ILLINOIS POLLUTION CONTROL BOARD
May 6, 1999

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 94-373
	)	(Enforcement - Land)
WAYNE BERGER and BERGER WASTE MANAGEMENT, an Illinois corporation,	)	
	)	
Respondents.	)	

MARIA M. MENOTTI AND JOSHUA W. GUBKIN, ASSISTANT ATTORNEYS GENERAL, ATTORNEY GENERAL'S OFFICE, APPEARED ON BEHALF OF COMPLAINANT; and

JOEL A. BENOIT, OF MOHAN, ALEWELT, PRILLAMAN & ADAMI, APPEARED ON BEHALF OF RESPONDENTS.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This case is before the Board on the six-count "First Amended Complaint" filed by complainant the People of the State of Illinois on November 7, 1996, against Wayne Berger and Berger Waste Management, Inc. The complaint alleges that the respondents violated the Environmental Protection Act (Act) (415 ILCS 5 (1996)) and its implementing regulations in the operation of a landfill near Olney, Illinois, in Richland County. Also before the Board is the respondents' appeal of an evidentiary ruling of the hearing officer excluding evidence of settlement offers, as well as various motions.

At the outset, the Board affirms the hearing officer's evidentiary ruling. After considering the record, the Board finds respondent Wayne Berger liable for the violations alleged in counts I, II, III and V of the complaint, but not liable for the violations alleged in counts IV and VI of the complaint. The Board finds that respondent Berger Waste Management, Inc., is not liable for any of the alleged violations. The Board revokes Mr. Berger's supplemental permit and imposes a monetary penalty of $30,000 against Mr. Berger. Mr. Berger is directed to immediately close the landfill in accordance with 35 Ill. Adm. Code 814.Subpart E.

The Board also grants respondents' motion for sanctions, and as a sanction strikes complainant's request for attorney fees.

BACKGROUND FACTS

In 1979, respondent Wayne Berger began operating a landfill on property behind his home outside of Olney, Illinois. Tr. at 216-17, 494-96, 500-01. The landfill is a trench landfill, covering approximately seven acres. Tr. 216, 515, 562, Comp. Exh. 6. The landfill received residential waste collected from towns around the landfill by a trash hauling business also owned by Mr. Berger. Tr. at 507-510.

The landfill operated under permit 1979-1-OP. Comp. Exh. 4. The original permit did not require financial assurance, although in 1985 and again in 1988 Mr. Berger posted letters of credit in accord with the financial assurance regulations then in effect. Tr. at 77. The groundwater monitoring provisions required quarterly sampling of two wells for five constituents. Comp. Exh. 4. The annual cost of groundwater monitoring under the original permit was $400 per year. Tr. at 584. Aside from a single administrative citation issued in 1988, which Mr. Berger paid, Tr. at 519, 521, there were no State enforcement actions prior to the pending case, nor were any citizen complaints about the landfill received by either Mr. Berger or the Illinois Environmental Protection Agency (Agency). Tr. 185, 507.

In the early 1990s, faced with tightening regulations on landfills, Mr. Berger began to consider getting out of the landfill business. Tr. at 525. Terra Tech, Inc., an Indiana corporation, expressed interest in purchasing the landfill. Tr. at 525-526. Terra Tech would not, however, execute an option to purchase the landfill unless it was open. Tr. at 550. Mr. Berger submitted a notice to the Agency stating that the landfill would remain open through 2000. Resp. Exh. 21. Although the notice to the Agency was submitted by Mr. Berger, it was prepared by the president of Terra Tech, Mike Johnson, and submitted by Mr. Berger at Terra Tech's insistence. Tr. at 549-50. Similarly, Terra Tech submitted a permit application. Tr. at 553. Based on this application, on March 20, 1992, the Agency issued supplemental permit 1991-401-SP, which imposed heightened financial assurance and expanded groundwater monitoring requirements on the landfill. Comp. Exh. 2. Financial assurance requirements increased from $38,398 to $241,950. *Id*. Where before Mr. Berger had been required to monitor two wells quarterly for five parameters, he was now required to monitor eight wells for 14 parameters each quarter, and an additional 31 parameters annually. *Id*. This increase in monitoring requirements increased Mr. Berger's annual monitoring costs from approximately $400 to approximately $15,000. Tr. at 584.

Terra Tech did obtain an option to buy the landfill from Mr. Berger, Resp. Exh. 23, and Mr. Berger believed that Terra Tech was going to exercise its option. Tr. at 554-55. Terra Tech had spent years working on the project, and as part of the consideration for its option had paid half the cost of extensive engineering work and well construction. Tr. at 555, 617. Terra Tech continued working on plans to possibly purchase the landfill through late 1992 or 1993. Tr. at 557. The option, however, was never exercised, although Terra Tech never informed Mr. Berger that it did not intend to purchase the landfill. Tr. at 559. Mr. Berger continued to operate the landfill as he always had, but did not provide the added financial assurance required by permit 1991-401-SP.

In 1992, when the requirements of permit 1991-401-SP became applicable, Mr. Berger and his wife had a net worth of approximately $460,000, Tr. at 585, and income from Mr. Berger's business was approximately $40,000 or $41,000. Tr. at 597. Bruce Runyon, president and CEO of Olney Trust Bank, testified that a person with a net worth of $449,200 and an average annual income of $41,697 would not qualify for a letter of credit in the amount of $241,000. He testified that to issue such a letter of credit the bank would require monthly income of approximately $10,000, nearly triple the average amount earned by Mr. Berger. Tr. at 292-94. He further testified that no bank would issue a letter of credit based on this income and asset position. Tr. at 295.

On June 24, 1993, the Agency conducted an inspection of the landfill, at which time the inspector noted various operational violations. Comp. Exh. 5, Tr. at 563. The inspector also cited Mr. Berger for failure to comply with the landfill's financial assurance requirements. Comp. Exh. 5. The Agency conducted additional inspections on April 18, 1994, and August 25, 1995, which provided the basis for most of the remaining violations alleged in the complaint.

In July of 1993, Mr. Berger formed Berger Waste Management, Inc. (BWM), and he and his wife transferred their interest in the property underlying the landfill to the corporation. Tr. at 592-93. The Bergers also created a land trust, with Mr. Berger's wife as the named beneficiary, and transferred their residence, farm, and six rental houses to the trust. Tr. at 595. At the same time, Mr. Berger transferred his interest in their jointly owned car to his wife. *Id*. The landfill stopped accepting waste in September of 1993. Tr. at 217, 560.

At the time of hearing, Mr. Berger's sole asset of any value was his IRA, valued at $80,000. Tr. at 593. The total value of Mr. Berger's assets, plus the assets transferred to the corporation or his wife or into the trust, was $358,000 at the time of the hearing. Tr. at 595-596. From 1979 through 1990, Mr. Berger's business income averaged approximately $40,000 to $41,000. Tr. at 597. In 1991, 1992, and 1993 (prior to incorporation of BWM) respectively, Mr. Berger's business had net income of $26,610, $43,800 and $45,210. Tr. at 317-18, R51-53. After incorporation of BWM, the corporation had net losses of $1,800 and $3,947 in 1993 and 1994 respectively, and had net income of $6,056, $636 and $3,284 in 1995, 1996 and 1997 respectively. Tr. at 319, R54-R58. The corporation sold its trash hauling business at the end of 1997. The corporation received $50,000, and Mr. Berger received $55,000 for a related agreement not to compete. Tr. at 231. Mr. Berger has not been employed since the trash hauling business was sold. Tr. at 216, 597. Given his background and the type of employment available in the area, he estimates that he could earn $15,000 per year. Tr. at 598-601.

