BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
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	)	
	)	
FAIRMOUNT PARK, INC., a Delaware	)	
Corporation,	)	
	)	
Respondents.	)	

NOTICE OF FILING

To:

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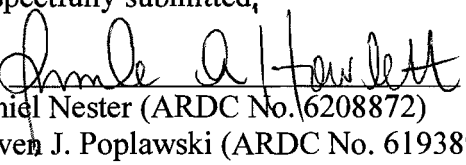
PLEASE TAKE NOTICE THAT I have on March 18, 2011 electronically filed with the Office of the Clerk of the Pollution Control Board E.R. 1, LLC, AS ASSIGNEE OF COMPLAINANT CASEYVILLE SPORT CHOICE, LLC, RESPONSE TO ERMA SEIBER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. SEIBER AND IN HER INDIVIDUAL CAPACITY FAIRMOUNT PARK INC.'S MOTIONS FOR RECONSIDERATION AND IN THE ALTERNATIVE MOTIONS FOR INTERLOCUTORY APPEAL, a copy of which is hereby served upon you.

Respectfully submitted,

By: 

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E.R. 1, LLC, AS ASSIGNEE OF COMPLAINANT CASEYVILLE SPORT CHOICE, LLC, RESPONSE TO RESPONDENT ERMA I. SEIBER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. SEIBER AND IN HER INDIVIDUAL CAPACITY AND FAIRMOUNT PARK INC.'S MOTIONS FOR RECONSIDERATION AND IN THE ALTERNATIVE MOTIONS FOR INTERLOCUTORY APPEAL

E.R. 1, LLC, ("E.R. 1") as assignee of Complainant Caseyville Sport Choice, LLC ("CSC"), by and through its undersigned counsel, pursuant to 35 Ill. Admin. Code 101.520(b) and Illinois Supreme Court Rule 308, in response to Erma Seiber, administratrix of the estate of James A. Seiber and in her individual capacity ("Seiber") and Fairmount Park Inc.'s ("Fairmount") (collectively the "Respondents") Motions for Reconsideration and in the Alternative Motions for Interlocutory Appeal ("Motions"), states as follows:

I. INTRODUCTION

This Complaint was filed under the provisions of the Illinois Environmental Protection Act (the "Act") seeking a finding, among other things, that Respondents violated the Act by illegally disposing (in the case of Respondent Seiber) and allowing the illegal disposal (in the

case of Respondent Fairmount) of horse manure and municipal trash on property CSC purchased from Respondent Seiber and cleaned up at an expense of approximately $4.5 million. Seiber does not dispute that it illegally disposed of Fairmount's waste on the property CSC purchased. Fairmount, while repeatedly arguing that it is not at fault for the illegal disposal of the waste, does not dispute that it generated the waste at issue and that the waste was illegally disposed of on property purchased by CSC. The bottom line is that the Act is a strict liability scheme, and Respondents arguments do not overcome that simple fact.

In their Motions, Respondents make what appear to be a number of arguments as to why the Illinois Pollution Control Board's ("Board") denial of their Motion to Dismiss and Fairmount's Motion for Summary Judgment should be reconsidered. In the alternative, Respondents request interlocutory appeal in the event reconsideration of their Motions does not provide Respondents with the relief they (again) seek. In short, however, Respondents' arguments boil down to a reiteration of arguments previously rejected by the Board and the following two "new" arguments: (1) claims arising as a result of wholly past violations cannot be bought under the Illinois Environmental Protection Act; and (2) Respondents should benefit from the No Further Remediation ("NFR") letter that CSC obtained by cleaning up the horse manure and other waste generated at Fairmount's facility and illegally disposed of by Seiber on Seiber's property, which Seiber sold to CSC. These arguments are not supported by Illinois law. Further, these are *arguments* newly raised by Respondents: **they are not reflective of new evidence or a change in the law as required in order to meet the requirements for reconsideration.** Finally, Respondents have not met the requirements for interlocutory appeal.

