

ILLINOIS POLLUTION CONTROL BOARD
December 14, 1994

IN THE MATTER OF:)
)
PETITION OF BROWNING-FERRIS)
INDUSTRIES OF ILLINOIS, INC.;)
BROWNING-FERRIS INDUSTRIES OF) AS 94-13
IOWA, INC.; AND, BFI MODERN) (Adjusted Standard)
LANDFILL, INC. FOR ADJUSTED)
STANDARD FROM 35 Ill. Adm.)
Code Section 811.714(b))

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

This matter is before the Board on a petition for an adjusted standard filed by Browning-Ferris Industries of Illinois, Inc., Browning-Ferris Industries of Iowa, Inc., and BFI Modern Landfill, Inc. (hereinafter known collectively as petitioner or BFI). BFI asks that the Board grant an adjusted standard to the Board's rule of general applicability for financial assurance found at 35 Ill. Adm. Code 811.714(b). That requirement provides that in order to utilize an insurer to satisfy solid waste disposal facility financial assurance for closure and post-closure care, the insurer "shall be licensed to transact the business of insurance by the Illinois Department of Insurance pursuant to the Illinois Insurance Code".

BFI filed its petition on June 30, 1994. The Illinois Environmental Protection Agency (Agency) filed a response to the petition instanter on August 1, 1994. BFI waived hearing and the Board did not receive a request for a hearing, so no hearing was held.

Based upon the record and upon review of the factors involved in the consideration of adjusted standards, the Board finds that BFI has failed to demonstrate that factors relating to BFI are "substantially and significantly different from the factors relied upon by the Board in adopting the general regulation". Accordingly, the request for adjusted standard is denied for the reasons discussed below.

ADJUSTED STANDARD PROCEDURE

The Board's responsibility in this matter arises from the Environmental Protection Act (Act) (415 ILCS 5/1 et seq.). The Board is charged therein to "determine, define and implement the environmental control standards applicable in the State of Illinois" (415 ILCS 5/5(b)) and to "grant *** an adjusted standard for persons who can justify such an adjustment" (415 ILCS 5/28/1(a)). More generally, the Board's responsibility in this matter is based on the system of checks and balances integral to Illinois environmental governance: the Board is charged with the rulemaking and principal adjudicatory functions,

and the Agency is responsible for carrying out the principal administrative duties.

The Act provides that a petitioner may request, and the Board may impose, an environmental standard that is different from the standard that would otherwise apply to the petitioner as the consequence of the operation of a rule of general applicability. Such a standard is called an adjusted standard. The general procedures that govern an adjusted standard proceeding are found at Section 28.1 of the Act and within the Board's procedural rules at 35 Ill. Adm. Code 106.

Where, as here, the regulation of general applicability does not specify a level of justification required for a petitioner to qualify for an adjusted standard, the Act at Section 28.1(c) specifies four demonstrations that must be made by a successful petitioner:

- 1) Factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
- 2) The existence of those factors justifies an adjusted standard;
- 3) The requested standard will not result in environmental or health effects substantially or significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
- 4) The adjusted standard is consistent with any applicable federal law.

RULES OF GENERAL APPLICABILITY

The Board's rules at 35 Ill. Adm. Code 811.714 provide in pertinent part that:

- a) An owner or operator may satisfy the requirements of this Subpart by obtaining closure and postclosure care insurance which conforms to the requirements of this Section and submitting an executed duplicate original of such insurance policy to the Agency.
- b) The insurer shall be licensed to transact the business of insurance by the Illinois Department of Insurance pursuant to the Illinois Insurance Code (Ill. Rev. Stat. 1991, ch. 73, pars. 613 et. seq. [215 ILCS 5/1 et. seq.]).

The Board originally adopted this provision in 1990, in the Board's rulemaking proceeding In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7, 114 PCB 483, (August 17, 1990)¹. The Board in R88-7 developed and adopted comprehensive statewide regulations concerning the operation of landfills. The financial assurance provisions were one small section of these regulations. The Board has since amended the landfill regulations to include the provisions adopted by the USEPA under the Resource Conservation and Recovery Act (RCRA) Subtitle D in R93-10 RCRA Subtitle D Amendments (Amendments to 35 Ill. Adm. Code Part 811 and 814).

