

ILLINOIS POLLUTION CONTROL BOARD
July 23, 2009

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 06-159
) (Enforcement - Land)
GARY SIMMONS, individually, and)
LAWRENCE COUNTY DISPOSAL CENTRE,)
INC., an Illinois corporation,)
)
Respondents.)

PHILLIP McQUILLAN, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF
COMPLAINANT; and

GARY SIMMONS APPEARED *PRO SE*

INTERIM OPINION AND ORDER OF THE BOARD (by S.D. Lin):

On April 17, 2006, the People of the State of Illinois (People or complainant) filed a six-count complaint against Gary Simmons and Lawrence County Disposal Centre, Inc. (Disposal Centre) (collectively, respondents) for alleged violations of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2008))¹ and the Board's non-hazardous waste landfill regulations for operation, closure and post-closure care at the Lawrence County Disposal Facility (Landfill, a/k/a "Dowty Landfill"), located near Sumner, Lawrence County, Illinois.

Respondents failed to file an answer to the complaint. Mr. Simmons appeared at the October 29, 2008 hearing, but failed to contest the allegations and failed to submit a closing brief. The Disposal Centre failed to appear through an attorney at hearing, or any other time in this proceeding, and failed to submit a closing brief.

Based on the record in this proceeding, the Board finds the respondents in violation as alleged in the amended complaint and assesses the civil penalties requested by the People. The Board assesses the requested civil penalties of \$10,000 against Lawrence County Disposal Centre, Inc., and \$1,000 against Gary Simmons individually. The Board will also order the Disposal Centre to pay the time use value of \$118,421.90 against the Disposal Centre to recoup the economic benefit earned through non-compliance. The Board further orders the respondents to pay attorney fees in the amount to be determined after the complainant files an affidavit of attorney fees. The People must perform the necessary penalty calculations as well as any attorney fee affidavit and submit these documents to the Board and respondents within 35 days

¹ The pleadings in this case refer to both the 2004 and 2006 versions of the Illinois Compiled Statutes. As there is no difference in the relevant sections from the 2004 to the 2006 and to the 2008 compilation, the Board will consistently reference the 2008 edition.

of the order. The respondents may file any response to these documents within 21 days of receipt.

Upon receipt of the affidavit, the Board will enter a final order in this proceeding directing the payment of the assessed penalty and attorney fees.

PROCEDURAL HISTORY

On April 17, 2006, the People filed a six-count complaint against the respondents for alleged violations of the Act, Board regulations, and permit terms at the Landfill. The complaint alleges that respondents violated five provisions of the Act, namely, Sections 9(a), 21(d)(1) and (d)(2), and 22.17(a) and (b) (415 ILCS 5/9(a), 21 (d)(1) and (d)(2), and 22.17(a) and (b) (2008)). The complaint also alleges that the respondents violated 35 Ill. Adm. Code 745.201(b); 811.109(a); 811.111(c)(1)(A), (c)(2), and (c)(5); 811.310(c); 811.312(c); 811.315(e)(1)(G); 811.319(a), (a)(1), (a)(2), and (a)(3); 811 .320(d)(1); 813.501; 813.502(a). The People allege that respondents violated these provisions by (1) violating various post-closure care requirements; (2) violating site security and maintenance requirements; (3) violating closure permit conditions; (4) violating groundwater monitoring requirements; (5) violating gas monitoring requirements; and (6) causing, threatening, or allowing air pollution.

On October 29, 2008, a hearing was held in Lawrenceville before Hearing Officer Carol Webb. On December 12 2008, the complainant filed a brief in this proceeding. Neither of the respondents has submitted a brief.

FACTS

Gary Simmons and the Lawrence County Disposal Centre, Inc. have been the owners and operators of the Lawrence County Disposal facility (Landfill) at all times relevant to this proceeding. Comp. at 1-2 (¶3-4). The landfill ceased operations pursuant to an order entered in People of the State of Illinois v. Gary Simmons and Lawrence County Disposal Centre, Inc., No. 93 CH 12 (Lawrence County Circuit Court, January 12, 1994). *Id.* at 2 (¶7). That case involved operational violations at the landfill. *Id.*

The IEPA certified the closure of the Landfill on May 17, 1999, and issued Supplemental Permit No. 1997-033-LFM to the respondents, regarding the post-closure care of the facility. Comp. at 2 (¶8). The permit noted that the thirty year post-closure care period began October 1, 1998. *Id.*

Ambraw Valley Solid Waste Management Agency (Am-Val) inspected the conditions of the Landfill on at least 14 occasions between February 19, 2001 and September 8, 2005 to determine compliance with permit obligations and the post-closure care program. (Am-Val made these inspections pursuant to a delegation agreement with the IEPA as authorized by Section 4(r) of the Act, 415 ILCS 5/4(r) (2008).) Comp. at 3-4 (¶9-15). During the inspections, Am-Val observed numerous alleged violations at the landfill. *Id.* These included permit violations, failure to conduct maintenance, and failure to properly control and monitor to monitor

groundwater contamination and landfill gas emissions. *Id.* By its second inspection on May 09, 2001, Am-Val had documented alleged violations of all five provisions of the Act which are alleged in the complaint. People's Exhs. 1.1 and 1.2. Although Am-Val notified the respondents of the violations on several occasions, the respondents failed to respond to most of these notifications (Tr. at 15-36), and did not perform any remedial action at the landfill. Tr. at 39.

