ILLINOIS POLLUTION CONTROL BOARD
August 7, 2003

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

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

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

This matter comes before the Board on a three-count complaint filed by the Illinois Attorney General, on behalf of the People of the State of Illinois (complainant), and at the request of the Illinois Environmental Protection Agency (Agency), against Doren Poland (Poland), Lloyd Yoho (Yoho), and Briggs Industries, Inc. a/k/a Briggs Plumbing Products, Inc. (Briggs). The complaint alleges various violations of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2002)) and Board regulations related to respondents' operation of a permitted landfill (old landfill) and an unpermitted site (unpermitted area), both of which are located in Knox County, Illinois.

On September 6, 2001, the Board issued an order finding Poland, Yoho, and Briggs in violation of Sections 21(a), (d), (e), and (p)(1) of the Act (415 ILCS 5/21(a),(d),(e),(p)(1) (2002)) and 35 Ill. Adm. Code 807.201, 807.202(a), and 812.101. The Board found that respondents had caused or allowed the open dumping of waste by allowing the development and operation of a waste-storage or waste-disposal operation without a permit, by disposing or storing waste at a site that does not meet the requirements of the Act and Board regulations, and by causing or allowing open dumping resulting in litter. *See* Poland, PCB 98-148, slip op. at 15 (Sept. 6,

2001). The Board remanded the matter for further hearings and the appropriate technical relief, penalty and attorney fees.

For the reasons given below, the Board imposes a civil penalty of $25,000 on Briggs, and $5,000 each on Poland and Yoho but awards no attorney fees to the complainant. The respondents are jointly liable for the remediation as described below.

PROCEDURAL HISTORY

Pursuant to the Board's September 6, 2001 order, a hearing was held on December 10, 2002. All parties appeared and participated. Briggs filed a post-hearing brief on February 10, 2003. The complainant filed a reply brief on February 21, 2003. On February 25, 2003, Poland filed a reply brief; and on February 28, 2003, Yoho filed a brief.

BACKGROUND

On September 6, 2001, the Board found the following facts relevant. Briggs owns and operates a ceramics manufacturing plant (plant) in Knox County. On April 19, 1979, the Agency issued an operating permit to respondents Briggs, Poland, and Yoho for a 15.8 acre landfill (old landfill). The Agency-issued permit allowed for the disposal of waste vitreous china, scrap clay, bricks, and broken portland cement concrete. Although Poland and Yoho owned and operated the landfill from 1979 to 1993, Briggs was a co-permittee.

From 1979 to 1993, Briggs disposed of its ceramics waste at the old landfill. Its ceramics waste included scrap clay, waste vitreous china, bricks, and waste concrete. Prior to closure of the old landfill, Poland and Briggs sought and obtained Agency approval to reduce the size of the old landfill from 15.8 to 4.6 acres. The 4.6-acre site was covered and closed in 1993. During this 1979-1993 time period, Briggs participated actively in the operations of the old landfill. For example, when compliance issues arose with the Agency, it was Briggs who notified the Agency that corrective measures had been taken to eliminate any future violations. In 1984, Briggs applied to the Agency for a modification of the permit. An employee of Briggs, Jim Willis, signed the application as site owner. The Agency issued a supplemental permit to Briggs in 1984.

In September and October 1992, Briggs posted financial assurance in the form of letters of credit and a trust agreement. During the life of the old landfill, Briggs was also responsible for paying half of the operating expenses of the site. During a November 29, 1993 inspection of the old landfill, Agency personnel observed that waste had been deposited in an unpermitted area of the site. Waste from Briggs' manufacturing plant was disposed of at the unpermitted area from approximately 1993 to 1997. Despite various efforts over time by one or more of the respondents to secure a permit for the unpermitted area, an Agency permit was never obtained.

The unpermitted area covers an area of approximately 3.05 acres. The process waste consisted mainly of ceramic material, vitreous china and plaster molds. The nearest residence to the unpermitted area is located approximately 250 feet away. Forty-seven wells exist within 25 square miles centered around the landfill. Except for one, all the wells draw water from bedrock.

The unconsolidated drift thicknesses range from 20 to 50 feet around the unpermitted area. Land use in the area is primarily agricultural. The unpermitted area is located in an area that has been classified by the State's geologic survey as having hydrogeologic conditions favorable for limiting groundwater contamination. Groundwater underlying the unpermitted area discharges into a surface water stream near the southern boundary of the unpermitted area.