In adopting the RCRA Subtitle D requirements the Board proceeded pursuant to Sections 7.2 and 22.4 of the Act. Under Section 7.2 of the Act, the Board may only adopt those regulations identical-in-substance to the regulations adopted by the USEPA. In R93-10, the Board specifically responded to a comment from the Agency regarding financial assurance through the insurance mechanism. The Agency commented on the differences between the Board's landfill regulations and the federal requirements. The Board stated:

To the extent the Illinois regulations specify the person who must regulate the trustee, issuer of a letter of credit or the insurer, without more the Board perceives that the Illinois regulations go beyond the scope of the federal regulations. Without regard to the Agency's assertions that most Illinois sites have provided financial assurance that does not comply with the requirement, the Board cannot amend these provisions in the way requested without a proposal from the Agency that would initiate a "regular" rulemaking on the merits. (R93-10, September 15, 1993 at 18.)

FACILITY DESCRIPTION

BFI is one of the largest publicly held companies engaged in the business of waste. (Pet. at 3.) BFI owns or operates over 100 municipal and industrial waste solid waste landfills, including several in Illinois. (Pet. at 3.) BFI is seeking the adjusted standard for five Illinois facilities. BFI has been actively involved with both the USEPA and the Board in the development of regulations for the operation of solid waste

¹ References to the Board's prior rulemaking proceedings will be cited as "R @@, date at ___"; the petition will be cited as "Pet. at ___"; the Agency response will be cited as "Ag. Rec. at ___".

facilities, including the provisions for financial assurance. (Pet. at 3.)

BFI explains that the five Illinois facilities are currently utilizing a financial test/corporate guarantee for the demonstration of financial responsibility. (Pet. at 15.) On January 20, 1993, BFI informed the Agency that it desired to utilize insurance policies issued by a "captive" insurer. (Pet. at 15.) BFI has established Global Indemnity Assurance Company (Global) a wholly-owned captive insurance company to issue insurance policies to satisfy facility closure/post-closure financial assurance obligations. (*Id.*) Global is incorporated and domiciled in the state of Colorado. (Pet. at 15.) On March 4, 1994, the Agency denied BFI's request to use a "captive" insurer because Global is not licensed in Illinois. (*Id.*)

BFI states that Global was capitalized by BFI in accordance with Colorado legislation that prevents the parent of a wholly-owned captive from avoiding liability through the voluntary dissolution of the captive. (Pet. at 16.) According to the petitioner, Colorado legislation protects the rights of policyholders to the surplus by requiring certain assets be held in a qualified financial institution "in a strong iron box which requires two distinct and different keys to unlock it" (C.R.S. Section 10-3-210). BFI asserts that the assets can be removed only under very specific circumstances. (Pet. at 16.)

The closure/post-closure policies written by Global would respond in the event that BFI failed to pay for its closure/post-closure obligations, according to petitioner. However, BFI maintains there is little likelihood of BFI's failure to respond due to the Company's financial strength and conservative investment and expenditure practices. (Pet. at 16.)

BFI also states that the Colorado Division of Insurance is accredited by the National Association of Insurance Commissioners and was one of the first states to be accredited. (Pet. at 16.) BFI points out that the Colorado agency requires all captives to provide, among other things, detailed information regarding capitalization, risk exposure, rate adequacy and investment philosophy, and biographical affidavits of all executive officers, directors and organizers as a precondition to approval. (Pet. at 16-17.)

BFI argues that:

Colorado's conservative captive regulatory climate and its status as an accredited state provide adequate safeguards to ensure captive solvency. One cannot be assured that captives domiciled in non-accredited states meet similar standards. In addition, by also utilizing a bond-ratings criterion for the use of a non-commercial policy, the

proposed standard is consistent with the U.S. EPA's statement that a company's "bond rating incorporates an evaluation of its financial management practices. Bond ratings are widely used as a measure of credit risk associated with a long-term general obligation debt instrument". 58 Fed. Reg. 68,353, 68,356 (Dec. 27, 1993).