The IEPA ultimately collected on the financial assurance bond for post-closure care at the landfill, and contracted with Environmental Restoration, LLC to conduct post-closure care at the landfill. Tr. at 56. The IEPA paid Environmental Restoration, LLC \$91,927.26 for remedial work performed from January 16, 2007 to February 25, 2007, and \$14,348.70 for remedial work performed from February 25, 2007 to March 26, 2007. Tr. at 60-61; People's Exh. 20. The IEPA also incurred costs of \$5,277.56 in Fiscal Year 2006 and \$6,868.38 in Fiscal Year 2007. Tr. at 60-61; People's Exh. 20. The total of these amounts, without interest, is \$118,421.90. Tr. at 60-61; People's Exh. 20.

Hearing Testimony and Exhibits

Three witnesses testified at the hearing. Twenty exhibits were admitted on behalf of the complainant and one exhibit was admitted on behalf of the respondents. The relevant testimony is summarized below.

Bob Gher, an inspection officer at Am-Val, testified regarding the inspections, the violations found, the reports he made in the course of business after conducting the inspections, and the violation notice letters he sent to Simmons. Tr. at 6-48. Mr. Gher testified that he had sent each inspection report to Mr. Simmons, which included the alleged statutory and regulatory violations found during each inspection, but that Mr. Simmons did not respond to the reports. Tr. at 15-36; *see* Comp. Br. at 2; *see* People's Exhs. 1.1-5.3.

Mr. Gehr stated that he sent a violation notice letter to Mr. Simmons on February, 19, 2001, and subsequent violation notice letters on May 14, 2001 and July 13, 2001. Tr. at 36-38; *see* People's Exhs. 9-11. He indicated that Mr. Simmons was sent a compliance commitment rejection letter on September 18, 2001. Tr. at 39; *see* People's Exh. 14. Mr. Gehr testified that Simmons did respond to a later violation notice letter, dated November 23, 2002, through a letter by Simmons' attorney, Stephen Hedinger. Tr. at 39; *see* People's Exhs. 12-13. But, Mr. Simmons ultimately performed no remedial work at the landfill. Tr. at 39

Mr. Gher testified about the effects of the violations. Tr. at 40-42. Specifically, he testified that the violations created risks of groundwater contamination, air pollution, litter, and unauthorized access to the landfill. *Id.*

Mr. Gher testified further about the remedial work that Environmental Restoration LLC performed at the landfill. Tr. at 42-44. He stated the remedial work did not resolve all of the problems, and that violations still existed at the time of the hearing, including those caused by ongoing erosion, permit violations, and failure to mow and conduct maintenance. *Id.* at 44, 47-48.

Christian Leibman has been the manager of the solid waste unit in the IEPA's land permit section since 1999, and has worked in the permit section for 23 years. Mr. Leibman testified regarding the closure certification of the landfill. Tr. at 48-52. Mr. Leibman stated that failure to maintain the final cover system and monitor for groundwater contamination and gas migration during the post-closure care period were violations of the post-closure permit. *Id.* at 51.

Gary Simmons testified as an adverse witness. Simmons acknowledged that he was the sole stockholder of Lawrence County Disposal Center Inc., which held title in the landfill, and that he had purchased the landfill from Mr. Lauren Dowty in 1988. *Id.* at 53-54. Simmons confirmed that he had received copies of each violation notice letter, and agreed to the contents of the inspection reports. *Id.* at 55. He also stated that he had no reason to doubt the accuracy of the invoice from Environmental Restoration LLC., which identified the remediation work that took place and the amount of money charged. *Id.* at 55-56. Further, he stated that to his knowledge, none of the allegations in the complaint was false. *Id.* at 57.

Mr. Simmons made a statement on his own behalf, apologizing for the violations. *Id.* at 61-64; *see* Resp. Exh. 1. He stated that while he regretted that violations occurred after closure due to lack of funding, he had closed the landfill in compliance, and while it was in operation, he had improved the landfill's condition. Tr. at 64; *see* Resp. Exh. 1. He stated that the prior condition of the landfill "was an opportunity, and I was a little naïve with the rules changing as rapidly as they did, especially during that time that I was quickly on a treadmill I could not get off of." Tr. at 64.

