waste. The Safety-Kleen Corp. case has settled the issue of whether the hazardous nature of a substance "bootstraps" it into the catagory of waste. The Board finds that there is insufficient evidence in the record to hold that the substance released from the truck was a waste. Consequently, Counts I, II and III must be dismissed as against all respondents.

WATER POLLUTION AND WATER POLLUTION HAZARD VIOLATIONS

Count IV charges that all four respondents violated §12(a) and (d) of the Act. Section 12 of the Act provides inter alia that:

> No person shall:
>
> a. Cause or threaten or allow the discharge of any contaminants into the environement in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;
>
> d. Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard;

Ill. Rev. Stat. 1981, ch. 111½, paragraph 1012. Water Pollustion is defined in §3 to be:

> nn. "WATER POLLUTION" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge or any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

Contaminant is defined as:

> d. "CONTAMINANT" is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

Ill. Rev. Stat. 1981, ch. 111½, paragraph 1003.

A review of the record shows that respondents, Covert and Bliss, Inc., did cause a discharge of an unknown quantity of trichloroethylene, a contaminant as defined in the Act, onto the land. The soils and hydrology of the area create "leaky artesian" conditions where the water table rises above the soil surface (R. 160). These facts indicate a high probability that the TCE will contaminate the groundwater. Evidence was presented that the groundwater generally flowed toward the Mississippi River, which is 1,200 feet away from the Venice ICG yard and that contaminants generally flowed with groundwater (R. 155-156). No evidence was presented as to the existence of wells near the ICG yard nor is there evidence that groundwater actually did come in contact with the contaminants. The Board finds that there is insufficient proof that the respondents actually caused water pollution.

The respondents' conduct has, however, threatened the surface and groundwater in a manner that would tend to cause water pollution in violation of §12(a) of the Act. The threat to the ground and surface water is highly probable given the ICG yard's proximity to the river and its hydrologic conditions. The contaminants were applied to the land in sufficient quantities to saturate the soil and puddle on the surface. The Act defines water pollution in terms of the potential harm and injury to public health, safety and welfare. TCE is listed as a toxic hazardous substance under Resource Conservation and Recovery Act regulations. 40 C.F.R. 261.31. The Board has adopted this federal listing in its waste disposal regulations at 35 Ill. Adm. Code 721.130 and 721.133. Contamination of groundwater with TCE would adversely impact public health, safety and welfare. The Agency has proved the high probability of a threat to the ground and surface waters of the State. The Board finds that respondents, Jay Covert and Bliss, Inc., have violated §12(a) of the Act. The Agency presents no evidence or theory of liability against Russell Bliss, the corporate president, and the record shows no conduct by respondent ICG that would provide a basis for a finding of violation.

Respondents Covert and Bliss, Inc. have also violated §12(d) of the Act by depositing a contaminant upon the land so as to create a water pollution hazard. As in the case of finding a §12(a) violation that "threatens" water pollution, a §12(d) violation need not include evidence of actual water pollution, since both sections of the Act are intended to address potential threats and hazards. EPA v. Allaert Rendering, Inc., PCB 76-80, 35 PCB 281 (September 6, 1979). This case was affirmed on appeal in Allaert Rendering, Inc. v. Illinois Pollution Control Board, 91 Ill. App. 3d 153, 414 N.E. 2d, 492 (December 12, 1980).

In the present case, the respondents have discharged TCE in sufficient quantities to create a risk of ground and surface water pollution. It is more likely than not that there will be a potential contamination of the ground and surface water with a hazardous substance. The Board finds that Jay Covert and Jerry-Russell Bliss, Inc. have violated §12(d) of the Act.

SPECIAL WASTE HAULING PERMIT CONDITIONS VIOLATIONS

Count V alleges that respondent Bliss, Inc. violated certain standard conditions of its special waste hauling permit and thereby violated §12(d) of the Act.

The permit issued to the respondents contained the standard conditions for a special waste hauling permit issued by the Agency. As part of the conditions of this permit, the permitee, Bliss, Inc. was required by paragraphs 4(c) and (d) to allow any agent duly authorized by the Agency upon the presentation of credentials to inter alia:

> "(c) to inspect at reasonable times, including during any hours of operation of vehicles, tanks or other equipment operated under this permit such vehicles, tanks, or other equipment permitted to be operated under this permit;
>
> (d) to obtain and remove at reasonable times samples of any discharge or emission of pollutants and samples of any special waste being hauled;"

Paragraph 11 of the Standard Conditions of the respondent's special waste hauling permit provided that:

> "11. The permittee(s) shall not haul or otherwise transport any special waste generated within Illinois or any special waste to be disposed, stored or treated within Illinois unless that special waste is accompanied by a properly completed and signed manifest, in accordance with the requirements of Part V of Chapter 9, unless such special waste is exempted from the manifest requirements pursuant to Rules 210 or 211 of Chapter 9."

Paragraph 13 of the Standard Conditions provided that:

> "13. The permittee(s) shall not deliver any special waste for disposal, storage or treatment except to a site facility which has been designed by the deliverer of the special waste and which site or facility has a permit to accept such waste for disposal, storage or treatment as well as all applicable permits as required by the Environmental Protection Act and regulations adopted thereunder by the Illinois Pollution Control Board."