DECEMBER 10, 2002 HEARING

At the hearing, the attorneys for the complainant and Briggs each provided statements. The complainant's statement was made in lieu of a post-hearing brief. The arguments made therein are summarized below. Neither party produced any witnesses, but both submitted written testimony that was accepted. Poland and Yoho appeared as well. Yoho provided a statement, but neither offered any testimony.

The complainant offered the written testimony of Kenneth Smith into evidence, and Briggs offered the written testimony of Michael Rapps into evidence. The testimony is summarized as follows.

Kenneth Smith

Smith holds a degree in civil engineering and has been employed with the Agency for 14 years. Smith at 1. He testified that the Agency has never issued a permit for the operation of the unpermitted area. Smith at 2. Smith stated that the unpermitted area must be properly permitted so that closure and post-closure care may occur, or the wastes in the unpermitted area must be removed for proper disposal in a permitted landfill to mitigate potential environmental threats. *Id.*

Smith testified that the waste generated by Briggs is an industrial process waste and is regulated as special waste, and has not been demonstrated to be inert. Smith at 3. He testified that merely covering the unpermitted area with soil and causing vegetation to grow would not satisfy the regulations and would not be sufficient to mitigate potential leachate problems. *Id.*

Smith testified that the cost of compliance would include the excavation of the waste in the unpermitted area for transport to and disposal at a permitted landfill, and would directly depend upon the volume of the waste. Smith at 4. He estimates the technical remedy in this case would cost approximately $2.3 million. *Id.*

Michael Rapps

Rapps is a licensed, professional engineer with extensive experience in solid waste, landfill design, site investigation and remediation issues. Rapps at 1. Rapps testified that the land use surrounding the two landfills is primarily agricultural. Rapps at 6. He estimates the unpermitted area's surface covers 3.05 acres, and is eight to ten feet deep. Rapps at 9.

Rapps testified that the unpermitted area is not aesthetically unpleasant from any distance, and, due to its location, is difficult to view without actually being on the site. Rapps at

10. He stated that he has reviewed all the tests performed on the waste deposited at both landfills and has collected "grab" samples from the unnamed stream that flows along and through both landfills on August 22, 2002. *Id*.

Rapps testified that he has not seen test results establishing that either of the landfills is inert as defined in 35 Ill. Adm. Code 810.3, but that no landfill in Illinois has ever met the inert standards and been allowed to operate as an inert landfill. Rapps at 11.

Rapps testified that the unpermitted area in its present state poses little potential harm to the environment. Rapps at 13. He believes the potential concern in this matter regarding leachate is principally sulfates. *Id*. Rapps states that because the Abingdon Landfill abuts the unpermitted area it is not possible to separate the individual impacts the two landfills may be having on surface water, and to a lesser extent, groundwater. Rapps at 14.

Rapps testified that total dissolved solids and sulfates, at the levels indicated in the test results, do not pose a genuine threat of environmental harm even if the unpermitted area were to remain uncovered. Rapps at 15. Rapps believes that the minor, potential harm posed by the unpermitted area can be addressed by installing a cover. Rapps at 16. He estimates the cost to install an 807 cover at $82,038, and notes that an 807 cover was applied to the Abingdon landfill upon its closure. *Id*. He agrees with the complainant that the Abingdon landfill now poses no potential harm to the environment. *Id*.

Rapps also provided estimates of additional remedies. He estimates the cost of an 811 cover at $164,707; the cost to install an 811 cover with a geomembrane at $153,541; and the cost for removing the material to a landfill and establishing vegetation on the site at between $2,740,168 million and $4,206.456. Rapps at 17, 19. Rapps opines that an 811 cover is not warranted because the material placed in the unpermitted area is relatively innocuous and because an 807 cap yields a virtually equivalent benefit at half the cost. Rapps at 17-18.

Rapps testified that 807 caps are presently being used by the State of Illinois to address "orphan" landfills throughout the state. Rapps at 21. Further, Rapps argues that if, in the judgment of the Agency, 807 covers are sufficient to address the potential harm posed by municipal solid waste or general refuse landfills, they should be sufficient to address the potential harm from the unpermitted area. Rapps at 21-22.

In conclusion, Rapps asserts that the gravity of the violations is slight, and therefore, placement of an 807 cover is the most appropriate remedy. Rapps at 22.

ARGUMENT

Each party appeared at the hearing and submitted a post-hearing brief. The arguments of each party will be summarized here.