Mr. Simmons also testified that he is no longer the owner of the landfill. *Id.* at 65. He stated that Lawrence County Disposal Centre, Inc. lost its status of good corporate standing sometime around 2006, because he discontinued paying the yearly fee. *Id.* at 65-66. He testified that he sold the landfill to Eastern Environmental, which later sold it to Waste Management, the current operator. *Id.* at 65.

The Disposal Centre did not appear through an attorney at any time in this proceeding or at hearing. Under Illinois law, Mr. Simmons as an individual, even though sole shareholder in the Disposal Centre, cannot represent the corporation. *See* 35 Ill. Adm. Code 101.400 (b), citing Section 1 of the Corporation Practice of Law Prohibition Act, 705 ILCS 220/1 (2008) and Section 1 of the Attorney Act, 705 ILCS 205/1 (2008).

STATUTORY AND REGULATORY BACKGROUND

The regulations and permit conditions which the respondents allegedly violated are voluminous, so they are not included in this section. A short summary of the statutes follows.

Sections 21(d)(1) and (2) of the Act provide in pertinent part that no person shall:

- (d) Conduct any waste-storage, waste-treatment, or waste disposal operation:
 - 1) Without a permit granted by the Agency or in violation of any conditions imposed by such permit . . .

- 2) In violation of any regulations or standards adopted by the Board under this Act. 415 ILCS 5/21 (d)(1) and (2) (2008).

Sections 22.17(a) and (b) of the Act provide in pertinent part that:

- (a) The owner and operator of a sanitary landfill site . . . shall monitor gas, water, and settling at the completed site for a period of 15 years after the site is completed or closed, or such longer period as may be required by Board or federal regulation.

- (b) The owner and operator of a sanitary landfill site . . . shall take whatever remedial action is necessary to abate any gas, water or settling problems which appear during such period of time specified in subsection (a).

415 ILCS 5/22.17(a) and (b) (2008).

Section 33(c) of the Act provides in its entirety that:

- (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. 415 ILCS 5/33(c) (2008).

Section 42(h) of the Act provides that

In determining the appropriate 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 respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- (3) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
- (4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
- (5) the number, proximity in time, and gravity of previously adjudicated violations of the Act by the respondent;
- (6) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and
- (7) whether the respondent has agreed to undertake a “supplemental environmental project,” which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform.

In determining the appropriate civil penalty to be imposed under subsection (a) or paragraph (1), (2), (3), or (5) of subsection (b) of this Section, the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship. However, such penalty may be offset in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and respondent. 415 ILCS 5/42(h) (2008).

The alleged regulatory violations are many. These are not set forth here in the interests of conserving space and paper. But, the gist of the rules alleged to have been violated is summarized in the discussion of each of the complaint’s counts below.

THE COMPLAINT’S ALLEGATIONS

The following discussion summarizes each of the six counts in the complaint.

Count I: Post-Closure Care Violations

Count I of the complaint alleges that the respondents violated Sections 22.17(a) and (b) of the Act, (415 ILCS 5/22.17(a) and (b) (2008)) and Section 811.312(c) of the Board's landfill regulations (35 Ill. Adm. Code 811.312(c)) by:

- a) failing to monitor gas, water and settling at the landfill site,
- b) failing to take remedial action necessary to abate gas, water, and settling problems, and
- c) failing to implement adequate measure to monitor and control the emission of landfill gas. Comp. at 10.

Count II: Site Security and Maintenance Violations

Count II alleges that the respondents violated Sections 811.109(a) and (b) of the Board's landfill regulations (35 Ill. Adm. Code 811.109(a) and (b)), and Sections 811.111(c)(1)(A), (c)(2), and (c)(5) of the Board's landfill regulations (35 Ill. Adm. Code 811.111(c)(1)(A), (c)(2), and (c)(5)) by:

- a) failing to conduct quarterly inspections of all vegetated surfaces after closure,
- b) failing to fill rills, gullies and crevices six inches or deeper than six inches which have been identified by Am Val, and
- c) failing to re-vegetate those areas with failed or eroded vegetation in excess of 100 square feet. Comp. at 13.

The complaint also alleges that the respondents violated Section 21(d)(2) of the Act (415 ILCS 5/21 (d)(2) (2008)) by conducting a waste-storage or a waste-disposal operation upon the site in violation of the Board's landfill regulations. Comp. at 13.