PROCEDURAL HISTORY

This case was commenced by complainant on December 7, 1994. After a period of discovery, complainant filed an amended complaint on November 7, 1996, which the Board accepted on December 5, 1996. The six-count amended complaint alleges violations based on failure to post financial assurance (count I), failure to file an application for significant modification of a permit (count II), failing to compact refuse, allowing litter, and failing to

apply cover (count III), depositing waste beyond the permitted boundaries of the landfill (count IV), failing to monitor groundwater (count V), and failing to maintain adequate roads (count VI).

More discovery followed. Significant to the matters before the Board today, respondents propounded "Respondents' Request to Admit" and "Respondents' Second Set of Interrogatories" to complainant on April 23, 1998. Complainant filed its "Answer to Respondents' Request to Admit" on May 18, 1998, and its "Answer to Second Set of Interrogatories" on June 3, 1998. In its "Answer to Respondents' Request to Admit," complainant objected to four of the five requests or, "without waiving the objection," denied any facts in the requests. Within their second set of interrogatories respondents sought information in the event of a denial of the requests to admit; complainant responded to these interrogatories that it had objected to the requests to admit.

Respondents filed a "Motion to Compel and for Expedited Ruling Directed to Hearing Officer" on July 27, 1998, seeking, among other things, rulings on complainant's objections to the requests to admit. Per the hearing officer's direction, complainant responded to the motion on August 3, 1998, and on August 4, 1998, the hearing officer issued an order ruling on the motion to compel. The hearing officer ruled that complainant's responses to the requests to admit would be treated as denials, and directed complainant to produce (and file with the Board) any information responsive to respondents' second set of interrogatories on or before August 10, 1998. Complainant did not file any supplemental information. The hearing officer noted in the August 4 order that should respondents prove at hearing any of the matters they sought admitted in the requests to admit, they could seek appropriate relief from the Board.

A hearing was held in Olney, Illinois on August 18, 19, 20, and 21, 1998. Complainant filed its "Hearing Brief" on October 16, 1998. "Respondents' Hearing Brief" was filed on November 9, 1998. In their hearing brief, respondents ask the Board to reverse the hearing officer's ruling on August 18 excluding evidence of respondents' offers at conferences held pursuant to former Section 31(d) of the Act, 415 ILCS 5/31(d) (1994).[1] See Tr. at 65-67; Resp. Br. at 36-39. Complainant filed a "Reply Brief" on November 24, 1998.

On November 25, 1998, respondents filed "Respondents' Motion for Sanctions," arguing that they had proven matters sought admitted in "Respondents' Requests to Admit," and seeking relief in accordance with the hearing officer's August 4 order. On December 7, 1998, complainant filed a "Motion for Extension of Time to Answer." On December 15, 1998, before the Board could rule on complainant's motion, complainant filed a "Motion for Leave to File," seeking leave to file *instanter* complainant's "Response to Motion for Sanctions," which was appended to the "Motion for Leave to File." The Board grants the "Motion for Leave to File," and accepts complainant's "Response to Motion for Sanctions." This action renders complainant's "Motion for Extension of Time to Answer" moot.

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[1] Former Section 31(d) required the Agency to provide a party complained against "an opportunity to meet appropriate agency personnel in an effort to resolve such conflicts which could lead to the filing of a formal complaint." The Agency was required to provide this opportunity before a written complaint could be served. 415 ILCS 5/31(d) (1994).

EVIDENTIARY RULING

At the hearing on August 18, 1998, respondents' counsel attempted to introduce evidence of the settlement offers respondents had made at the Section 31(d) conferences prior to the litigation. His purpose was to demonstrate that respondents had been diligent in attempting to comply with or secure relief from the Act and regulations. Diligence is a factor the Board may consider under Section 42(h)(2) of the Act in determining an appropriate penalty. 415 ILCS 5/42(h)(2) (1996). The hearing officer upheld complainant's objection to this evidence, and denied respondents' request to make an offer of proof. Tr. at 65-67, 233-37.

Respondents argue that their evidence should have been admitted. Respondents base their argument on a passage from Cleary & Graham's Handbook of Illinois Evidence. Cleary & Graham state:

> Neither an offer to compromise a disputed liability claim of the opposing party nor an actual completed compromise is admissible as an admission of liability. The reasons assigned for the exclusion are (1) irrelevancy, since the offer or compromise in reality involves a purchase of peace rather than an admission of liability, and (2) policy in that compromises, favored by public policy, would be discouraged by admitting the evidence.
>
> Liability must be disputed. Negotiations to determine and settle the amount to be paid under an admitted liability do not fall within the rule of exclusion. Cleary & Graham's Handbook of Illinois Evidence § 408.1 (4th ed. 1984) (citations omitted).

The Board agrees with respondents that where liability has been admitted (or otherwise determined) settlement discussions which are relevant may be admitted. Smothers v. Cosgove-Meehan Coal Co., 264 Ill. App. 488, 492 (4th Dist. 1932); Smiley v. Manchester Ins. & Indem. Co., 49 Ill. App. 3d 675, 681, 364 N.E.2d 683, 688 (2nd Dist. 1977), *aff'd* 71 Ill. 2d 306, 375 N.E.2d 118 (1978); Shimkus v. Board of Review of Ill. Dept. of Labor, 117 Ill. App. 3d 826, 831, 454 N.E.2d 36, 39 n.2 (1st Dist. 1983). In this case, however, the Board cannot find that the discussions respondents seek to have admitted would be relevant.

Section 42(h)(2) of the Act specifically authorizes the Board to consider the presence or absence of diligence on the part of a respondent to either comply with the Act or regulations or secure relief from the requirements of the Act or regulations. Respondents have never claimed that they have come into compliance with respect to any of what they call the "big ticket items" in this case. Resp. Br. at 38. Rather, respondents seek to introduce offers at former Section 31(d) meetings on the basis that such offers constitute attempts to secure relief from the requirements of the Act or regulations. The Board rejects this interpretation of Section 42(h)(2). A party can secure relief from requirements by obtaining a variance, an adjusted standard, or a site-specific rule from the Board. These mechanisms impact the applicability of

rules or statutes to the recipient. A settlement offer, on the other hand, has no impact on the application of a rule or statute; it is merely an attempt to influence the State's exercise of prosecutorial discretion. Acceptance of a settlement offer does not bring a party into compliance. Indeed, a party settling with the state receives no shield against an enforcement action brought by any other person. See 415 ILCS 5/31(d) (1996).[2]

Since respondents' settlement offers were not attempts to secure relief from the requirements of the Act or regulations, they are not relevant to the Board's inquiry under Section 42(h)(2). Respondents have not articulated any other basis for admission of the settlement offers, and we see none. Because the settlement offers are not relevant to any issue before the Board, they were properly excluded at the hearing, and the hearing officer's ruling is affirmed.

LIABILITY DETERMINATIONS

Section 31(e)

As an initial matter, respondents argue that compliance with the regulations identified in several counts would impose an arbitrary and unreasonable hardship on respondents, and consequently, based on Section 31(e) of the Act (415 ILCS 5/31(e) (1996)), no violation should be found. Section 31(e) provides:

> In hearings before the Board under this Title the burden shall be on the . . . complainant to show . . . that the respondent has violated . . . any rule or regulation or the Board or permit or term or condition thereof. If such proof has been made, the burden shall be on the respondent to show that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship.

Respondents base their argument on the last sentence of this subsection.

The Board need not rule on whether the last sentence of Section 31(e) creates a defense to liability, as respondents argue, or merely allocates the burden of production on an issue relevant to mitigation of any penalty. Even if respondents are correct, the Board cannot find that the hardship faced by respondents in this case is in any way arbitrary. Respondents' current predicament is the result of decisions made by respondents, and those decisions had clearly discernible effects under the landfill regulations. Thus, the hardship faced by respondents is self-imposed, and cannot be considered arbitrary. See City of Salem v. IEPA (July 8, 1998), PCB 98-1, slip op. at 4. Any defense to liability arguably provided by Section 31(e) is therefore unavailable to respondents.