Briggs

Briggs requests that the Board specify the amount of collective penalty each respondent must pay and the percentage of the cost of any injunctive relief granted that each respondent must pay. Briggs at 18. Briggs contends the Board may do this by imposing several liability or by imposing joint and several liability and recognizing that Briggs prevailed on its counterclaims against Poland and Yoho. *Id*. Briggs argues that its share of responsibility for the violations should be set at no more than 5%. Briggs at 20. Briggs arrives at this figure allocating 50% of the responsibility to owners Poland and Yoho, and dividing the operators' share of liability between all three respondents. Briggs at 19. Briggs then discounts its portion of the operators' share because their involvement in the operation of the landfill was minimal, thus arriving at the 5% liability. Briggs at 19-20.

In addressing the Section 33(c) factors, Briggs asserts that even the complainant has failed to establish that the unpermitted area poses a threat of environment harm. Briggs at 22. Briggs contends the record establishes that the contaminants that most consistently exceed the drinking water standards (sulfates and total dissolved solids) are found naturally in the water in the Abingdon area, and thus any leachate generated by the unpermitted area is reduced in significance. Briggs at 23. Briggs highlights the testimony of Mr. Rapps who opines that the unpermitted area, in its present condition, does not pose a genuine threat to the environment. *Id*.

Briggs argues that the evidence shows that the unpermitted area has caused no actual harm, that available data demonstrates the material in the unpermitted area does not pose a genuine threat of environmental harm, and that the potential harm posed by the unpermitted area is miniscule. Briggs at 23.

Briggs argues that the Board has held in the past that the social and economic value is not particularly applicable in situations such as this, but that the Poland and Yoho were attempting to increase the value of the land by filling a borrow pit with dirt, clay, gravel, concrete, brick and asphalt. Briggs at 24. Briggs contends that the testimony of Mr. Rapp establishes that the unpermitted area is suitably located geologically. *Id*.

Briggs asserts that it is technically practicable to either remove the material in the unpermitted area and deposit it in a permitted landfill or cover the unpermitted area. Briggs at 24. Briggs asserts that the only evidence in the record regarding covering the unpermitted area indicates that an 807 cover would be sufficient to reduce or eliminate leachate generation. Briggs at 25. Briggs argues that when two technical remedies are available and both provided essentially the same protections sought, the one that costs millions of dollars more (removal) is not economically reasonable. Briggs at 26. Briggs contends that the complainants proposed remedy is unjustified in that removal is too expensive given the benefits expected. *Id*. Briggs contends that Poland and Yoho repeatedly attempted to obtain permits for the unpermitted area. *Id*.

Briggs notes that the complainant estimates it will cost $2.3 million to perform the removal work at the unpermitted area, and that Briggs' expert estimates the costs for removal to be $4.2 million. Briggs at 29. Briggs asserts that the adjacent Abingdon landfill has an 807

cover that the complainant admits has allowed no actual harm to the environment, and contends that orphan landfills across the state are routinely capped by the Agency with 807 covers. *Id.*

Briggs asserts that when material deposited at an unpermitted site has not been shown to pose a threat to the environment, the appropriate remedy is a cease and desist order, an order requiring that the material be covered with soil and vegetated, and a penalty mitigated by the cost of applying cover. Briggs at 31. Briggs concludes that based on the facts, expert opinions and Board precedent, the Board should order technical relief in the form of an order requiring that an 807 cover be applied to the unpermitted area and that the stream be monitored for constituents of concern. Briggs at 33.

Briggs contends that it should not be ordered to perform any technical remedy ordered by the Board because it is not the current owner or operator of the unpermitted area. Briggs at 33. Briggs asserts that Section 45(d) of the Act indicates that the proper course of action is an order requiring the property owner to perform any injunctive relief ordered and an apportionment of the cost of that injunctive relief among all parties found responsible. Briggs at 33-34. Briggs argues that Yoho should be directed to perform any technical remedy, and that Briggs and Poland should be ordered to contribute to the cost of applying that cover based on their proportionate degree of responsibility. Briggs at 34.

In addressing the 42(h) factors, Briggs asserts that Poland told Briggs the Agency approved the continued use of the unpermitted area as long as Poland was seeking a permit and that consideration of 42(h)(1) supports a mitigation in any penalty. Briggs at 36. Briggs contend that Section 42(h)(2) should weigh in mitigation of a penalty because Poland and Yoho repeatedly attempted to obtain a permit for the unpermitted area beginning in August of 1992, and continuing until October 9, 1998. *Id.*

Briggs asserts that the complainant admitted it could not quantify economic benefit and instead suggested that the Board should "do its work and determine, as best it can" to what extent Briggs realized an economic benefit. Briggs at 36. Briggs contends that it is not possible for the Board to do complainant's work and arrive at a dollar value for economic benefit accrued by Briggs because the complainant failed to put on any evidence that Briggs obtained an economic benefit as a result of the violations. Briggs at 37. Accordingly, Briggs concludes that Section 42(h)(3) considerations should not affect the penalty imposed. Briggs at 38.