Count III: Permit Violations

Count III alleges that the respondents violated Section 21(d)(1) of the Act (415 ILCS 5/21 (d)(1) (2008)) by violating various provisions of the Landfill's permit, as follows:

- a) failing to submit reports required by Permit No. 1997-033-LF and Board regulations, failing to prevent unauthorized entry to the landfill by means of a fence or gate or a natural barrier as required by Condition I. 5. of the permit,

- b) failing to post a sign at the entrance to the landfill that provides notices as required by 35 Ill. Adm. Code 811.109(b) and Condition I. 6. of the permit,
- c) failing to submit to the IEPA by May 1st of each year an annual certification signed by the operator or a duly authorized agent as required by Condition III. 1.,
- d) failing to submit to the IEPA by May 1st of each year an annual report for each calendar year pursuant to 35 Ill. Adm. Code 813.504 as required by Condition III. 2.,
- e) failing to submit to the Illinois IEPA on a quarterly basis all groundwater monitoring data as required by Condition III. 3. and in accordance with the schedule in Special Condition XI. 11. of the water monitoring program of the permit pursuant to 35 Ill. Adm. Code 813.502,
- f) failing to keep operating records required by 35 Ill. Adm. Code 812 and 813 available at the site engineer's office at Lamac Engineering Co., in Mt. Carmel, Illinois as required by Condition IV. 4.,
- g) failing to submit to the IEPA the results from gas monitoring for each year, ending on December 31, in the annual report required by 35 Ill. Adm. Code 813.501, as specified in Special Condition III. 2., as required by Condition V. 7. and in accordance with Special Condition III. 2.,
- h) failing to file an application to renew the permit, which expired on June 30, 2001, failing to revise the current cost estimates for post-closure care as required by Condition IX. 3.,
- i) failing to determine background groundwater quality as required by Condition XI. 9., failing to collect groundwater samples on a quarterly basis each year as required by Condition XI. 11.,
- j) failing to submit to the Illinois IEPA the groundwater monitoring data as required by Condition XI. 11.,
- k) failing to annually prepare an evaluation of the groundwater flow direction and the hydraulic gradients at the facility using the groundwater surface elevations and by failing to report this information to the IEPA by July 15 of each year as required by Condition XI., and
- l) conducting a waste-storage or waste-disposal operation upon the site in violation of the permit. Comp. at 18-21.

Count IV: Groundwater Monitoring Violations

Count IV alleges that the respondents violated Section 21(d)(1) of the Act (415 ILCS 5/21 (d)(1) (2008)), Section 811.320(d)(1) of the Board's landfill regulations (35 Ill. Adm. Code

811.320(d)(1)), Section 813.502(a) of the Board's landfill regulations (35 Ill. Adm. Code 813.502(a)), Section 22.17(a) of the Act (415 ILCS 5/22.17(a) (2008)), and Section 21(d)(1) of the Act (415 ILCS 5/21 (d)(1) (2008)) by:

- a) failing to determine background concentrations for those constituent parameters identified in Sections 811.315(e)(1)(G) and 811.319(a)(2) and (a)(3) to establish background groundwater quality, failing to perform quarterly groundwater monitoring during any time during calendar years 1999, 2000, 2001, 2002, 2003, 2004 and 2005,
- b) failing to submit all groundwater monitoring data pursuant to Section 811.319(a) of the Board's landfill regulations and pursuant to the permit,
- c) failing to monitor groundwater at the facility, failing to submit to the Illinois IEPA on a quarterly basis all groundwater monitoring data as required by Condition III. 3. and in accordance with the schedule in Special Condition XI. 11. of the water monitoring program of the permit pursuant to 35 Ill. Adm. Code 813.502,
- d) failing to determine background groundwater quality as required by Condition XI. 9., failing to submit to the IEPA the groundwater monitoring data as required by Condition XI. 9., failing to collect groundwater samples on a quarterly basis each year as required by Condition XI. 11.,
- e) failing to submit to the IEPA the groundwater monitoring data as required by Condition XI.11.,
- f) failing to annually prepare an evaluation of the groundwater flow direction and the hydraulic gradients at the facility using the groundwater surface elevations, and
- g) failing to report this information to the IEPA by July 15 of each year as required by Condition XI. 17. Comp. at 27-28.

Count V: Gas Monitoring Violations

Count V alleges that the respondents violated Section 21(d)(2) of the Act (415 ILCS 5/21 (d)(2) (2008)), Section 811.312(c) of the Board's landfill regulations (35 Ill. Adm. Code 811.312(c)), Section 811.310(c) of the Board's landfill regulations (35 Ill. Adm. Code 811.310(c)), Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2008)), and Section 22.17(a) of the Act (415 ILCS 5/22.17(a) (2008)) by:

- a) causing or allowing the emission of landfill gas directly into the environment, failing to check gas monitoring devices and obtain ambient air samples on a monthly basis,
- b) failing to submit to the IEPA the results from gas monitoring for each years, ending on December 31, in the annual report required by 35 Ill. Adm. Code 813.501, as

specified in Special Condition III. 2., as required by Condition V. 7, and in accordance with Special Condition III. 2., and

- c) failing to monitor gas at the facility. Comp. at 34-35.