The record shows that on April 14, 1982, a tank truck owned by Bliss, Inc. and registered to haul special waste with the

Agency was operating in the State of Illinois (R. 12-13, 113-116). As a special waste hauling permittee, Bliss, Inc. was required to comply with all special and standard conditions attached to such a permit as well as all applicable sections of the Act and Board regulations. It is clear from the evidence presented that Bliss, Inc.'s employee, Jay Covert, refused to allow the tank truck to be inspected and a sample to be taken. The Agency employee identified himself and presented his official credentials, in accordance with the standard conditions. The Board finds that the conduct of Bliss, Inc.'s authorized agent violated standard conditions 4 (c) and (d) of the special waste hauling permit and thereby violated §21 (d) of the Act. The Board is unable to make a finding of violation of paragraphs 11 and 13 because the Agency has failed to provide any evidence that the substance released from the tank truck was a waste or special waste.

Violating permit conditions can be the basis for suspension or revocation of a permit. This remedy is explicitly provided by the terms of the standard conditions (Complainant's Exhibit No. 14A). The Agency's right to reasonably inspect and sample permitted vehicles is critical to the success of the special waste hauling permit system. If permitted special waste haulers do not prepare special waste manifests or display special waste placards on their vehicles, the only way to determine if special wastes are being carried is through inspection and sampling. If this right is denied, the intent and policy of the permit program will be thwarted. For these compelling reasons, the Board revokes Bliss, Inc.'s special waste hauling permit No. 0186. While the permit in existence at the time of the incident expired on March 31, 1983, the Board's action today is not moot. The revocation of a permit has a continuing effect that does not end with the expiration of that permit. The grounds for the revocation may serve as a basis for the future denial of a permit application. People ex rel. Carpentier v. Goers, 20 Ill. 2d 272, 170 N.E. 2d 159 (1960).

SECTION 33(c) FACTORS AND REMEDIES

Section 33(c) of the Act requires the Board to consider all facts and circumstances bearing upon the reasonableness of the discharges or deposits before the Board may impose the remedial provisions of the Act for violations alleged and proven in the proceeding. The Board construes this requirement to apply to permit violations as well as the §12(a) and (d) violations, although not technically involving a "discharge." Section 33(c) establishes four criteria that must be considered by the Board.

The first criteria is the character and degree of injury to or interference with the protection of the health, general welfare and physical property of the people. The Board has found that the respondents violated §12(a) and (d) of the Act through conduct that caused the release of a toxic contaminant, TCE, into the environment of Illinois. Ground and surface water has been

threatened with pollution. Respondent Bliss, Inc. has also violated the standard conditions of its special waste hauling permit. These permit violations are not trival, but go to the very heart of the special waste hauling permit system's ability to ensure public safety and health. The respondents, by releasing a listed hazardous substance in a hydrologically sensitive area, have engaged in conduct that could imperil the health and general welfare of the people of Illinois.

The second criteria the Board must consider is the social and economic value of the pollution source. Bliss, Inc. is a foreign corporation that operates in Illinois. Bliss, Inc. engages in the business of hauling special waste as well as "road oiling" for dust control. These activities are, as a general rule, socially and economically valuable, but only when conducted in a responsible and lawful manner. There is no social or economic value in contaminating soil and threatening water pollution with toxic substances nor is there value in flagrantly violating special waste hauling permit conditions.

The third criteria is the suitability of the pollution source to the area in which it is located. Bliss, Inc. operates as a mobile source of pollution. Bliss, Inc. released toxic contaminants on soil with "leaky artesian conditions." The ICG yard is also very close to the Mississippi River and is susceptible to flooding. While this site was particularly unsuitable for a toxic discharge, no site is "suitable" for the uncontrolled release of TCE.

The last criteria is the technical and economic reasonableness of reducing or eliminating the emissions. In the present case it is not unreasonable to utilize clean oil for dust-control. In light of these four factors, the Board finds that the release of TCE in a manner that violated the Act and the violation of the standard permit conditions were not reasonable. The Board, therefore, will impose a penalty of $3,000 against Bliss, Inc. and a penalty of $100 against Jay Covert. In addition, the Board will revoke Bliss, Inc.'s special waste hauling permit No. 0186 The Board notes that there is no burden on the Agency to prove the unreasonableness of respondent's conduct in terms of each of the four criteria in §33(c). Once the Agency establishes a prima facie showing of a violation, the burden shifts to the respondent to introduce evidence relating to the reasonableness of the respondents' conduct. Processing & Books v. Pollution Control Board, 64 Ill. 2d 68, 351 N.E. 2d 865 (1976). No such evidence was introduced by Covert and Bliss, Inc.

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

ORDER

I. The Board finds the following:

A. Counts I, II and III are dismissed against all respondents.

B. Respondents Jay Covert and Jerry-Russell Bliss, Inc. violated §12 (a) and (d) of the Act.

C. Respondent Jerry-Russell Bliss, Inc. violated standard conditions (c) and (d) of its special waste hauling permit No. 0186.

II. The Board imposes a penalty of $3,000 against respondent, Jerry-Russell Bliss, Inc., and revokes special waste hauling permit No. 0186 issued to this respondent.

III. The Board imposes a penalty of $100 against respondent Jay Covert.

IV. Within 10 days of the date of this Order, the respondents shall, by certified check or money order payable to the State of Illinois, pay the penalties imposed in II. and III. of this Order which is to be sent to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, Illinois 62706

IT IS SO ORDERED.

Board Member J. Theordore Meyer dissented.

I, Dorothy M. Gunn, hereby certify that the above Opinion and Order was adopted on the 2nd day of August, 1984 by a vote of 5-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board