(Pet. at 17.)

The petitioner also maintains that although commercial insurers are often licensed in multiple states, single-parent captive insurers typically are licensed in only the state of domicile. (Pet. at 11.) BFI asserts that captive insurers write insurance for property and/or liability that is located in other states without obtaining licenses in multiple jurisdictions. (*Id.*) BFI argues that the existing standard places an undue hardship on single parent captive insurers by requiring the parent company to maintain multiple licenses when the parent in fact controls the risk which is covered and controls the captive. (Pet. at 11-12.)

RELIEF REQUESTED

BFI requests that the Board grant the present petition for an adjusted standard, and that the Board include the following language in its order granting this petition:

(b) Licensing:

- (1) The insurer shall be licensed to transact the business of insurance by the Illinois Department of Insurance pursuant to the Illinois Insurance Code, or
- (2) For the solid waste disposal facilities identified as IEPA site numbers 0978020002 (Lake County-Wintrop Harbor/BFI #2); 1418210001, (Ogle County-Davis Junction;BFI); 1610400007, 1989-15-de-op (BFI-Quad Cities Sanitary Landfill); 1630100003 (BFI Modern Landfills); and 043010004 (Bloomingdale Mallard Lake Landfill), the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states. In addition, the applicant, in order to utilize a non-commercial insurance policy, must demonstrate a current rating of AAA, AA, A or BBB for its most recent bond issuance as issued by Standard and Poor, or a rating of Aaa, Aa, A or Baa as issued by Moody's.

BFI maintains that the requested adjusted standard is based on the federal standard found at 40 C.F.R. 258.74(d), as well as an additional requirement that petitioner must, in order to utilize a non-commercial insurance policy, demonstrate possession of a current rating of AAA, AA, A, or BBB for its most recent bond issuance as issued by Standard and Poor, or a rating of Aaa, Aa, A, or Baa, as issued by Moody's. The bond-rating requirement is based on the standard utilized in Section 811.715(e)(1)(B)(i), Ill. Adm. Code. (Pet. at 9.)

AGENCY RESPONSE

The Agency asserts that the petitioner has correctly stated the level of justification required for this adjusted standard to be granted, and also appropriately does not discuss the quantitative and qualitative impacts on the environment. The Agency agrees with BFI that the adjusted standard is consistent with federal law. (Ag. Rec. at 4.) However, the Agency does not believe the petitioner has established that the factors relating to petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the rule of general applicability. (Ag. Rec. st 3-4.)

The Agency argues that the points raised in the petition "for the most part, convey the Petitioner's assessment of the federal financial responsibility requirements". (Ag. Rec. at 2.) The Agency further states that the petitioner is suggesting that an adjusted standard is "justified merely because the Illinois regulation of general applicability is inconsistent with the federal financial assurance regulations". (Ag. Rec. at 3.)

The Agency also expresses concern with the financial condition of Global and that a deterioration of the financial condition could affect the environment. The Agency states that if the Board grants the adjusted standard a condition that the parent company demonstrate annually that it satisfies the financial test set forth at 35 Ill. Adm. Code 811.715(b)(3) be included. The Agency then states that it "recommends" that the Board grant the adjusted standard. (Ag. Rec. at 6.)

COMPLIANCE ALTERNATIVES

The petitioner states that there are five approaches to demonstrate financial assurance for disposal facilities under the Board's regulations. Those five are trust funds, surety bond for performance, surety bond for payment, a letter of credit and self-insurance. The petitioner states that the compliance alternatives are "either essentially unavailable or are highly restrictive". (Pet. at 18.) BFI argues that restrictive financial responsibility requirements can have adverse

consequences including abandonment of facilities before closing them. (*Id.*)

BFI states with regards to trust funds that "it is widely recognized that trust funds are not a cost-effective mechanism for the demonstration of financial responsibility." (Pet. at 19) According to BFI the primary disadvantage is that the trustee fee expense is significantly greater for long-term obligations than for short-term. (*Id.*) Regarding letters of credit, BFI maintains that such a mechanism "typically does not permit firms to build-up assurance in the letter of credit over time" and surety bonds are difficult to obtain for long-term obligations. (Pet. at 20.)