Count VI: Air Pollution Violations

Count VI alleges that the respondents violated Section 811.312(c) of the Board's landfill regulations (35 Ill. Adm. Code 811.312(c)), Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2008)), and Section 9(a) of the Act (415 ILCS 5/9(a) (2008)) by

- a) causing or allowing the emission of landfill gas into the environment so as to cause or tend to cause air pollution air pollution,
- b) conducting a waste-storage or waste-disposal operation upon the site in violation of Board regulations, and
- c) causing or allowing the emission of landfill gas into the environment so as to cause or tend to cause air pollution in Illinois or so as to violate regulations or standards adopted by the Board. Comp. 36-37.

FINDINGS OF VIOLATION

At no time have the respondents mounted any sort of defense to the complaint. The respondents did not file an answer to the complaint within 60 days of the date the Board accepted this matter for hearing. The Board deems admitted the allegations in each count of the complaint. *See* 35 Ill. Adm. Code 103.204(d); *People v. Simmons*, PCB 06-159 (April 20, 2006), slip. op. at 1. Moreover, the Disposal Centre failed to appear at hearing through an attorney, resulting in a default under the Board's procedural rules, since complainant proved its *prima facie* case at hearing. *See* 35 Ill. Adm. Code 101.608. Therefore, the Board finds that the respondents are liable for the violations below.

REMEDIES, INCLUDING PENALTY

The Board considers the factors set forth in Sections 33(c) and 42(h) of the Act in determining the appropriate remedy and civil penalty, if any. In making its orders, the Board is required to consider any matters of record concerning the reasonableness of the alleged pollution, including those factors identified in Section 33(c). The Board is also required by the Act to consider any matters of record concerning the mitigation or aggravation of any penalty, including those matters specified in Section 42(h). *See*, *People v. Bernice Kershaw and Darwin Kale Kershaw d/b/a Kershaw Mobil Home Park*, PCB 92-164 (April 20, 1994).

In this case, the People have requested a multi-faceted remedy. The People request that Respondents be ordered to perform post-closure maintenance and monitoring of the facility; and to renew the closure permit. Comp. Br. at 46-47. The People have also requested imposition of civil penalties against each respondent, and imposition of attorney fees. *Id.*

The Board will discuss the factors from Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2008) which the Board must consider when determining the appropriate remedy and penalty, if any. Finally, the Board will assess the appropriate remedy and penalty and explain the Board's reasons for them.

Section 33(c) Factors

The Character and Degree of Injury to, or Interference With, the Protection of the Health, General Welfare and Physical Property of the People

The violations that occurred after the landfill closed presented a grave interference with the protection of the health and general welfare of the people. Gehr's testimony identified that the violations created several risks, including groundwater contamination, air pollution, litter, unauthorized access to the landfill, and erosion. The Board finds that this factor weighs against the respondents, because the risks to public health and welfare demonstrate the unreasonableness of the pollution.

The Social and Economic Value of the Pollution Source

Properly-run, closed, monitored, and cared for landfills have economic and social value. But here, the Landfill was in violation of operating standards as well as closure and post-closure standards. At the end of its useful life, the Landfill had little social and economic value, and presented an environmental hazard which IEPA was forced to remediate. The Board finds that this factor weighs against the respondents.

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

The suitability of the site for a landfill is not at issue here. When it was operating the pollution source was suitable for the area in which it was located. This factor weighs neither for nor against the respondents.

The Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Emissions, Discharges or Deposits Resulting from Such Pollution Source

Properly closing a landfill and meeting the applicable standards after doing so is technically practicable and economically reasonable. The Board considered the technical practicability and economic reasonableness of landfill compliance standards when it adopted the Board rules concerning closure and post-closure care of landfills. The Board finds that this factor weighs against the respondents.

Any Subsequent Compliance

The respondents did not comply subsequent to receipt of numerous notices of violation. Although the Landfill was eventually closed through the actions of IEPA and its contractor, no credit is due to respondents. The Board finds that this factor weighs against the respondents.

Section 42(h) Factors**Duration and Gravity of the Violation**

The respondents committed ongoing violations for several years, some of which were still ongoing at the time of the hearing. The underlying purpose of the Board's landfill rules is to require the landfill owner to shoulder the burden of properly caring for the landfill both during and after the end of its useful life, to avoid having the burden of environmental damage and remediation care fall upon the taxpayers of the state of Illinois. Here, respondents did not perform closure, leaving the state to step in to do so. The Board finds that this factor aggravates the violation, and warrants a substantial penalty.

Due Diligence

The respondents failed to respond to letters from Am-Val which indicated violations on several occasions. There is no evidence of any due diligence in the record. The Board finds that this factor aggravates the violation, and warrants a substantial penalty.