Briggs argues that since any technical remedy ordered will be costly, Section 42(h)(4) should mitigate any penalty imposed. Briggs at 39. Finally, Briggs asserts that no previously adjudicated violations by any of the respondents exist and that Section 42(h)(5) should, therefore, mitigate any penalty. Briggs at 40.

Briggs asserts that the penalty imposed against Briggs for all the violations alleged should not exceed the $5,000 the complainant deems sufficient from Poland and Yoho. Briggs at 43. Briggs argues that it would inequitable, arbitrary and capricious for the Board to impose the penalties requested by complainant when the respondents have been found to have violated the same provisions of the Act and regulations at the same time and place. *Id.* Unless there is a

factual distinction, argues Briggs, all respondents should be ordered to perform the same technical relief and should be ordered to pay the same attorney fees. *Id*.

Briggs asserts that it is complainant's admitted position that Poland and Yoho committed willful, knowing or repeated violations of the Act, but that complainant is only seeking attorney fees from Briggs. Briggs at 44. Briggs contends that no competent evidence supporting complainant's request for 12 additional hours in attorney fees for the preparation of complainant's reply brief. Briggs at 45. Briggs argues that the request for attorney fees should be denied, but that, if granted, should be limited in amount and divided between all three respondents. *Id*.

Complainant

The complainant disagrees with the Board's conclusion that there was insufficient evidence in the record to determine whether the wastes at the unpermitted area posed such a risk to the environment so as to require removal. Tr. at 8. The complainant contends that the respondents failed to prove the wastes at the unpermitted area are inert, and that the complainant proved they failed to prove it. Tr. at 10. Further, states the complainant, the leachate testing by Andrews Engineering in November 2000, indicates that the levels do not meet inert standards. Tr. at 11. The complainant maintains that exhibit 74 contains analytical results showing that levels of chromium, iron, oil and grease, total dissolved solids and sulfates were in excess of the inert waste classification standards. Tr. at 12.

The complainant highlights the testimony of Mr. Rapps who states that in his opinion, the unpermitted area will likely never meet the inert waste standards. Tr. at 12. The complainant contends it has already met its case and has introduced testimony and documentary evidence regarding lack of due diligence and the accrual of economic benefit. Tr. at 14. The complainant asks that the Board impose a $25,000 penalty against Briggs and $5,000, or less, against Poland and Yoho. Tr.at 17. The complainant argues that the technical relief issue is an opportunity for the Board to "snatch defeat from the jaws of victory" because the unpermitted wastes improperly disposed of cannot simply be left there. Id.

The complainant asserts that the unresolved issues of technical remedy and penalty could have been determined by the Board without a further hearing, but acknowledges that it is the Board's prerogative to conduct a separate hearing on remedy. Comp. at 1. The complainant asserts that People's Exhibit 74 provides the only objective factual evidence in the record as to potential environmental risk. Comp. at 3. The complainant argues that Briggs should be liable not only for civil penalties, but also for whatever technical relief may be necessary. *Id*.

The complainant maintains that the evidence show Briggs enjoyed cost savings through its joint operation of the disposal site solely dedicated to its own wastes, but argues the Board cannot reasonably expect a precise quantification of the economic benefit in a case such as this. Comp. at 3-4.

The complainant contends that the crux of the matter is set forth in Section 33(c)(iv) of the Act providing that the economic reasonable of reducing or eliminating the emissions,

discharges or deposits resulting from the pollution source is the inquiry. Comp. at 4. The complainant argues that any determination of reasonableness must be made in the context of the totality of the evidence. *Id.*

The complainant acknowledges that its proposed remedy is costly, but asserts that any such recommendation as to technical relief is constrained by the Board's regulatory requirements. Comp. at 5. The complainant asserts that Briggs seems to suggest that the Board may carve out an exemption from the comprehensive permitting requirements of Part 811 or Part 807 as long as it shows that an 811 or 807 cover is more economically reasonable. Comp. at 5. The complainant appears to be arguing that this is not acceptable. The complainant asserts that protecting the bottom line of a business corporation would involve the Board intentionally ignoring the generally applicable permit requirements. *Id.* The complainant contends that a meaningful analysis of the deterrence factor would entail simply noting that it is better to provide a disincentive to others similarly situated rather than encouraging others to ignore the regulations. *Id.*

Poland

Poland asserts that the best way to take care of the problem caused by the Agency and Abingdon is for the Agency to issue a permit to cover the two-acre site with soil that has been saved for cover. Poland at 7. Poland contends that this approach will never hurt mankind in any way, but will be a piece to be used for farming instead of the gully it was. *Id.*

Poland asks why he was allowed to dispose of Briggs' inert waste for over four years if the Agency was so concerned. Poland at 8.