Count I

[2] Current Section 31(d) of the Act was formerly Section 31(b), and as such was in effect at the same time as former Section 31(d). See 415 ILCS 5/31(b) (1994).

Allegations

In count I of the complaint complainant alleges that respondents owned and operated a landfill in Richland County under two permits issued by the Agency, operating permit 1979-1-OP and supplemental permit 1991-401-SP. Supplemental permit 1991-401-SP, issued on March 20, 1992, includes the following provisions:

> 6. Financial assurance shall be maintained by the operator in accordance with 35 Ill. Adm. Code, Subtitle G, Part 807, Subpart F in an amount equal to the current cost estimate for closure and post-closure care. The current cost estimate is $241,950. Revised financial assurance for this amount shall be provided to the Agency by July 2, 1992.
>
> 7. The operator shall file revised cost estimates for closure and post-closure at least every two years in accordance with 35 Ill. Adm. Code, Subpart G, Part 807, Subpart F. The first revised cost estimates are due on or before December 12, 1992. Pet. Exh. 2 at 2-3.

Complainant alleges that respondents did not maintain financial assurance in an amount equal to the current cost estimate and did not submit revised cost estimates as required. Complainant alleges that these omissions constitute violations of Sections 21(d)(1), 21(d)(2) and 21.1(a) of the Act (415 ILCS 5/21(d)(1), 21(d)(2), 21.1.(a) (1996)), and 35 Ill. Adm. Code 807.302, 807.601, 807.603(a), 807.603(b)(1), and 807.623(a). Section 21(d)(1) provides, with qualifications not relevant here, that no person may conduct a waste-disposal operation in violation of any condition imposed by a permit granted by the Agency. Section 21(d)(2) provides that no person may conduct a waste disposal operation in violation of any regulations adopted by the Board. Section 21.1(a) provides:

> a) Except as provided in subsection (a.5) no person other than the State of Illinois, its agencies and institutions, or a unit of local government shall conduct any waste disposal operation on or after March 1, 1985, which requires a permit under subsection (d) of Section 21 of this Act, unless such person has posted with the Agency a performance bond or other security for post-closure care in accordance with this Act and regulations adopted thereunder.

Section 807.302 provides:

> All conditions and provisions of each permit shall be complied with.

Section 807.601 provides in relevant part:

> No person shall conduct a waste disposal operation . . . which requires a permit under Section 21(d) of the Act unless such person has provided financial assurance in accordance with [35 Ill. Adm. Code 807.Subpart F].

Section 807.603 provides in relevant part:

> a) The operator must maintain financial assurance equal to or greater than the current cost estimate at all times except as provided in this Section.
>
> b) The operator must increase the total amount of financial assurance so as to equal the current cost estimate within 90 days after any of the following:
>
> 1) An increase in the current cost estimate[.]

Section 807.623(a) provides:

> a) The operator must revise the current cost estimate at least once every two years. The revised current cost estimate must be filed on or before the second anniversary of the filing or last revision of the current cost estimate.

Complainant alleges that the violations are ongoing.

Facts

Beginning in 1979, Wayne Berger operated a landfill in Richland County, Illinois. Tr. at 216-17. The landfill operated under operating permit 1979-1-OP and supplemental permit 1991-401-SP from March 29, 1979, through September 18 or 20, 1993, when it stopped receiving waste. Comp. Exh. 2, 4, Tr. at 217. (Although the landfill no longer accepts waste, the Agency has not certified it closed, so from a regulatory standpoint it is still operating and the financial assurance requirements are still in effect.) Mr. Berger owned the landfill until July of 1993, when title was transferred to Berger Waste Management, Inc. Tr. at 592-593.

Supplemental permit 1991-401-SP, quoted above, requires the operator of the landfill to provide financial assurance for closure and post-closure care. Respondents admit that they have not provided financial assurance in the amount of $241,950 or submitted updated cost estimates. Resp. Br. at 20-21; Tr. at 218-19. In 1988, respondent Wayne Berger provided a letter of credit in the amount of $38,398 for financial assurance, but that amount was not increased as required by supplemental permit 1991-401-SP, and the letter of credit expired on October 31, 1993. Tr. at 259-60; Res. Exh. 18.

Analysis

Respondents do not dispute that the violations alleged in count I occurred. There is an issue, however, as to whether both respondents are liable for the violations.

With the exception of Section 807.302, all the regulations and statutes at issue under count I either specifically apply to operators, or prohibit persons from "conduct[ing] a waste disposal operation" unless certain actions are taken. (Section 807.302 applies to a permit holder.) An "operator" is defined in 35 Ill. Adm. Code 807.104 as "[a] person who conducts a . . . waste disposal operation." It is clear from the record that the waste disposal operations at issue in this case were conducted by Wayne Berger. Tr. at 217. Significantly, all permits for the landfill were issued to Wayne Berger. Comp. Exh. 2, 4. Apparently, the permits were never transferred to BWM. Comp. Br. at 14. Mr. Berger testified that he was the only person responsible for operation and maintenance of the landfill, and that he has always been in charge of the landfill. Tr. at 217. The Board therefore finds that Mr. Berger was the operator of the landfill, and BWM did not become the operator when it received title to the property. Consequently, BWM's involvement is only as an owner. Therefore BWM is not liable for the violations alleged in count I.

Complainant argues that BWM is the alter ego of Wayne Berger and thus both respondents should be found jointly liable for all violations. Reply at 7-8. In order to pierce the corporate veil under an alter ego theory, however, unity of identity between a corporation and its owner is not enough; recognizing the separate corporate identity must also sanction a fraud or promote injustice. *In re* Rehabilitation of Centaur Ins. Co., 158 Ill. 2d 166, 172-73, 632 N.E.2d 1015, 1017-18 (1994). Complainant has not demonstrated that this second requirement is met. There is no allegation of actual fraud in this case. Complainant argues, however, that "BWM is a corporation which was formed solely for the purpose of avoiding liability in this enforcement action." Reply at 7. If this was Mr. Berger's purpose, he did not achieve it: the Board has found him, rather than BWM, liable for the violations that occurred. Complainant may be basing its argument on the fact that the existence of the corporate entity places a barrier between Complainant and certain assets that might otherwise be available to satisfy a judgment. The mere prospect of an unsatisfied judgment, however, cannot satisfy the "promote injustice" prong of the test. See Sea-Land Services, Inc. v. The Pepper Source, 941 F.2d 519, 522-23 (7th Cir. 1991) (applying Illinois law). Absent some other showing of injustice resulting from the separate corporate existence of BWM, we will not pierce the corporate veil and hold BWM responsible for Mr. Berger's violations of the Act and regulations.[3]

Conclusion

[3] To the extent Complainant is concerned with the availability of assets of BWM to satisfy any judgment it may obtain, the Board notes that Mr. Berger's stock in BWM is among his assets, upon which Complainant could levy to satisfy a judgment. The Board further notes that if Mr. Berger's transfer of property to BWM upon its formation was improper, Complainant has a remedy through statutes allowing avoidance of fraudulent transfers, see, *e.g.*, 740 ILCS 160 (1996).

The Board finds that Wayne Berger committed each of the violations alleged in count I of the complaint. The Board further finds that Berger Waste Management, Inc., is not liable for any of the violations alleged in count I. The violation of Section 807.623(a) continued from December 12, 1992, through August 21, 1998. The other violations continued from July 2, 1992, through August 21, 1998.