Economic Benefits Accrued

The People's closing brief asserts that respondents have avoided certain costs, particularly those associated with sampling, monitoring, and maintenance. The People contend that

From at least the beginning of the year 2001 through the time at which the Illinois hired Environmental Restoration, LLC, of St. Louis, Missouri to perform the necessary remediation work in 2007, Respondents did not incur any costs or expend any money in complying with the permit, the Act, or the Board regulations. The Respondents saved approximately \$118,421.90 which are the costs incurred by the Illinois EPA and paid out of the financial assurance bond proceeds which were collected by the Illinois EPA. Complainant submits that Respondents' savings amount to the time uses value of the money over the approximate six year time period. The interest value of this money should be assessed against Respondents as a penalty. The interest should be computed by using the maximum rate allowable under Section 1003(a) of the Illinois Income Tax Act, 35 ILCS 5/1003. This Board should find that Respondents have saved money as a result of their noncompliance, and these savings should be considered by the Board in reaching its final order and opinion. Comp. Br. at 45.

Respondents have not disputed the People’s assertions. The Board therefore finds that, as a minimum, the respondents have accrued economic benefits in the amount “of the time uses value of \$118, 421.90 over a six year period”.

Penalty Which Will Serve to Deter Further Violations

The respondents do not currently own or operate the landfill, and the record does not indicate that they own or operate other similar sites. But the circumstances of this case do indicate that deterrence is an important consideration. By failing to respond to Am-Val’s violation notices and failing to remediate the landfill, the respondents opted to neglect their closure and post-closure responsibilities and save costs in the short-run, rather than address the problems promptly. Civil penalties should deter violations by the respondents and others who are similarly subject to the Act by providing disincentives for the neglect of post-closure responsibilities. The Board finds that this factor aggravates the penalty.

The Number, Proximity in Time, and Gravity of Previously Adjudicated Violations

The respondents had one previously adjudicated violation in 1993. The complainant states that it is not submitting this as an aggravating factor. Accordingly, the Board finds that this factor neither aggravates nor mitigates the violation.

Whether the Respondent Voluntarily Self-Disclosed the Non-Compliance

The respondents did not voluntarily self-disclose the non-compliance in this case. The Board finds that this factor aggravates the violation.

Whether the Respondent Has Agreed to Undertake a Supplemental Environmental Project in this Case

The respondents did not agree to undertake any supplemental environmental projects; the record does not indicate that one was suggested. The Board finds that this factor neither aggravates nor mitigates the violation.

Remedy Discussion

Remedy Order

The People request that the respondents be ordered to perform post-closure maintenance and monitoring of the Landfill facility, and to renew the closure permit. The Board finds that these measures are reasonable and necessary to assure that any changes in the Landfill’s condition are timely discovered and remediated. The Board next turns to penalty considerations.

Statutory Maximum Penalty

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.” Gilmer, PCB 99-27, slip. op. at 8, citing IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990), slip. op. at 72. The basis for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act 415 ILCS 5/42(a) and (b) (2002). 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.

In this case, the respondents violated five provisions of the Act, all of which began by the time of Am-Val’s second inspection on May 09, 2001. People’s Exhs. 1.1 and 1.2; Comp. Br. at 24-25. The respondents performed no remediation, and the closure and post-closure care initiated by the IEPA did not begin until January 16, 2007 (People’s Exh. 20; Comp. Br. at 29). Still, some of the violations were present at the landfill at the time of the October 29, 2008 hearing. Tr. at 44. By multiplying \$50,000 by five statutory violations, a base penalty of \$250,000 is reached. By adding \$10,000 for each day per each of the five violations over only a five year period,² an additional civil penalty of \$91,250,000.00 is reached. This makes the total maximum penalty \$91,500,000.

Complainant’s Requested Penalties

The People remind that the Board has broad discretionary powers to assess civil penalties under the statutory authority vested by the Act. Southern Illinois Asphalt Company v. Pollution Control Board, 60 Ill.2d 104, 326 N.E. 2d 406 (1975). Courts have traditionally upheld the imposition of civil penalties where it will “aid in the enforcement of the Act,” but not where it is shown to be merely “punitive.” Southern Illinois Asphalt Company, 326 N.E.2d at 412; see also, City of Monmouth v. Pollution Control Board, 57 Ill. 2d 482, 313 N.E. 2d 161 (1974) (punitive considerations for civil penalties are secondary).