Yoho

Yoho asserts that he and Poland in good faith did everything they knew to try and secure a permit for the unpermitted area. Yoho at 2. Yoho contends that they hired an environmental engineer who filed the necessary papers for the permit on numerous occasions and spent over $100,000 with the engineer. *Id.*

Yoho asserts that he and his wife have always worked hard, obeyed the law, raised their family and now have his 95-year-old mother living in his house. Yoho at 2. Yoho asserts that ceramic waste has been used as fill all over Knox County for at least 50-60 years and has never caused any harm to plants or animals. *Id.* Yoho contends there is no reason why the unpermitted area should not be covered with topsoil, just as the four acres next to it have been. *Id.*

Yoho asserts that he could never in one lifetime come up with enough money to excavate the material and haul it to another landfill. Yoho at 2. Yoho argues that this recommendation is totally unreasonable in light of the fact that there is absolutely no threat to the environment. *Id.*

PUBLIC COMMENTS

The Board received 19 public comments in this matter. The comments are uniformly in support of Poland and Yoho, and suggest that covering the unpermitted area is the appropriate remedy in this instance. Public comments 8, 12, 14, and 15 are petitions signed by local residents asking that Yoho and Poland not be fined and that the Board allow respondents to cover the material as has been done in the past. Collectively, over 140 individuals signed the petitions. *See* Public Comments 8, 12, 14, and 15.

TECHNICAL REMEDY

The Board next considers the remedy that the Board will order the respondents to undertake.

Section 33(c) Factors

The Act states that the Board must consider all facts and circumstances involved in an enforcement order including, but not limited to, the factors in Section 33(c). 415 ILCS 5/33(c) (2000). These factors include:

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.

Other factors, such as good faith, may also be considered. IEPA v. Allen Barry d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990).

No evidence or testimony has been presented to indicate that any injury to health, welfare and property occurred as a result of these violations. The evidence is clear that the waste in the unpermitted area cannot be classified as inert. However, Briggs' expert Rapps has testified that total dissolved solids and sulfates do not pose a genuine threat of environmental harm even if the unpermitted area were to remain uncovered. Smith discusses mitigation of potential environmental threats, but does not provide any specific information on this fact. The record does not address any facts that might impact upon the social or economic value of the unpermitted area.

The Board finds that the unpermitted area, being located adjacent to the Abingdon landfill, is suitably located. Respondents are all in the business of waste disposal, and could have properly disposed of the waste. The evidence does not show any technical impracticability in eliminating emissions, discharges or deposits resulting from the pollution source. The parties agree that it is technically practicable to remedy the site. The only issue is whether the technical remedy is economically reasonable. The proposed remedies vary in cost from $82,038 to an estimated $4.2 million. Finally, the respondents did not subsequently comply with the Act. The Agency notified Poland and Yoho that they needed to obtain proper permits, but Poland and Yoho failed to do so and violated the Act and associated regulations for over four years. The respondents have yet to remediate the site.

In light of these findings, the Board will determine the appropriate remedy.

Remedy

The complainant requests that the Board order the respondents to excavate the waste disposed of in the unpermitted area and dispose the same in a permitted chemical waste landfill. The complainant estimates the cost for this remedy at $2.3 million, whereas Briggs estimates the remedy to cost $4.2 million. Briggs suggests that the application of a cover over the landfill would be sufficient to protect the environment from any harm. Three different methods of cover are considered.

Briggs argues that a part 807 final cover – a compacted layer of not less than two feet of suitable material – is the appropriate remedy. *See* 35 Ill. Adm. Code 807.305. This type of cover would allow precipitation to enter the landfill resulting in the generation of leachate that may contaminate ground or surface water. Although no vegetation is required in the rules, Briggs' proposed remedy includes a six-inch soil vegetation layer, partially alleviating the concern that the cover may be susceptible to erosion. The estimated cost for this type of cover at the unpermitted area is $82,038.