BFI points out that the current provisions for self-insurance are adapted from the RCRA Subtitle C program, which the USEPA is currently in the process of revising. (Pet. at 20-21.) According to BFI in order to self-insure the company:

(1) a net worth of \$10 million, net worth and tangible net worth both at least six times the amount of coverage sought, satisfaction of one of three financial ratios, and at least 90% of assets (or six times the amount of liability coverage) located in the United States; or (2) a current investment quality bond rating, net worth of at least \$10 million and six times the amount of liability coverage located in the United States. (Pet. at 21 citing 40 CFR 264.143, 264.145, 265.143 and 265.145.)

HEALTH AND ENVIRONMENTAL EFFECTS

BFI maintains that the granting of the adjusted standard will have no environmental effect. BFI states that granting the adjusted standard will not "affect to any degree any day-to-day operation, design standard, maintenance procedure, or closure or post-closure operation and inspection requirement of the designated facilities". (Pet. at 26.)

The Agency agrees that the granting of the adjusted standard will have no adverse environmental or health effects. (Ag. Rec. at 5.)

CONCLUSION

Section 28.1(c) of the Act requires that in order for a petitioner to receive an adjusted standard the petitioner must demonstrate that:

Factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner.

BFI has provided substantial information regarding the history of the regulations at both the federal and state level. BFI has explained the differences between the federal financial assurance requirements and the state financial assurance requirements. BFI has even described a potential hardship for captive insurers. However, the Board finds that BFI has not demonstrated that the factors relating to BFI are different than those considered by the Board when adopting the rule of general applicability.

The Board recognized the differences between the federal and state regulations when the Board adopted the Subtitle D regulations. (quoted in relevant part, *supra*, p. 3.) The Board suggested that a change in the rule of general applicability might be appropriate; however, the identical-in-substance rulemaking was not the forum to proceed with such a change. Therefore, the Board invited a proposal for regular rulemaking. (R93-10, September 15, 1993 at 18.) In addition, the Board has recently granted an adjusted standard to the financial assurance requirements at 35 Ill. Adm. Code 811.710 and 811.713. (In the Matter of: Petition of Winnebago Reclamation Service, Inc, AS94-11, (December 1, 1994) (Winnebago).) In Winnebago, the petitioner set forth several factors which were substantially and significantly different from those considered by the Board when adopting the general rule. Those factors included the fact that the petitioner had already supplied financial assurance to the USEPA and the fact that the petitioner was under a consent decree.

In the instant matter, BFI has presented the type of information which could lead to a rule change; however such a change, absent a showing of substantially and significantly different factors, is not appropriate for the adjusted standard proceeding. The factors related by BFI, in part, were considered by the Board as recently as the Board's proceeding in R93-10. Therefore, the Board denies BFI's request for an adjusted standard.

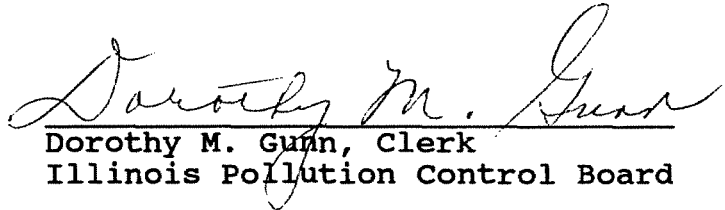
ORDER

The Board hereby denies the request of Browning-Ferris Industries of Illinois, Inc., Browning-Ferris Industries of Iowa, Inc., and BFI Modern Landfill, Inc for an adjusted standard from 35 Ill. Adm. Code 811.714.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/40.1) provides for the appeal of final Board orders within 35 days of service of this decision. The Rules of the Supreme Court of Illinois establish filing requirements. (But 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 14th day of December, 1994, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board