In this case, the People’s brief does a particularly fine and concise job of summarizing the history of penalty decisions before the Board and courts. The People assert that

In the last thirty years of enforcement under the Act, civil penalties assessed by the Board or Illinois courts have fallen between two ends of a spectrum. On the one end, little or no civil penalties have been deemed necessary because of pertinent facts that weighed heavily upon the nature of the violations or the extent of the alleged pollution. Technical or paperwork violations, such as the failure to obtain permits or submit reports, have frequently been afforded this treatment. See, Park Crematory, Inc. v. Pollution Control Board, 201 Ill. Dec. 931, 637 N.E.2d 520 (1st Dist. 1994); Trilla Steel Drum Corporation v. Pollution Control Board, 180 Ill.App.3d 1010, 536 N.E.2d 788 (1st Dist. 1989). Similarly, the inadvertence of the defendant, Southern Illinois Asphalt Company, *supra*, the good faith efforts of a defendant to bring about compliance prior to the filing of a complaint, Park Crematory, Inc., *supra*; Bressler Ice Cream Company v. Pollution Control Board, 21 Ill.App.3d 560, 315 N.E.2d 619 (1st Dist. 1974), and lack of

² Using a five year period provides a conservative estimate, because the respondents violated each provision of the act for more than five years.

any economic benefit from noncompliance, Park Crematory, Inc., *supra*, have figured prominently in cases involving low or nominal civil penalties. Again, amendments to Section 33 of the Act, 415 ILCS 5/33 (2006) and Section 42 of the Act, 415 ILCS 5/42 (2006), all of which were subsequent to the aforementioned cases and all of which increased the penalty amounts subsequent to the aforementioned cases, make it clear that the Board has the power and authority to assess a penalty in this matter.

On the other end of the spectrum, some enforcement actions brought under the authority of the Act have resulted in substantial monetary penalties. In these cases, circumstances showing the unreasonableness of the defendant's conduct or its lack of good faith, ESG Watts, Inc., v. Pollution Control Board, 282 Ill. App. 3d 43, 668 N.E.2d 1015 (4th Dist. 1996), the seriousness and lengthy duration attributed to the violations, People v. John Prior and Industrial Salvage, Inc., PCB No. 97-1 11 (November 20, 1997); People v. Panhandle Eastern Pipeline Company, PCB No. 99-191 (November 15, 2001), the need for deterrence, People v. Waste Hauling Landfill, Inc and Waste Hauling, Inc., PCB No. 95-91 (May 21, 1998), or the accrual of a significant economic benefit, Panhandle, *supra*, have been important considerations in the penalty determination.

Of course, most litigated cases fall somewhere in the middle of the aforementioned spectrum. The determination as the amount of the penalty is dependent on the unique facts of each case, as no exact "formula" for arriving at a penalty exists, People v. Bernice Kershaw and Darwin Dale Kershaw, PCB No. 92-1 64 (April 20, 1995); People v. ESG Watts, Inc., PCB No. 96-233 (February 5, 1998). Comp. Br. at 37-39.

In making their penalty recommendation, the People suggest that as to Gary Simmons, the People contend that this case should be ranked at the lower end of the penalty spectrum. Comp. Br. at 40. The complainant requests imposition of a civil penalty of \$1,000 to be paid by Gary Simmons individually. As to the Disposal Centre, the People contend that this case should be ranked at the mid-range of the penalty spectrum. Comp. Br. at 40. The People seek a civil penalty of \$10,000 to be paid by Lawrence County Disposal Centre, Inc. Comp. Br. at 46, 47. Additionally, the complainant also seeks a penalty in the amount of the time use value of the money Respondent saved by non-compliance—the interest value on approximately \$118,421.90. Interest is assessed from the date of payment by the IEPA through July 23, 2009 – the date of this order.

The complainant requests that the present time use value of \$118,421.90 be "computed by using the maximum interest rate allowable under Section 1003(a) of the Illinois Income Tax Act, 35 ILCS 5/1003." Comp. Br. at 47. The Illinois Department of Revenue has provided that "the rate of interest to be paid to taxpayers and to be charged to taxpayers is the underpayment rate established under Section 6621 of the Internal Revenue Code." 86 Ill. Adm. Code 700.210(a). This is "the sum of the Federal short-term rate plus 3 percentage points." 86 Ill. Adm. Code 700.210(b). The rate is re-calculated every six months.

The Board's Assessment of Penalties

The Act authorizes the Board to assess civil penalties amounting to several million dollars against the respondent, because the landfill was in violation of multiple provisions of the Act for several years. The violations unreasonably interfered with public health and welfare, and the provisions applying to post-closure operation of a landfill are technically practicable and economically reasonable. The Board notes that aggravating factors, specifically, the duration and gravity of the violation, the absence of due diligence on behalf of the respondents, the economic benefit to the respondents by not complying, and the need for deterrence, support an imposition of a substantial penalty under Section 42(h).

After listing the factors to consider in determining whether a substantial penalty is warranted, Section 42(h) provides that:

The Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in any arbitrary or unreasonable hardship. However, such civil penalty may be off-set in whole or in part pursuant to a supplement environmental project agreed to by the complainant and the respondent. 415 ILCS 5/42(h) (2008).

