BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
CASEYVILLE SPORT CHOICE, LLC.	)	
An Illinois Limited Liability Company,	)	
	)	
Complainant,	)	
	)	
vs.	)	**PCB 2008-030**
	)	
ERMA L. SEIBER, administrator of the	)	
estate of James A. Seiber, deceased,	)	
and ERMA I. Seiber, in her individual	)	
capacity and FAIRMONT PARK, INC.,	)	
a Delaware Corporation.	)	
	)	
Respondents.	)	

MOTION FOR RECONSIDERATION AND IN THE ALTERNATIVE MOTION FOR LEAVE TO SEEK INTERLOCUTORY APPEAL

Now comes the respondent, ERMA I. SEIBER, individually and in her capacity as the Administrator of the Estate of James A. Seiber, deceased, by and through her attorney, Donald W. Urban, and hereby joins the respondent, FAIRMONT PARK INC., in moving that that the Illinois Pollution Control Board reconsider its decision of February 3, 2011 where the Board denied Respondent's motion to dismiss and Fairmont Parks Motion for Summary Judgment.

Respondent Seiber requests that the Board reconsider the issue of the Board's authority to award reimbursement of clean up costs for alleged past violations for disposal of non-hazardous solid waste to a private citizen complaint. In support of her motion for Reconsideration or in the alternative her leave to seek certification to conduct an interlocutory appeal, the Respondent

Seiber states as follows:

ARGUMENT FOR RECONSIDERATION

NEW ISSUES RAISED

No On Going Violations Exist to be pursued before the Board Making Dismissal Appropriate in Accordance with Supreme Court Law

1. The Respondent Seiber joins the Respondent Fairmont in noting that Section 31(d), 415 ILCS 5/31(d) which authorizes non-governmental entities to file an action before the board specifically states: "Any person may file with the Board a Complaint, meeting the requirements of subsection (C) of this section, against any person allegedly *VIOLATING* this act or any rule or regulations thereunder or any permit or term or condition thereof (emphasis added)." No allegation has been made as to the existence of on-going violations as there are none and this matter must be dismissed for failing to meet the fundamental requirement for filing as found in the specific statutory authorization for going forward. The statute must be interpreted to mean what it says. Section 31 (C) specifically requires the Agency to exhaust administrative remedies before pursuing a violation as voluntary compliance is the goal and was achieved in the instant proceeding before the action was filed.

2. Statutes providing citizen suits against persons "alleged to be in violation of" a provision of the statute do not create a cause of action for "wholly past" violations. Harris Bank Hinsdale vs. Suburban Lawn, Inc., 1992 WL 396295 (N.D. Ill.) *quoting* Gwaltney vs. Chesapeake Bay Foundation, Inc. 484 U.S. 49 (1987). Though the Court in Harris Bank noted that the Defendant was a past owner of the leaking UST's and that violations of this provision apply to owners and operators, the issue before the Court was not whether *FORMER* owners of

UST's could be held liable under this RCRA provision, but whether owners of leaking UST's could be held liable for "wholly past" violations. Relying on Gwaltney, the Harris Bank Court stated that a citizen suit based on an "in violation of" provision must contain allegations of either ongoing or intermittent violations to state a claim. Id at 64. The Court found that the case only involved past allegations and therefore failed to state a claim. Harris Bank, 1992 WL 396295 (N.D. Ill.). These complainants failed to state a claim as well as the Act requires allegations that a person is currently "violating" the Act which is to say that the person is "in violation" of the Act. In the instant proceeding, no one was "in violation" of the Act at the time the matter was filed.

3. The decision of the United States Supreme Court in Gwaltney vs. Chesapeake Bay Foundation, Inc. was re-examined in Chesapeake Bay Foundation, Inc. Vs. Gwaltney of Smithfield, Inc. 890 F.2d 690 (4th Cir. 1989). The Court in Chesapeake Bay, was presented with determining what constitutes an "on going violation." The Chesapeake Bay Court defined an ongoing violation of RCRA 7002 (a)(1)(A) to be "a reasonable likelihood that a past polluter will continue to pollute in the future." Chesapeake Bay vs. Gwaltney at 693. The Court stated that an ongoing violation could be proven by either:

1. Proving violations that continue on or after the date the complaint is filed or

2. By adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. Id.

No violations are occurring as the horse manure was remediated. James Seiber is dead. Erma Seiber is quite elderly, infirmed, and never participated in the business. Fairmont Race Track has been land applying their horse manure through Keller Farms since 1994. Based upon these facts there is no likelihood of violations in the future.