Count II

Allegations

Complainant alleges that on October 29, 1992, the Agency sent Mr. Berger a letter acknowledging receipt of notification from Berger that the landfill would operate beyond September 18, 1992. In accordance with 35 Ill. Adm. Code 814.104, the letter required Mr. Berger to file an application for significant modification of the operating permit by March 1, 1993. Complainant alleges that the Agency has not received a significant modification application, and respondents have consequently violated Section 21(d)(2) of the Act and Section 814.104. Section 21(d)(2) is discussed above. Section 814.104 provides:

> a) All owners or operators of landfills permitted pursuant to [Section 21(d)] shall file an application for a significant modification to their permits for existing units, unless the units will be closed pursuant to Subpart E within two years of the effective date of this Part.
>
> ***
>
> c) The application shall be filed within 48 months of the effective date of this Part, or at such earlier time as the Agency shall specify in writing pursuant to 35 Ill. Adm. Code 807.209 or 813.201(b).

Facts

On or about March 15, 1991, Mr. Berger sent the Agency a notification form stating that the Berger landfill would remain open beyond September 18, 1992. Res. Exh. 21. On or about October 29, 1992, the Agency sent Mr. Berger a letter acknowledging receipt of this notification and requiring that an application for significant modification of the operating permit be filed by March 1, 1993, in accordance with 35 Ill. Adm. Code 814.104. Comp. Exh. 3. Respondents admit that they have not submitted the application. Resp. Br. at 20-21; Tr. at 219-20.

Analysis

The alleged violations, as noted, are admitted. We turn then to whether BWM can be held liable for these violations. Section 814.104(a) places responsibility for submitting a significant modification application on the owner or the operator, but 35 Ill. Adm. Code 813.201, which governs initiation of significant modification to a permit, provides only for the operator (813.201(a)) or the Agency (813.201(b)) to initiate a significant modification to a permit. Under the definition of "owner" in 35 Ill. Adm. Code 807.104 and 810.103, however, the owner is considered the operator if there is no other person conducting an operation at a site. In such a circumstance the owner could initiate a modification under Section 813.201. In this case, however, there is an operator: Mr. Berger. BWM is not therefore deemed an operator under Section 810.103, and cannot initiate the permit modification.[4] The Board therefore concludes that only the operator, Mr. Berger, is to be held liable for these violations.

Conclusion

The Board finds that Wayne Berger has violated Section 21(d)(2) of the Act and 35 Ill. Adm. Code 814.104 by failing to submit a significant modification permit as required by the Agency. The Board further finds that Berger Waste Management, Inc., is not liable for the violations alleged in count II. The violations continued from March 1, 1993, to August 21, 1998.

Count III

Allegations

Complainant alleges that on June 24, 1993, the Agency conducted an inspection of the landfill. Complainant alleges that on that date, respondents caused or allowed refuse to be deposited in two areas of the landfill which had not received at least six inches of daily cover. Complainant also alleges that on that date, respondents allowed litter to be blown along a fence at the northern boundary of the landfill. Complainant further alleges that on that date respondents allowed refuse to be deposited in the landfill which had not been compacted. Complainant alleges that by failing to place adequate daily cover respondents have violated Sections 21(d)(2) and 21(o)(5) of the Act. Complainant alleges that by failing to collect and contain litter from the landfill site at the end of each working day, respondents have violated Sections 21(d)(2) and 21(o)(12) of the Act and 35 Ill. Adm. Code 807.306. Finally, complainant alleges that by failing to compact refuse deposited in the landfill respondents have violated Section 21(d)(2) of the Act and 35 Ill. Adm. Code 807.303(b).

[4] This interpretation is consistent with the understanding of the interrelationship between "owners" and "operators" expressed by the Board in the rulemaking in which the term "owner" was added at Section 814.104. See In the Matter of: RCRA Subtitle D Amendments (May 27, 1993), R93-10, slip op. at 11; In the Matter of: RCRA Subtitle D Amendments (September 15, 1993), R93-10, slip op. at 23.

Section 21(d)(2) is discussed above. The relevant provisions of Section 21(o) provide:

> No person shall:
>
> o. Conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section, in a manner which results in any of the following conditions:
>
> * * *
>
> 5. uncovered refuse remaining from any previous operating day or at the conclusion of any operating day, unless authorized by permit;
>
> * * *
>
> 12. Failure to collect and contain litter from the site by the end of each operating day[.]

Section 807.303(b) provides:

> Unless otherwise specifically provided by permit, the following methods of operation shall be followed:
> ***
> b) Spreading and compacting - as rapidly as refuse is deposited at the toe of the fill, all refuse shall be spread and compacted in layers within the cell, such layers not to exceed a depth of two feet.

Section 807.305(a) provides:

> Unless otherwise specifically provided by permit, the following cover requirements shall be followed:
>
> a) Daily Cover - a compacted layer of at least 6 inches of suitable material shall be placed on all exposed refuse at the end of each day of operation.

Section 807.306 provides:

> All litter shall be collected from the sanitary landfill site by the end of each working day and either placed in the fill and compacted and covered that day, or stored in a covered container.

Complainant alleges that the violations are ongoing.

Facts

Daily Cover. Complainant's Exhibit 5, an Agency inspection report, indicates that on June 24, 1993, Agency inspectors conducted an inspection of the Berger landfill, and that an

area of the landfill "was observed as having exposed refuse. Work was not being conducted in Area A on the day of the inspection." Mr. Berger admits that he had uncovered or insufficiently covered refuse at the end of an operating day. Tr. at 220-21. There is no evidence of uncovered or insufficiently covered refuse on any day other than the date of the inspection reported in Complainant's Exhibit 5. Reports from subsequent inspections do not indicate uncovered or insufficiently covered refuse. See Comp. Exh. 6, 7.

Litter. Complainant's Exhibit 5 indicates that "[b]lown and weathered litter was observed along the fence north of Area A." Inspector Sheila Williams, who signed the inspection report, further testified that photo 5, appended to the inspection report, showed the litter in question, and that she did not remember any other litter at the landfill on that date. Tr. at 146-47. Mr. Berger admitted that there was litter at the landfill on that date. Tr. at 566. Although Mr. Berger testified that he constructed fences to catch litter blown by wind during operations, and he personally picked up litter that blew off the landfill site, Tr. at 511-12, Mr. Berger admitted that there was "a little" litter at the landfill at the end of an operating day. Tr. at 220.

Compacting. Complainant's Exhibit 5 indicates that "[r]efuse in Area A was observed as not having been compacted. Non-crushed boxes and fully expanded plastic jugs were observed in Area A." See also photo 2 in Complainant's Exhibit 5. Ms. Williams testified that there was uncompacted refuse in an area not receiving waste on the date of the inspection, Tr. at 102, and that the area of uncompacted refuse was approximately 30 feet by 60 feet. Tr. at 143.

Analysis

Daily Cover. Mr. Berger admitted the presence of uncovered or inadequately covered waste at the end of an operating day. This condition constituted a violation of Section 21(o)(5) of the Act and 35 Ill. Adm. Code 807.305(a). There is no evidence, however, from which the Board can find that this condition existed on any date other than the date of the inspection, June 24, 1993. BWM had not yet been incorporated on June 24, 1993. The Board accordingly concludes that Wayne Berger committed the violations in question.

Litter. As noted, Mr. Berger has admitted that there was litter present at the end of an operating day, which constitutes violations of Section 21(o)(12) of the Act and 35 Ill. Adm. Code 807.306. Respondents' arguments regarding the small amount of litter involved may bear on an appropriate penalty, but do not impact whether Section 21(o)(12) or Section 807.306 have been violated. There is no evidence in the record that litter violations occurred more than once; the Board can therefore find no ongoing violation of either provision. Since BWM did not exist when the violations occurred, the Board concludes that only Wayne Berger, and not BWM, committed these violations.

Compacting. Based on the testimony of Ms. Williams and the photographs included in Complainant's Exhibit 5, the Board finds that Mr. Berger did not compact refuse as rapidly as it was deposited in the landfill. This failure constitutes a violation of 35 Ill. Adm. Code 807.303(b). There is no evidence from which the Board can determine the duration of this

violation. Because the violation occurred prior to the incorporation of BWM, only Mr. Berger can be held responsible for the violation.