As an alternative, Briggs discusses a part 811 cover as a possibility. Two different types of 811 cover are discussed. The first is for an inert waste landfill. *See* 35 Ill. Adm. Code 811.204. Three feet of soil material supporting vegetation to minimize erosion is called for. This type of cover allows precipitation to enter the landfill at a slower rate than part 807 cover because of greater thickness, but still results in the generation of leachate that may contaminate ground or surface water. The parties did not provide an estimated cost. However, based on the estimated cost of applying a two-foot cover, the Board calculates the cost to be approximately $110,000.

The second part 811 cover option is for a chemical waste landfill. *See* 35 Ill. Adm. Code 811.314. The final cover consists of a low permeability layer overlain by a final protective layer with vegetation. The low permeability layer may be comprised of either three feet of compact earth with a hydraulic conductivity of 1 x 10(-7) cm per second or a geomembrane. The final protective layer must be at least three feet thick and sufficient to protect the low permeability layer from freezing and minimize root penetration. This type of cover significantly reduces the

concerns about ground or surface water contamination. The estimated costs are $153,541 for a geomembrane cover, and $164,707 for a compacted earth cover.

The parties agree that the unpermitted area does not, and will likely never meet, the inert waste standards contained in part 811. However, although Briggs argues that material in the unpermitted area is innocuous, the leachate concentrations for total dissolved solids, sulfates, and oil and grease exceed the part 811 inert waste limits and the ground water standards of 35 Ill. Adm. Code 620. *See* People's Exh. 74. The test results in People's Exh. 74 show that the concentration of total dissolved solids was 2030 mg/L – the part 811 inert waste limit is 500 mg/L. The sulfate concentration was 1290 mg/L – the part 811 inert waste limit is 250 mg/L. The concentration of phenols was 0.019 mg/L – the part 811 inert waste limit is 0.001 mg/L. If the unpermitted area were permitted in accordance with the Board regulations, the landfill would be subject to the putrescible and chemical waste landfill regulations requirements.

The record shows that potential environmental harm in this instance is minimal. The wastes disposed of do not pose such a risk to the environment as to require removal. The adjacent Abindgon landfill is closed with a part 807 final cover. The complainant acknowledges that the cover has allowed no actual harm to the environment. Further, orphaned landfills across the State (those that no longer accept waste, but were never properly closed) are routinely capped by the Agency with a cover following part 807. Although the unpermitted area is not an orphaned landfill, that this type of remedy is acceptable in such situations is an indication of the reasonableness of this approach.

While total dissolved solids and sulfates in ground or surface water may not pose a significant threat to aquatic life and human health at the levels present in the leachate sample, they could still have an adverse impact. There is very little information present in the record to characterize the leachate quality. The rules at Section 811.202 require samples to representative of undiluted and unattenuated leachate emanating from the unit. 35 Ill. Adm. Code 811.202. This is usually achieved through the use of multiple samples at different locations. The report accompanying the samples in question notes that the leachate samples used for characterization are very likely to be contaminated or diluted. People's Exh. 73.

Given the limited data available and the unknowns regarding the site geologic conditions, more than an 807 cover is necessary to ensure the environment is protected. The Board finds that a cover that substantially comports with the requirements of the part 811 chemical waste landfill cover requirements is the appropriate remedy in this case. While this remedy costs more than the 807 cover or the inert waste final cover, an engineered low permeability final cover would assure the protection of the groundwater in the affected area. In addition, the monitoring of the unnamed stream will be required. The Agency should be made aware of all remedial activity at the unpermitted area. To that end, results of the monitoring, as well as all plans and reports associated with the application of cover as required by this order, must be submitted to the Agency.

The complainant's argument that it is necessary to move the waste to a permitted landfill is not persuasive. Cover in accordance with the part 811 closure requirements would place an enormous financial burden on the respondents, with little environmental benefit when

considering the nature of the waste disposed of in the unpermitted area. Nor is the Board convinced that the technical relief is constrained by the Board's regulatory requirements. The Board is imposing a remedy to found violations of the Act and regulations. Although the remedy corresponds to the cover requirements for a part 811 chemical waste landfill, the Board is not directing the respondents to obtain a permit or issuing a permit in this order. Accordingly, the Board does not have to carve out an exemption from the comprehensive permitting requirements of Part 811 or Part 807, as argued by the complainant.

The Board has broad authority to take whatever steps are necessary to rectify the problem of pollution and correct instances of pollution on a case-by-case basis. Discovery South Group v. PCB, 275 Ill. App. 3d 547, 656 N.E.2d 51 (1st Dist. 1995). This includes a final order exercising the Board's power to order compliance with the Act. *Id*. Today, the Board is issuing an order concerning the remedy for violations of the Act and associated regulations as it is authorized to do under the Act.