Accordingly, the Board agrees with the People that the Disposal Centre must at least pay the time use value of \$118,421.90. The Board assesses this amount against the Disposal Centre to recoup the economic benefit earned through non-compliance. However, the record does not specify the details of how the People would suggest interest be calculated, presumably using the documents contained in Peoples Exhibit 20.³ The Board will order the People to perform the calculations, and to submit its explanation for them to the Board and respondents within 35 days of the order. The respondents may respond to the calculated figure within 21 days of receipt.

Because a substantial penalty is warranted under Section 42(h), the Board finds that the total penalty should be greater than the interest value of the remedial expenses. Accordingly, the Board acknowledges the complainant's requests for a \$1,000 civil penalty against Gary Simmons individually and a \$10,000 civil penalty against the Lawrence County Disposal Centre, Inc., and assesses these amounts in addition to the time uses value of the remedial expenses.

Penalty Summary

The Board assesses civil penalties of \$1,000 against Gary Simmons individually and \$10,000 against Lawrence County Disposal Centre, Inc., to penalize the respondents for committing ongoing violations at the landfill, failing to exercise due diligence in curing the

³ Specifically, People's Exh. 20 contains two invoices and two other billing records indicating charges from Environmental Restoration, LLC. The invoice for \$91,927.26 is dated March 08, 2007 and the invoice for \$14,348.70 is dated March 21, 2007. The other two, which are internal billing records listing charges billed by each individual, do not contain a clear date. The People's brief is unclear on when they would suggest interest charges begin to accrue.

problems, and causing the IEPA to take necessary actions to remediate the site. Accordingly, the total amounts for the civil penalties in this case are \$10,000 against Lawrence County Disposal Centre, Inc., and \$1,000 against Gary Simmons individually. The Board assesses the time use value of \$118,421.90 against the Disposal Centre to recoup the economic benefit earned through non-compliance. The People must perform the necessary calculations and submit them to the Board and respondents within 35 days of the order. The respondents may respond to the calculated figure within 21 days of receipt.

ATTORNEY FEES

Section 42(f) of the Act allows the Board to assess attorney's fees where the violator has committed "willful, knowing or repeated violation of the Act." 415 ILCS 5/42(f) (2008). The complainant asks for reasonable fees and costs and asks for leave to file an affidavit as to costs. Comp. Br. at 47. The Board finds that awarding of attorney fees is appropriate, finding that respondents violations are "willful, knowing or repeated" within the meaning of Section 42(f) of the Act. The Board directs the complainant to file an affidavit itemizing its attorney fees within 35 days of the order. The respondents may respond to the affidavit of costs within 21 days of receipt.

CONCLUSION

The Board finds that Gary Simmons and Lawrence County Disposal Centre, Inc. violated numerous provisions of the Act, Board regulations, and permit terms before and after the Landfill closed. The failure to properly close, care for, and monitor the Landfill was unreasonable because the violations risked public health and welfare, and the closure and post-closure procedures under the Act are technically feasibility and economically reasonable. Further, the ongoing nature of the violations, the absence of due diligence on behalf of the respondents, the economic benefits accrued by the respondents as a result of non-compliance, and the need for deterrence support the imposition of a substantial penalty.

The Board assesses the requested civil penalties of \$10,000 against Lawrence County Disposal Centre, Inc., and \$1,000 against Gary Simmons individually. The Board will also order the Disposal Centre to pay the time use value of \$118,421.90 against the Disposal Centre to recoup the economic benefit earned through non-compliance. The Board further orders the respondents to pay attorney fees in the amount to be determined after the complainant files an affidavit of attorney fees. Upon receipt of the affidavit, the Board will enter a final order in this proceeding directing the payment of the assessed penalty and attorney fees.

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

ORDER

1. The Board finds that the respondents, Gary Simmons and Lawrence County Disposal Centre, Inc., violated the Act, Board regulations, and terms of its permit, as alleged in the complaint.
2. The Board hereby assesses civil penalties of \$10,000 against Lawrence County Disposal Centre, Inc., and \$1,000 against Gary Simmons individually.
3. The Board assesses the time use value of \$118,421.90 against the Disposal Centre to recoup the economic benefit earned through non-compliance. The People must perform the necessary calculations, with explanations of how they are reached, and submit them to the Board and respondents within 35 days of the order. The respondents may respond to the calculated figure within 21 days of receipt of the calculations and explanation.
4. The People must file an affidavit of attorney fees on or before August 27, 2009, which is 35 days from the date of this order. The respondents may respond within 21 days of receipt of the affidavit of attorney fees.
5. Respondents must renew their closure permit for the Landfill, and perform post-closure maintenance and monitoring of the facility as required by the closure permit and Board rules.
5. The respondents must also cease and desist from violations of the Act, and the Board's regulations.
6. Following receipt of all filings required or allowed by this interim order, the Board will then issue a final order assessing the above-listed civil penalties for the violations and awarding appropriate attorney fees.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on July 23, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board