Conclusion

The Board finds that on or about June 24, 1993, Wayne Berger violated Section 21(o)(5) of the Act and 35 Ill. Adm. Code 807.305(a) by failing to cover refuse at the end of an operating day with a compacted layer of at least six inches of suitable material. The Board also finds that on or about June 24, 1993, Wayne Berger violated Section 21(o)(12) of the Act and 35 Ill. Adm. Code 807.306 by failing to collect and contain litter at the site by the end of an operating day. The Board also finds that as of June 24, 1993, Wayne Berger violated 35 Ill. Adm. Code 807.303(b) by failing to compact refuse as rapidly as it was placed in the landfill. By violating Sections 807.303(b), 807.305(a), and 807.306, Wayne Berger has also committed three violations of Section 21(d)(2) of the Act. None of these are continuing violations.

Count IV

Allegations

Complainant alleges that on April 18, 1994, the Agency conducted an inspection at the landfill and that on that date respondents caused or allowed refuse to be deposited in an area which extended approximately seventy feet beyond the permitted boundary of the landfill. Complainant alleges that respondents have thereby violated Sections 21(d)(1) and 21(o)(9) of the Act. Section 21(d)(1) is discussed above. Section 21(o)(9) provides:

> No person shall:
>
> * * *
>
> o. Conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section, in a manner which results in any of the following conditions:
>
> * * *
>
> 9. deposition of refuse in any unpermitted portion of the landfill[.]

Facts

Complainant's Exhibit 6 indicates that on April 18, 1994, Agency inspector Sheila Williams conducted an inspection of the Berger landfill and noted:

> The only apparent violation observed . . . was that the landfill has gone beyond the permitted boundary on the southwest region. The Soils and Hydrogeologic Investigation and Recommended Goundwater Monitoring System report prepared by Shaffer, Drimmel, Silver & Associates, Inc. includes a map designating the permitted waste boundary as being directly west of, but no further south than Monitoring Well G107. However, during the

> inspection, the boundary of the landfill in this area was estimated to continue approximately 70 ft. south of Monitoring Well G107.

There are two maps included in Complainant's Exhibit 6. The first is a copy of a map prepared by Shaffer, Drimmel, Silver & Associates, Inc. and submitted to the Agency by Mr. Berger. The second map, copied from a map in the Agency's files, is of unknown origin, Tr. at 157-58, and marked with a written notation "Not to Scale." The second map includes designation of landfill cells.

The Board notes that although the second map has a handwritten notation "Not to Scale" on it, a comparison with the first map shows that the boundaries of the landfill are consistent. Mr. Berger testified that the second map accurately depicted the layout of the cells of the landfill. Tr. at 515. Furthermore the map does include indications of scale: there are several circles on the map indicated as having radii of 50 feet. Respondents have suggested that the "Not to Scale" notation refers to the markings made on the map by the inspector and not to the map itself. The Board finds this interpretation credible.

From east to west, the southern boundary of the landfill runs straight parallel to the property line of the landfill for approximately (perhaps slightly less than) half its breadth, then follows a meandering course north-northwest to a point approximately halfway to the landfill's northern boundary. From that point, the southern boundary again proceeds straight west for a short distance before turning back south for another short distance. The boundary line then resumes a meandering course north and west again to the western edge of the facility. In broad terms, the effect of this course is an irregular notch being taken out of the southwest corner of the otherwise-rectangular landfill.

Monitoring well G107 is marked on both maps inside this notch. It is shown surrounded by the landfill on three sides, and is located just to the east of the point where the boundary of the landfill turns back to the north and west. The second map indicates that landfill cells 79D, 80D, and 83D are immediately west of the well. Landfill cell 88D, on the other hand, is located three cells farther to the west, near the western edge of the landfill. At the hearing, Ms. Williams marked an area on the first map where she believed waste had been deposited beyond the permitted area. Tr. at 109. On the second map, the area she indicated is immediately south of cells 79D, 80D, and 83D; it would be part of those cells if they were extended to the south. Comp. Exh. 6.

Ms. Williams testified that she did not survey to determine whether monitoring well G107 was actually located where indicated on the first map. Tr. at 159-60. She stated that the well could be located further north or south than its position on the map. Tr. at 153. She assumed that the well was located accurately because the first map was submitted by Mr. Berger. Tr. at 159.

Harry Chappel, respondents' expert witness, testified that based on his observations in the field the boundary of the permitted area of the landfill coincided with the tree line of a wooded area to the south of the landfill. Tr. at 377. He determined this based on the topographic lines on the second map. Tr. at 394. He testified that based on his observations

the actual location of monitoring well G107 was east of cell 88D and approximately 206 feet north of the tree line. Tr. at 379.

Mr. Berger testified that he has never deposited any waste in cells 79D, 80D, or 83D, or anywhere south of those cells, Tr. at 573, and the area that Ms. Williams thought was in those cells must have been in cell 88D. Tr. at 565. Ms. Williams testified that she estimated which cells were involved based on the location of monitoring well G107. Tr. at 139.

Analysis

Complainant's case for waste having been deposited beyond the permitted boundaries of the landfill is predicated on the assumption that monitoring well G107 marks the boundary of the landfill. Given the contradictory evidence on the subject, the Board cannot determine from this record where monitoring well G107 is located relative to the boundary. Absent any other evidence establishing the landfill boundary and the deposit of waste outside that boundary, the Board concludes that there is insufficient evidence to support a finding of violations.

Conclusion

The Board finds no violations of Sections 21(d)(1) or 21(o)(9) of the Act based on waste disposed beyond the permitted landfill boundaries.

Count V

Allegations

Complainant alleges that supplemental permit 1991-401-SP imposed a groundwater monitoring program on the landfill, which required monitoring reports be submitted to the Agency, and that since at least January 15, 1995, respondents have failed to submit the required reports. Complainant alleges that this failure is a violation of supplemental permit 1991-401-SP, and consequently respondents have violated Sections 21(d) and 21(o) of the Act.

Section 21(d)(1) is quoted above. Section 21(o) provides in relevant part:

> No person shall:
>
> * * *
>
> o. Conduct a sanitary landfill operation which is required to have a permit under subsection (d) of this Section, in a manner which results in any of the following conditions:
>
> * * *
>
> 11. failure to submit reports required by permits or Board regulations.

Complainant alleges that these violations are ongoing.

Facts

Supplemental permit 1991-401-SP requires Wayne Berger to monitor groundwater in the vicinity of the landfill for an array of potential contaminants and submit groundwater monitoring reports to the Agency each quarter, on the fifteenth of January, April, July, and October. Comp. Exh. 2, Attachment A at 3. Respondents admit that they have not submitted groundwater monitoring reports since September of 1994. Res. Br. at 20-21; Tr. at 223.

Analysis

As noted, the violations are admitted. Because these violations are predicated on a permit condition, only the permit holder can be held liable. BWM is therefore not liable for these violations. It is not clear whether the report submitted in September 1994 was the third quarter report submitted late or the fourth quarter report submitted early; in light of the allegation that respondents have been out of compliance since at least January 15, 1995, Comp. at 13, we will assume the latter, and find that these violations continued from January 15, 1995, through the hearings.

Conclusion

The Board finds that Mr. Berger has violated Sections 21(d)(1) and 21(o)(11) of the Act by failing to submit groundwater monitoring reports to the Agency as required by supplemental permit 1991-401-SP. The Board further finds that Berger Waste Management, Inc., is not liable for the violations alleged in count V. The violations continued from January 15, 1995, through August 21, 1998.

Count VI

Allegations

Complainant alleges that on August 25, 1995, the Agency conducted an inspection of the landfill, and that respondents had allowed thick vegetation to grow over the landfill road, making the landfill inaccessible on that date. Complainant alleges that by causing or allowing the road to become inaccessible, respondents have violated Section 21(d)(2) of the Act and 35 Ill. Adm. Code 807.314(b). Section 21(d)(2) is discussed above. Section 807.314(b) provides:

> Except as otherwise authorized in writing by the Agency, no person shall cause or allow the development or operation of a sanitary landfill which does not provide:
> ***
> b) Roads adequate to allow orderly operations within the site[.]