PENALTY ANALYSIS

On September 6, 2001, the Board issued an order finding Poland, Yoho and Briggs in violation of Sections 21(a), (d), (e), and (p)(1) of the Act (415 ILCS 5/21(a),(d),(e),(p)(1) (2002)) and 35 Ill. Adm. Code 807.201, 807.202(a), and 812.101. Having found violations, the Board must now determine the penalty to be assessed.

In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act. ESG Watts, Inc. v. PCB and People of the State of Illinois, 282 Ill. App. 3d 43; 668 N.E.2d 1015, (4th Dist. 1996); People v. Bernice Kershaw and Darwin Dale Kershaw d/b/a Kershaw Mobile Home Park, PCB 92-164 (Apr. 20, 1994); IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990). The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. Wells Manufacturing Company v. PCB, 73 Ill. 2d 226, 383 N.E.2d 148 (1978). The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must remember that no formula exists, and all facts and circumstances must be reviewed. Kershaw, PCB 92-164, slip. op. at 14; Barry, PCB 88-71, slip. op. at 62-63.

The Board has stated that the statutory maximum penalty "is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts." Barry, PCB 88-71, slip. op. at 72. The formula for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act. Section 42(a) provides for a civil penalty not to exceed $50,000 for violating a provision of the Act and an additional civil penalty not to exceed $10,000 for each day during which the violation continues.

Section 42(h) Factors

The complainant asks that the Board impose a $25,000 penalty against Briggs and $5,000, or less, against Poland and Yoho. In determining a penalty, Section 33(c) lists general factors for the Board to consider when issuing final orders and determinations, while Section

42(h) specifically governs penalty amounts. 415 ILCS 5/42(h) (2000); People v. Kershaw, PCB 92-164 (Apr. 20, 1995). Section 42(h) states, in pertinent part:

> In determining the appropriate civil penalty to be imposed . . . the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:
>
> 1. the duration and gravity of the violation;
>
> 2. the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
>
> 3. any economic benefits accrued by the violator because of delay in compliance with requirements;
>
> 4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and
>
> 5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator. 415 ILCS 5/42(h) (1998).

Section 42(h)(1) - Duration and Gravity

The record shows that respondents did not have a permit to dump waste at the unpermitted area from approximately 1993 to 1997. Despite various efforts over time by one or more of the respondents to secure a permit for the unpermitted area, an Agency permit was never obtained. Respondents were in violation of the Act and Code during that time.

Section 42(h)(2) - Due Diligence

The record shows that the respondents were not diligent in complying with the Act and Board regulations. Although Poland and Yoho hired an engineering firm to obtain the requisite permit, respondents did not wait for the permits before depositing waste at the unpermitted area. Furthermore, the waste remains uncovered at the unpermitted area to date.

Section 42(h)(3) - Economic Benefits

Aside from complainant's assertion that the Board should "do its work and determine, as best it can" to what extent Briggs realized an economic benefit, the record does not contain significant evidence on this factor. The complainant alleges that Briggs did accrue some economic benefit from its arrangements with Poland and Yoho. The complainant references a quote by the plant manager who said Briggs was receiving a "good deal." Tr. at 16. The complainant argues it would be unreasonable to expect a precise quantification of the economic

benefit in a case such as this, and at hearing counsel for the complainant stated that "I can't come up with a number." The complainant suggested the record should be reviewed.

Briggs contends that it is not possible for the Board to do complainant's work and arrive at a dollar value for economic benefit accrued by Briggs because the complainant failed to put on any evidence that Briggs obtained an economic benefit as a result of the violations, and that section 42(h)(3) considerations should not affect the penalty imposed.

Section 42(h)(4) - Deterring Further Violations

Briggs argues that since any technical remedy ordered will be costly, Section 42(h)(4) should mitigate any penalty imposed.

Section 42(h)(5) - Previous Violations of the Act

Complainants do not have any record of respondents committing any prior violations.

Penalty

In this case, the violations were ongoing for a number of years. The Board finds a monetary penalty is appropriate to deter future violations. Accordingly, a $25,000 penalty will be imposed on Briggs, while a $5,000 penalty will be imposed on each Poland and Yoho. These penalties will serve to deter future violations of the Act and Code.