The Court also noted that it should be taken into consideration whether remedial actions were taken to cure violations, the *ex ante* probability that such remedial measurers would be effective, and any other evidence presented during the proceedings that bears on whether the risk of continued violations has been completely eradicated. Id. In the instant proceeding the risk of future violations has been completely eradicated.

4. It is uncontroverted that the Complainant had knowledge of the condition of the property prior to making the purchase of the subject property and there was no concealment of any relevant facts from the complainant. Specifically, undisputed facts demonstrate the following:

A. James Seiber advised the complainant of the existence of the manure at the time of negotiations. While Mr. Seiber is deceased and the "Dead Man's Act" limits the ability of any party to testify as to what was said or not said, this information is admissible in other forms.

B. James Seiber Jr. testified that he was specifically hired by the complainant to assist in identifying the polluted areas known to the complainant at the time of purchase and that this was a condition of the original sales agreement.

C. Complaint purchased the Seiber property for a greatly inferior land value as opposed to other adjoining property owners due to the existence of polluted soil and the complainant's knowledge of the nature and extent of the pollution.

D. The complainant secured a TIF demonstrating the region as "blighted."

5. No evidence exists which demonstrates that either Fairmont or Seibers are "violating" the law or are in violation of the law. Whether the Seibers violated laws in the past is immaterial

to the instant proceeding and dismissal is appropriate.

6. James Seiber is deceased. Erma Seiber is quite elderly, infirmed, and not engaged in any business that might result in improper disposal. As such there is no deterrent effect to the instant proceeding.

7. A "No Further Remediation" letter was issued governing this site. An NFR protects parties from suit for violations in the past and governed by the NFR.

8. SEIBER joins FAIRMONT PARK in noting that the Board should not allow this matter to go forward when the Complainant has repeatedly failed to adhere to deadlines. The respondents have repeatedly sought a dismissal for want of prosecution and renews this request at this time. The record reflects that no action has been taken by the complainant since 2009 and no effort has been made by the complainant to provide answers to SEIBER's outstanding discovery requests.

9. Caseyville Sport Choice is not a recognized entity in the State of Illinois as they were involuntarily dissolved on October 8, 2010 by the Illinois Secretary of State. As such, the Board's reference to motions filed by "Caseyville Sports Choice" are in error. Likewise, the record is silent as to an intervention in these pleadings by a successor in the form of ER-1. The chain of ownership is further complicated in that it appears despite references in the pleadings, neither Caseyville Sports Choice or ER-1 have an interest in the property and the current owners are some form of holding company. There has been no intervention in accordance with 35 IAC 101.402 of the Board's Procedural Rules.

10. Intervention is defined as "the procedure with which a person, not originally a party to an adjudicatory proceeding, voluntarily comes into the proceeding as a party with the leave of the

board." No leave was sought or granted for any third party to come in and pursue these respondents on claims for cleaned up materials that were known by Complainant as elaborated upon in prior motions (including citation to transcripts of Complainant's witnesses.)

11. An NFR has previously been issued which gives the owner immunity from prosecution through the NFR for wholly past violations on the land. As such, a new party could not intervene in these proceedings since there are no on going violations as required by law for citizen's suits to go forward.

No Authority Exists to Allow Cost Recovery in this Case

12. Complainant seeks to obtain relief in the form of reimbursement of cleanup costs incurred in 2005 and 2006 for removal and disposal of horse manure yet no provision exists in the Illinois Environmental Protection Act to authorize a private party to obtain reimbursement of clean up costs for removal and disposal of solid waste, thereby making this action frivolous and ripe for dismissal. The case cited by the Board of People vs. Firoini is distinguishable . The instant proceeding is strictly a private party suing others to compensate for poor business decisions. The case involves solid waste that was properly disposed of prior to filing and for which an NFR was issued. The case becomes more frustrating because it now involves non-interveners attempting to recover an investment from the defunct Complainant by pursuing matters that the Complainant gave up pursuing in 2009.