Facts

Complainant's Exhibit 7, an Agency inspection report, indicates that on August 25, 1995, Agency inspector Sheila Williams inspected the Berger landfill and noted that while the landfill road was blocked by a truck, "[u]pon a closer look at the landfill road, it was apparent

that the State vehicle could not have been driven on the road even if it had been accessible. This was due to the height of the vegetation that was especially thick down the center of the road." Photos 4 and 5 attached to the inspection report show the road with grass grown up over it.

Ms. Williams testified that she was unable to drive her vehicle, a 1995 Chevrolet Caprice station wagon, on the roads of the landfill due to problems with vegetation, but also testified that she never tried to drive down the road. Tr. at 110, 114, 177, 179. She testified that she was afraid that driving down the road would damage her vehicle. Tr. at 195. The problematic vegetation consisted of grass and weeds. Tr. at 179. The grass in some places was as high as four feet tall. Tr. at 180-81.

Mr. Berger, on the other hand, testified that on or about August 25, 1995, he drove his pickup truck down the road with no problems. Tr. at 576.

The landfill was not accepting waste at the time of the August 25 inspection. Final cover had been applied (although not certified by the Agency) and vegetated. Tr. at 562.

Analysis

The Board concludes that the evidence is insufficient for it to find that the road was in fact inadequate. Given Ms. Williams' testimony that she did not try to drive down the road and Mr. Berger's testimony that he was able to drive down the road on or about the same day, the Board concludes that the State has not provided a preponderance of evidence that the road was inadequate. We are not ruling that an inspector must attempt to drive down an impassable road, and risk his or her vehicle, in order to establish a violation of Section 807.314(b). We believe, however, that proving the inadequacy of a road requires more than a visual inspection from a distance, which is all we have in this case.

Respondents have argued that "orderly operations," as that term is used in Section 807.314(b), do not include Agency inspections. The Agency disputes this interpretation. The Board is not reaching that issue because we find the evidence inconclusive in any event.

Conclusion

The Board finds no violation of Section 21(d)(2) of the Act or 35 Ill. Adm. Code 807.314(b) based on failure to maintain roads adequate to allow orderly operations within a site.

REMEDY

In crafting appropriate remedies, the Board considers the factors set forth in Section 33(c) of the Act (415 ILCS 5/33(c) (1996). Section 33(c) provides:

> c. In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions,

discharges, or deposits involved including, but not limited to:

i. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

ii. the social and economic value of the pollution source;

iii. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

iv. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

v. any subsequent compliance.

Where the Board determines that a monetary penalty is appropriate, Section 42(h) of the Act authorizes the Board to consider any matters of record in mitigation or aggravation of penalty. Section 42(h) specifically lists several items the Board may consider, but the list is not exclusive.

Section 33(c) Analysis

Section 33(c) by its terms applies to violations involving "emissions, discharges, or deposits[.]" In such cases, consideration of the Section 33(c) factors is mandatory. Only some of the violations found in this case fall into this category. Often, however, the Board finds it useful to consider Section 33(c) factors in connection with violations that do not specifically involve emissions, discharges or deposits, and has done so here.

Considering the Section 33(c) factors as they relate to the violations found above, the Board finds as follows:

Character and Degree of Injury

Count I. Mr. Berger's failure to provide the financial assurances required by permit 1991-401-SP results in a significant degree of interference with the protection of health, welfare, and property. Although the financial assurance violations may not be the most dramatic possible violations of the Act, they are among the most insidious in character: Mr. Berger violates the provisions which are in place to ensure that other more threatening violations do not occur, and which provide a safety net to protect the environment if the

operator cannot or will not meet his obligations under the law. The Board thus takes these violations very seriously. The Board concludes that this factor weighs in aggravation of the violations.

Count II. Failure to file a significant modification application also results in a significant degree of interference with protection of health, welfare, and property. Filing of the significant modification application begins an evaluation process under Part 814. Based at least partly on the information submitted in the significant modification application, the Agency determines whether a particular landfill is entitled to remain open under Subparts C or D of Part 814, or must close under Subpart E. See 35 Ill. Adm. Code 814.301(b), 814.401(b). Until the Agency completes its evaluation of a petitioner's significant modification application, it is not clear under which subpart the facility will be regulated. Land & Lakes Co. v. IEPA (August 8, 1998), PCB 97-209, slip op. at 4. Closure of landfills which do not meet the heightened requirements of Subpart C or D, or the imposition of those requirements on landfills which will remain open, reduces the threat of injury to health, welfare or property, but participants must meet their responsibilities under the rules, including timely filing of a significant modification application, for the regulatory framework to achieve its goals. Mr. Berger's failure to file his application on time derailed this process with respect to his landfill. The Board therefore concludes that this factor weighs in aggravation of the violations.

Count III. There is no evidence of any significant injury to or interference with the protection of health, welfare, or property resulting from any of the operational violations found under count III. The Board finds that this factor weighs in mitigation of these violations.

Count V. The Board finds that Mr. Berger's failure to perform the groundwater monitoring required under permit 1991-401-SP resulted in a significant degree of interference with the protection of health, welfare, and property. While the violations under count V are not of a type that will necessarily result in direct harm to the environment, they are, like the financial assurance violations discussed under count I, particularly insidious, because they hinder enforcement of other statutes and regulations which do involve direct impact on the environment. Groundwater monitoring ensures that pollution or a threat of pollution can be discovered early on, and any harm prevented or minimized. When this data is not collected, the entire regime of groundwater regulation is undermined. The Board accordingly finds that this factor weighs in aggravation of these violations.

Social and Economic Value

For part of the duration of some violations, the Berger landfill was operating and provided a valuable service to surrounding towns. Since late 1993, however, the landfill has not accepted waste. The Board finds that this factor weighs neither in aggravation nor mitigation of the violations.

Suitability of Pollution Source

The Berger landfill has been permitted as a landfill since 1979. The Board therefore finds that it is suitable to its location. The Board finds that this factor weighs in mitigation of these violations.

Technical Practicability and Economic Reasonableness of Compliance

Count I and V. Mr. Berger's financial assurance and groundwater monitoring requirements were set in permit 1991-401-SP. If Mr. Berger believed that the permit conditions were inappropriate, he had recourse through the Board's permit appeal procedures. The Board will not review the reasonableness of the terms of permit 1991-401-SP in this case. Accordingly the Board concludes that this factor weighs in aggravation of the violations.

Count II. Respondents assert that compliance with the requirement to file an application for significant modification is not economically reasonable. The evidence indicates that compliance, *i.e.*, preparation and filing of an application for a significant permit modification, would cost between $27,000 and $30,000.[5] The Board finds that an expenditure in this amount is not unreasonable. Respondents, in their arguments, lump this expenditure with other expenditures that the modified permit would presumably require, such as costs for additional cover or groundwater monitoring. These, however, are separate inquiries. The Board concludes that this factor weighs in aggravation of the violations.

Count III. There is insufficient evidence for the Board to make a finding on this factor. Mr. Berger has blamed wet weather for the conditions which resulted in at least some of the violations under count III. Tr. at 569-70. Complainant has disputed this claim. Reply at 3. We cannot tell on this record whether it would have been technically practicable for Mr. Berger to undertake the activities necessary for compliance if it was in fact raining on the day or days prior to Ms. Williams' inspection. The Board therefore finds that this factor weighs neither in aggravation nor mitigation of these violations.