Attorney Fees

Section 42(f) of the Act allows the Board to assess attorney fees in cases where a person "has committed a willful, knowing or repeated violation of the Act." 415 ILCS 5/42(f) (2002). The record shows that the violations were ongoing for a number of years. Throughout the proceeding, Poland and Yoho have maintained that the Agency informed them they could continue to dump on the site so long as they were attempting to obtain a permit. The Agency witnesses denied making any such statement. While the Board has found respondents in violation despite this claim, the Board, in its discretion granted by Section 42(f), declines to award attorney fees in this matter.

Third-Party Complaint

This order does not address the pending third-party compliant, filed by Briggs. The Board remands the third-party complaint to the hearing officer and with directions to proceed expeditiously to hearing.

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

CONCLUSION

For the reasons set forth herein, the Board orders the respondents to remediate the unpermitted area by applying a final cover as set forth below. The Board also imposes a civil penalty of $25,000 upon Briggs, and $5,000 each upon Poland and Yoho. The Board declines to award attorney fees or costs. The third-party complaint is remanded to the hearing officer for hearing.

ORDER

1. The Board, having previously found Doren Poland, Lloyd Yoho and Briggs Industries, Inc., a/k/a Briggs Plumbing Products, Inc. in violation of Sections 21(a),(d),(e), and (p)(1) of the Act (415 ILCS 5/21(a),(d),(e),(p)(1) (2002)) and Sections 807.201, 807.202(a), and 812.101 of the Board's waste disposal regulations (35 Ill. Adm. Code 807.201, 807.202(a), 812.101), orders them to cease and desist from all further violations of the Act and Board regulations.

2. The Board orders Yoho, the present owner of the unpermitted area, to apply a final cover over the unpermitted area. Specifically, Yoho must:

    a) Cover the unpermitted area by a final cover consisting of a low permeability layer overlain by a final protective layer constructed in accordance with the following requirements.

    b) Standards for the Low Permeability Layer

        2) The low permeability layer must cover the entire unpermitted area used for disposal..

        3) The low permeability layer must consist of any one of the following:

            A) A compacted earth layer constructed in accordance with the following standards:

                i) The minimum allowable thickness is 0.91 meter (3 feet);

                ii) The layer must be compacted to achieve a permeability of 1×10^{-7} centimeters per second and minimize void spaces.

                iii) Alternative specifications may be utilized provided that the performance of the low permeability layer is equal to or superior to the performance of a layer

meeting the requirements of subsections (b)(3)(A)(i) and (b)(3)(A)(ii).

B) A geomembrane constructed in accordance with the following standards:

i) The geomembrane must provide performance equal or superior to the compacted earth layer described in subsection (b)(2)(A).

ii) The geomembrane must have strength to withstand the normal stresses imposed by the waste stabilization process.

iii) The geomembrane must be placed over a prepared base free from sharp objects and other materials which may cause damage.

C) Any other low permeability layer construction techniques or materials, provided that they provide equivalent or superior performance to the requirements of this subsection.

c) Develop a Final Protective Layer that meets the following standards.

1) The final protective layer must cover the entire low permeability layer.

2) The thickness of the final protective layer must be sufficient to protect the low permeability layer from freezing and minimize root penetration of the low permeability layer, but may not be less than 0.91 meter (three feet).

3) The final protective layer must consist of soil material capable of supporting vegetation.

4) The final protective layer must be placed as soon as possible after placement of the low permeability layer to prevent desiccation, cracking, freezing or other damage to the low permeability layer.

3. Yoho must submit all plans and reports associated with the application of cover to the Agency.

4. The Board orders Yoho to monitor the unnamed stream between the unpermitted area and the Abingdon landfill for contaminants of concern, (*i.e.*, hexavalent chromium, iron [dissolved], oil and grease, phenols, total dissolved solids, and

sulfates0 for a period of five years on a quarterly basis after the final cover is placed. Briggs, Yoho and Poland are jointly and severally liable for the costs of monitoring the stream.

5. Yoho must submit all monitoring results to the Agency.

6. Briggs, Poland and Yoho are jointly and severally liable for the costs of complying with this order.

7. The Board orders Briggs to pay a civil penalty of $25,000, and Poland and Yoho to each pay a civil penalty of $5,000. All penalties must be paid no later than September 8, 2003, which is the 30th day after the date of this order. The respondents must each pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. The case number, case name, and the respondents' federal employer identification number or social security number must be included on the certified check or money order.

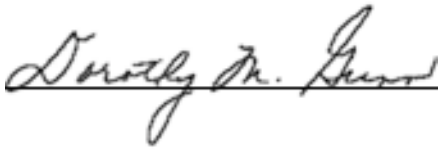
8. The respondents must each send the certified check or money order to:

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

9. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2002)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2002)).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on August 7, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board