13. The Board has misconstrued the literal interpretation of Section 45 (d) of the Illinois Environmental Protection Act 415 ILCS 5/45)("Act") in its decision of February 3, 2011. This section provides reimbursement for cleanup costs if the ***STATE*** (emphasis added) brings an action under the Act. There is no other authority in the Act for reimbursement of clean up costs

as a remedy that the Board can grant to the complainants or any third party creditor assigned the rights through contract or other means. Old Ben Coal Company vs. Department of Mines and Minerals, 207 Ill. App. 3d 1088, 566 N.E.2d 813 (5th Dist. 1991) specifically states "perhaps the most basic tenet of statutory construction directs that the language of the statue should get its plain and ordinary meaning." Quoting from Coldwell Banker vs. Clayton, 105 Ill. 2d , 389, 475 N.E.2d 536 (1985) the court stated

> In construing a statute or regulation, Illinois courts are guided by basic tenets of statutory construction. Normally courts will try to give effect to every word, clause and sentence. Bauer vs. HH Hall Construction Co., 140 Ill. App. 3d 1025, 489 N.E.2d 31 (1986). We can not adopt a construction which renders words or phrases superfluous or meaningless. In re Application of the County Collector, 132 Ill. 2d 64, 547 N.E.2d 107 (1989), People v. Parvin, 125 Ill. 2d 519, 533 N.E.2d 813 (1988). Where more than one construction can be placed on a statute, a court should select the construction which leads to a logical result and avoid that which would be absurd. Illinois Department of Revenue vs. Country Gardens, Inc., 145 Ill. App. 3d 49, 495 N.E.2d 161 (1986).

14. Section 58.9 of the Act applies only to regulated substances. Horse manure does not fall on that list. The cause of action brought by the complainant is barred by the cost assignment provision of Section 58.9 of the Act.

15. Caseyville Sport Choice voluntarily cleaned up the site and an environmental NFR letter was received. Unlike the case of Cooper vs. Aviall Serv, Inc., 543 US 1557 (2004) where the state brought suit against the complainant and the complainant sought reimbursement, in the instant proceeding there was no suit brought by the state requiring this case to be dismissed as a matter of law.

16. Section 33(b) of the Act allows the Board to issue an order directing respondents to cease and desist from violations of the Act. Since there are no on-going activities, there is

nothing from which to cease and desist.

17. As a matter of law, the Illinois Pollution Control Board can not grant relief reimbursing the Complainant $4,000,000.00 for removal and proper disposal of waste that does not constitute a hazardous waste. Horse manure does not fall under the accepted definition of hazardous waste.

The Board is not Statutorily Equipped to Deal with all Issues of this Dispute

18. The Illinois Pollution Control Board is not a court and is not the appropriate forum to deal with common law issues of liability, proportionment of costs, contract interpretations, liability of the environmental assessment company, and potential business fraud.

19. The environmental company performing the assessment never violated the Environmental Protection Act and yet they have liability in the instant proceeding if their recommendation was flawed and/or improperly influenced. It is uncontroverted that under the initial recommendation following the first assessment that a Phase II assessment was recommended but that under a later assessment there is no reference to horse manure and the recommendation of a Phase II assessment is not recommended.

21. The Act is silent on how the Board can provide the respondents with appropriate due process when there is no mechanism to interplead other parties who have not violated the Act but who's actions in changing their recommendation from requiring a Phase II to not requiring a Phase II directly impacted on the damages sustained by the Claimant.

22. The case involves issues involving common law fraud and common law breach of contract and the various defenses which the respondents would have to these charges. The Board, however, is not equipped to address those issues.

Interlocutory Appeal is sought if Reconsideration does not Give Relief

23. Respondent Seiber joins Respondent Fairmont in requesting that the Board reconsider its decision of February 3, 2010 as the Board has no authority in a private citizen suit to award clean up costs for wholly past alleged violations.

24. The Illinois Pollution Control Board procedural rules specifically provide for Board certification of interlocutory appears in accordance with Supreme Court Rule 308(a). *See Ill. Adm. Code 101.908.*

25. Illinois Supreme court Rule 308(a) provides:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law, as to which there is substantial ground for difference o opinion, that an immediate appeal from the order may materially advance the ultimate termination of the litigation; the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the Court's own motion or on the motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order.