Subsequent Compliance

Complainant failed to prove its allegation that the violations found under count III were continuing. The violations were only found to have occurred on one day, and were not noted in subsequent inspection reports. See Comp. Exh. 6, 7. With respect to the other violations, however, through the end of the hearing Mr. Berger had not achieved even partial compliance. The Board concludes therefore that overall this factor weighs in aggravation of the violations.

[5] These figures are the projected cost of an application assuming the landfill does not resume operations. Tr. at 349-350. Witnesses at the hearing testified that the cost of the application if the landfill were to remain open would be more than $100,000. Tr. at 53, 348. For reasons discussed in more detail below, however, Mr. Berger may not keep the landfill open. The Board therefore uses the lower figures in its analysis.

Conclusion

In fashioning any remedy, the Board must consider what action is best designed to achieve compliance with the Act. People v. ESG Watts, Inc. (February 5, 1998), PCB 96-107, slip op. at 50. Clearly from this record, the Berger landfill cannot meet the permit conditions underlying the violations found here. Based on Mr. Runyon's testimony, Mr. Berger could not and cannot qualify for a letter of credit to meet the financial assurance requirements of Subpart C or D; nor is there any apparent source of income or other resources to cover the cost of post-closure groundwater monitoring required under Subpart C or D. Thus, a Board order simply directing Mr. Berger to cease and desist from these violations would be pointless. Rather, since Mr. Berger cannot perform his duties under permit 1991-401-SP, the Board concludes that he is not entitled to the benefits of that permit. The Board accordingly revokes permit 1991-401-SP.[6]

Furthermore, Mr. Berger must now close the landfill. This is required by 35 Ill. Adm. Code 814.501(b); see also 35 Ill. Adm. Code 814.301(b) and 814.401(b) (facilities which cannot meet the requirements of 35 Ill. Adm. Code 814.Subpart C or D are subject to 35 Ill. Adm. Code 814.Subpart E). Because Mr. Berger cannot demonstrate compliance with Subpart C or D, the provisions of 35 Ill. Adm. Code 807 will govern closure of the landfill. See 35 Ill. Adm. Code 814.502(a).

The Board also concludes that a monetary penalty is appropriate. Among the factors the Board may consider in determining an appropriate penalty is the economic benefit to the violator due to delay in compliance. 415 ILCS 5/42(h)(3) (1996). As we have noted above, the Berger landfill never could have demonstrated compliance with Subpart C or D of Part 814, and consequently is subject to Subpart E. The Board concludes that the relevant economic benefit in this case is the money earned by Mr. Berger through continued acceptance of waste after the landfill should have closed under that Subpart.

In other cases we have considered the money saved by a violator through failure to provide financial assurance and failure to perform groundwater monitoring. See People v. ESG Watts, Inc. (February 5, 1998), PCB 96-233. In this case, however, we do not believe that the costs of compliance would provide an accurate measurement of savings to Mr. Berger, because he never had the financial ability to comply; we cannot find that Mr. Berger avoided spending money he never had. The major violations involved in this case are violations of the terms of permit 1991-401-SP. That permit, which includes conditions that Mr. Berger could not have met absent Terra Tech's involvement, was sought and issued based on Mr. Berger's belief that Terra Tech would buy the landfill. He was mistaken in that belief.[7] There is

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[6] Section 33(b) of the Act (415 ILCS 5/33(b) (1996)) provides in part, "The Board may . . . revoke the permit as a penalty for violation."

[7] Absent this mistake on Mr. Berger's part, presumably the permit conditions underlying the violations in counts I, II and V would not have been imposed on Mr. Berger and the operating violations underlying count III would not have occurred, since the landfill would have been closed.

insufficient evidence in this record to determine whether this belief was reasonable, but reasonable or not, the Board cannot find that Mr. Berger was acting in bad faith.

At some point, Mr. Berger realized that Terra Tech was not going to purchase the landfill. We cannot tell from this record when that revelation occurred, but we believe that Mr. Berger at least should have realized his predicament by March 1, 1993, when his significant modification application was due. By then at the latest, Mr. Berger should have understood that he could not make the necessary demonstration to remain open under Subpart C, and should have begun closure. In any event, by failing to file his application on time Mr. Berger forfeited the protections of 35 Ill. Adm. Code 814.105, which deems an operator in compliance with the requirements of Part 814 if the application is timely filed. Consequently, the landfill has been required to close by operation of 35 Ill. Adm. Code 814.501(b) since at least March of 1993.

From that point on, we will not give Mr. Berger the benefit of the doubt on the issue of good faith. The landfill continued operating until September, or for approximately six months. While we cannot determine from the record exactly how much income Mr. Berger realized from the continued operation of the landfill through September of 1993, we do know that historically the landfill earned approximately $40,000 per year. A person ought not be allowed to benefit economically from violating environmental laws and regulations. People v. Hendricks (June 17, 1998), PCB 97-31, slip op. at 14. The Berger landfill operated for approximately one-half year in violation of regulations; the Board therefore finds that a fine in the amount of half of one year's income, or $20,000, is appropriate.

Assessing this penalty, however, merely places Mr. Berger in the position in which he would have found himself had he met his obligations. Were this the only penalty assessed against Mr. Berger, he would lose only the money saved by failing to comply with Part 814. Accordingly, the Board concludes that it is necessary to assess an additional penalty to encourage compliance. The Board has previously found that requiring a repayment of two dollars for each dollar realized due to violation of regulations removes the economic incentive for noncompliance. People v. Watts (May 4, 1995), PCB 94-127, slip op. at 16, *aff'd sub nom*. ESG Watts, Inc. v. Pollution Control Board, 282 Ill.App.3d 43, 668 N.E.2d 1015 (4th Dist. 1996).

In this case, however, we note that revocation of the permit also has an economic effect: it forecloses the possibility that Mr. Berger could sell the landfill. Mr. Berger has argued that based on his limited resources a large penalty would be inappropriate. Were we to impose a light penalty on Mr. Berger while allowing him to continue operating, he could conceivably then sell the landfill to a party with the resources to meet the requirements of Subpart C, and thus realize an economic benefit from his violations. Revoking his permit and requiring closure thus prevents any future profit from violations; requiring payment of a penalty in the amount of his income from illegal operations accounts for the past.

In light of the deterrent effect of permit revocation, the Board will apply a multiplier of 1.5, rather than two, to economic gain to calculate the total penalty. The Board accordingly imposes a total penalty of $30,000.

ATTORNEY FEES

Complainant has requested an award of attorney fees pursuant to Section 42(f) of the Act (415 ILCS 5/42(f) (1996).[8] Under Section 42(f), the Board may consider an award of attorney's fees in a case where the complainant has proven a willful, knowing, or repeated violation of the Act by the respondent. The Board will not consider an award of attorney's fees in this case. This request is stricken as a sanction for complainant's abuse of discovery, as is discussed below.

SANCTIONS

Respondents have moved for sanctions against complainant based on asserted abuses of discovery. Events leading up to this motion begin with "Respondents' Requests to Admit." Respondents included the following items in their requests:

> 1. Complainant has no evidence that Respondents (or either Respondent) through the operation of the landfill impacted (beyond the impact allowed by governing parameters) groundwater or surface water from 1978-1998. (Admit or deny for each year in question.)
>
> ***
>
> 3. Complainant has no evidence that the alleged violations set forth in the First Amended Complaint resulted in actual harm to any water (including groundwater) of the State of Illinois.
>
> 4. Complainant has no evidence that the alleged violations set forth in the First Amended Complaint resulted in actual harm to any identifiable real property.
>
> 5. Complainant has no evidence that the alleged violations set forth in the First Amended Complaint resulted in actual harm to any identifiable person.

[8] Section 42(f) provides that the Board "may award costs and reasonable attorney's fees . . . to the State's Attorney or the Attorney General in a case where he has prevailed against a person who has committed a willful, knowing or repeated violation of the Act."