26. The Illinois Pollution Control Board's authority to certify interlocutory appeals is supported by judicial interpretation. See People vs. PCB, 129 Ill. App. 3d 958, 473 N.E.2d 452 (1st Dist. 1984); Getty Synthetic Fuel vs. PCB, 104 Ill. App. 3d 285, 434 N.E.2d 942 (1st Dist. 1984).

27. A Supreme Court Rule 308(a) certification by the Illinois Pollution Control Board requires satisfaction of a two prong test:

A. Whether the Board's decision involves a question of law involving a substantial difference of opinion.

B. Whether immediate appeal may materially advance the ultimate termination

of the litigation.

Residents Against a Polluted Environment and the Edmond B. Thornton Foundation vs. Village of Romeoville, PCB 91-7 (April 11, 1991).

28. The instant proceeding demonstrates a variety of questions of law involving a substantial difference of opinion, including but not limited to:

A. Whether on going violations are required for a citizen suit to go forward.

B. Whether the existence of an NFR bars enforcement.

C. Whether the Board has authority to allow a private citizen to recover costs in a case involving solid waste.

D. Whether there is any basis under the Act which allows the Board to order a a respondent to reimburse clean up costs to an entity (i.e. private citizen) who is not government (and especially where the state did not bring the underlying lawsuit).

E. Whether there is any basis under the Act which allows the Board to order a respondent to be responsible for a clean up that is long since and "wholly" in the past.

29. Given the complexity of this litigation, the myriad of issues to be addressed, the length of the trial, and the certainty of an appeal from the aggrieved litigant, it is clear that immediate appeal may materially advance the ultimate termination of the litigation.

WHEREFORE, for all of the reasons set forth above and the uncontroverted facts, the respondent, Erma I. Seiber, individually and as the Administratrix of the Estate of James Seiber, deceased, would petition this Board as follows:

A. For an order reconsidering its decision of February 3, 2011 and dismissing the pleadings of the complainant.

B. In addition or in the alternative for an order determining that none of the respondents have violated the Illinois Environmental Protection Act and are therefore not accountable to the complainant.

C. In addition or in the alternative for an order declaring that the Illinois Pollution Control Board lacks authority to grant the relief requested by the Complainant thereby dismissing the complainants cause of action.

D. In addition or in the alternative for an order stating that the Illinois Pollution Control Board does not have the authority to award cost recovery in actions brought by private citizens addressing non-hazardous waste.

E. In addition or in the alternative for an order by the Illinois Pollution Control Board lacks jurisdiction to hear private citizen enforcement matters where there are no on going violations.

F. In addition or in the alternative for an order by the Illinois Pollution Control Board determining that any of the issues referenced above Constitute a question of law involving a substantial difference of opinion. and that immediate appeal may materially advance the ultimate termination of the litigation.

G. In addition or in the alternative for an order certifying one or more of these issues as appropriate for an interlocutory appeal pursuant to the provisions Supreme Court Rule 308.

H. For such other and further relief as to the Court is just and equitable.

Respectfully submitted:

By: /s/ Donald W. Urban

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as administratrix of
James Seiber, deceased.

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In the Matter of:	)	
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CASEYVILLE SPORT CHOICE, LLC,	)	
an Illinois Limited Liability Company,	)	
	)	
Complainant,	)	
v.	)	**PCB 2008-030**
	)	
ERMA I. SEIBER, Administratrix of the	)	
Estate of James A. Seiber, Deceased,	)	
and ERMA I. SEIBER, in Her Individual	)	
Capacity and FAIRMONT PARK, INC.,	)	
a Delaware Corporation,	)	
	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I, the undersigned, on March 7, 2011, caused the foregoing Motion for Reconsideration and in the Alternative Motion for Interlocutory Appeal to be electronically filed with the Office of the Clerk, and caused a true and correct copy of said documents to be served upon:

David J. Gerber
Attorney at Law
241 North Main Street
Edwardsville, IL 62025
Attorney for Caseyville Sport Choice

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Attorney for E.R. 1., LLC, As Assignee of Caseyville Sport Choice, LLC

By depositing the same with the Belleville, Illinois branch of the United States Postal Service with first class postage in place.

By: /s/ Donald W. Urban
Donald W. Urban, #3125254
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