In its "Answer to Respondents' Requests to Admit," complainant responded to each of these requests in essentially the same way:[9]

> Complainant objects that this interrogatory is improper. This is not a fact that can be admitted or denied. This request is also irrelevant to the merits of the case, is conclusory, and calls for a legal opinion. Further the request is vague in that it fails to define what is meant by "actual harm". Without waiving the objection, Complainant denies any facts in this request and requires strict proof thereof at hearing.

"Respondents' Second Set of Interrogatories," propounded at the same time as the requests to admit, included interrogatories (nos. 6, 7, 8, and 9) directing complainant, if it denied requests to admit 1, 3, 4, or 5 respectively, to identify the waters, property or person harmed and identify every document in complainant's possession or control supporting the assertion that groundwater was impacted or that water, property or a person was actually harmed. In response, complainant stated that requests 1, 3, 4, and 5 were subject to objections.

Respondents brought a motion to compel responses to discovery, including requests 1, 3, 4, and 5 and interrogatories 6, 7, 8, and 9. The hearing officer ruled on the motion in an order entered on August 4, 1998. The relevant portion of that order provided:

> The respondents next request that the hearing officer deem the admissions sought within the request to admit, specifically 1, 3, 4, and 5, admitted because the complainant failed to comply with Supreme Court Rule 216(c). In the alternative the respondents request that the complainant's objections to those requests to admit be overruled and the complainant be directed to answer the requests to admit. The complainant's objections to each of these admissions is essentially the same, and the complainant specifically denies each of the admissions requested in 1, 3, 4, and 5, without waiving those objections. The complainant's responses shall be treated as denials and where the respondents are able to prove the truth of the matter of those facts sought to be admitted they may seek appropriate relief from the hearing officer or the Board.

The hearing officer also provided in the order that "[i]f the information sought by the respondent within interrogatories . . . 6, 7, 8 and 9, exists . . . the complainant shall provide that information to the respondents."

Respondents argue that they have proven the truth of facts sought to be admitted, and now seek appropriate relief. Complainant responds that since it objected to the requests to

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[9] Complainant's response to request 1 used "impacted" in place of "actual harm."

admit, it never had any obligation to provide any additional information, and sanctions are accordingly inappropriate.

The hearing officer's order of August 4 in effect overruled complainant's objections to the requests to admit. Because complainant's responses were treated as denials, complainant was under an obligation after August 4 to either answer interrogatories 6, 7, 8, and 9, or to amend its answers to the requests to admit to specifically admit the requested facts. Alternately, complainant could have sought clarification of the hearing officer's order. Complainant could not, however, take the course it did: ignore the hearing officer's order and pretend that its objections still operated to deprive the responses of any effect.

Based solely on complainant's failure to take any action in response to the hearing officer's order, the Board could find that complainant had abused discovery. In this case, however, respondents further assert that they have proven facts that complainant was requested to admit but denied. With regard to whether complainant had any evidence that respondent's operations had impacted groundwater, we note the following testimony from the hearing on August 20, 1998. The witness is Scott Kains, an Agency attorney who was responsible for answering respondents' written discovery requests. Tr. at 433.

> THE WITNESS: For the last four or five years we don't have groundwater monitoring reports. Prior to that, I don't have specific knowledge whether there was groundwater--I believe the term you used was impact. I don't have that knowledge.
>
> Now I don't know who within the Agency reviewed these reports from-- if they were, and I don't know if they were submitted as far back as 1978 or not, because I know the permit was not issued until, I believe, 1979. I don't know who it was who would have reviewed these reports.
>
> Q: Did you make any inquiry to find out?
>
> A: Oh, sure, sure.
>
> Q: Who did you talk to?
>
> A: I talked to Ken Smith. I talked to his supervisor, I believe, Joyce Munie, about who would be reviewing these things. And they said permit section does not review-- they are not geologists who review the groundwater monitoring reports. I believe Mr. Chappel testified that he was in charge of the compliance section and that they reviewed those reports.
>
> Now, I don't know if our compliance section currently does that or not. I am not sure that they do. We have a

groundwater assistance unit that is like a permits unit for groundwater.

Q: So the-- as you are stating here today, your correct answer would be you don't know? It is not correct to deny it?

A: I don't know that that is true, because-- I don't now where I could have gotten the information, I guess, is what I'm getting at. I endeavored to get the information, and . . . .

Q: Why was it denied, if you didn't know?

A: I didn't deny it. I didn't verify this. Tr. at 444-43.

From this testimony it is apparent to the Board that complainant had no basis upon which to deny respondents' first request to admit.

With regard to evidence of actual harm to real property, we have the following exchange:

Q: Well, what kind of investigation did you conduct to-- with Agency personnel or Agency files to reach your denial?

A: I reviewed the file. I spoke with Ken Smith, Joyce Munie, Sheila Williams, Kevin Bryant, John Taylor. Those are the folks I talked to.

Q: And did any of those people provide you with evidence in their possession of actual harm to any identifiable real property stemming from the alleged violations set forth in the first amended complaint?

A: No, they did not. Tr. at 445-46

Thus, complainant had no basis to deny respondent's fourth request to admit. Finally, regarding actual harm to any identifiable person, there is the following discussion:

Q: Will you admit that the Complainant has no evidence that the alleged violations set forth in the first amended complaint resulted in actual harm to an identifiable person.

A: I don't know if there has been any harm, any actual harm to an identifiable person.

Q: I'm not asking you if you don't know. Through your diligent inquiry through the Agency and all the people that you talked to related to the State of Illinois who filed this action, and who you represent, were you able to find any evidence that the alleged violations set forth in the first amended complaint resulted in actual harm to any identifiable person?

A: Based upon my review of the file and discussing the violations with the four or five people that I mentioned previously, I did not find that there was any actual harm to an unidentifiable [sic] person.

Q: So you admit it?

HEARING OFFICER CROWLEY: The question has been answered. I think the record is clear. Tr. at 447-48.

Thus, not only was complainant obligated to either disclose its evidence of impact/actual harm or amend its answers to the requests to admit, but from this testimony the Board can only find that complainant had no basis to deny at least requests 1, 4, and 5 in the first place. The Board concludes that complainant has abused discovery rules.

Under 35 Ill. Adm. Code 101.281, the Board will order sanctions when a party abuses discovery rules. The final question is an appropriate sanction. Respondents have requested attorney fees, but the appellate court has held that the Board is without authority to award attorney fees as a sanction. ESG Watts, Inc. v. Pollution Control Board, 286 Ill. App. 3d 325, 337-38, 676 N.E.2d 299, 307-08 (3d Dist. 1997). The Board will, however, strike complainant's request for attorney fees.

ORDER

1. The Board finds that Wayne Berger has committed the violations alleged in counts I, II, III and V of the "First Amended Complaint."

2. The Board finds that Berger Waste Management, Inc., has not committed any of the violations alleged in the "First Amended Complaint."

3. Supplemental permit 1991-401-SP is hereby revoked.

4. Wayne Berger must close the landfill he operates, in accordance with 35 Ill. Adm. Code 814.Subpart E.

5. The Board hereby assesses a monetary penalty in the amount of $30,000 against Wayne Berger. The penalty must be paid by certified check or money order made payable to the Environmental Protection Trust Fund. Mr. Berger send the payment no later than June 4, 1999, at 4:30 p.m. by First Class Mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

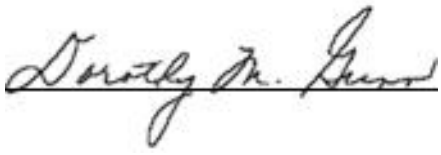
Mr. Berger must write the case name and number and his social security number on the certified check or money order. If the penalty is not paid within the time prescribed, it will incur interest at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (1996)) as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

6. "Respondents' Motion for Sanctions" is granted. Complainant's request for attorney fees pursuant to Section 42(f) is hereby stricken.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; 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 was adopted on the 6th day of May 1999 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board