This Response addresses the substantive and procedural errors with Respondents' "new" arguments and explains why Respondents' Motions should be denied.[1/]

II. RESPONDENTS' ARGUMENTS ARE FLAWED AS A MATTER OF LAW

A. THE ENVIRONMENTAL PROTECTION ACT DOES NOT PRECLUDE AN ACTION FOR PAST VIOLATIONS

Respondents argue that CSC's claims against them cannot be brought for wholly past violations, citing *Harris Bank Hinsdale v. Suburban Lawn, Inc.* and *Gwaltney v. Chesapeake Bay Foundation, Inc.*[2/] *See* Seiber's Motion at p. 2; Fairmount's Motion at p. 2. Respondents' arguments are flawed as demonstrated by the language of the Act itself and Board and Illinois court decisions.

Regarding the Act, when read as whole, its plain language supports the right to bring claims for past violations. Specifically, the statute provides that: "[i]n hearings before the Board . . . the burden shall be on the Agency *or other complainant* to show. . . that the respondent *has violated* or threatens to violate any provision of this Act. . . ." 415 ILCS 5/31(e) (emphasis added). The emphasized language shows that the Act allows citizen complainants to bring actions for past violations. Furthermore, the Act provides that: "[i]t shall not be a defense to findings of violations of the provisions of this Act . . . that the person has come into compliance subsequent to the violation. . . ." 415 ILCS 5/33(a) (emphasis added). Thus, the Act clearly contemplates actions for wholly past violations before the Board, as it is not a defense to a claim

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1/ Because the Board has already ruled on the other issues Respondents raise (*e.g.*, whether the Board has the authority to award Complainant reimbursement of its cleanup costs), they are not addressed in this Response. *See* Board's February 3, 2011 Order.

2/ *Harris Bank* addresses the federal Resource Conservation and Recovery Act, and *Gwaltney* addresses the federal Clean Water Act.

for such violations that they have been corrected.[3/] That the Act allows claims for past violations is further supported by the fact that, in making its determinations, the Board *shall* take into consideration "any subsequent compliance". 415 ILCS 5/33c(v) (emphasis added). If a suit for past violations could not be brought, there would be no reason for the Act to *require* Board consideration of subsequent compliance in determining the appropriate scope of a Board order.

That the Act allows claims for past violations is acknowledged in Illinois cases construing the Act. Unlike cases interpreting federal statutes, Illinois has declined to categorically follow these federal cases in the context of the Act. In *Shelton v. Crown*, PCB 96-53, Opinion and Order (Oct. 2, 1997), the Sheltons filed a citizens enforcement action against the Crowns alleging that the Crowns violated Illinois numeric noise standards. *See* Shelton, at p. 1. Before the Board ruled on the merits of the Shelton's case, the Crowns corrected the noise problem. *Id.* at p. 7. The Crowns argued that the Sheltons' citizen enforcement action was not authorized with regard to past violations. *Id.* at p. 11. The Board rejected the Crowns' argument, stating:

> The Crowns assert that because Section 31(b)[4/] of the Act. . . . which provides that a citizen may file "a written complaint . . . against any person allegedly violating the Act. . ." is written in the present tense (i.e., violating), a citizen has no authority to bring enforcement action for past violations. . . . The Board does not agree with the Crowns, and can find no appellate or Supreme Court decision during the Board's 27 years of existence that agrees with the Crowns' argument. Therefore, the Board reiterates that the Sheltons have authority under. . . the Act to bring this citizens enforcement action.

Shelton, PCB 96-53, at p. 11; see also *Modine Manufacturing Co. v. Pollution Control Board*, 193 Ill. App.3d 643, 648, 549 N.E.2d 1379, 1382 (Ill. App. 1990) (stating that "we decline to

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3/ Moreover, this is the statutory language that the *Modine* court cited in declining to hold categorically that actions cannot be brought for past violations. *See Modine Manufacturing Co. v. Pollution Control Board*, 193 Ill. App.3d 643, 648 at fn. 1, 549 N.E.2d 1379, 1382 at fn. 1 (Ill. App. 1990).

4/ At the time the case was filed, the citizens' enforcement provision of the Act was found at Section 31(b); it is now found at Section 31(d). *See Shelton v. Crown*, PCB 96-53, at p. 11, fn. 1.

hold categorically that penalties may not be imposed for wholly past violations"). In contrast, neither of the cases Respondents cite in their Motions address citizen suit provisions under the Act. While Respondents' cases may be good federal law, the Board and Illinois courts have not precluded causes of action under the Illinois Environmental Protection Act based upon the fact that the violations were past violations and the Act recognizes such causes of action.

B. FAIRMOUNT IS NOT ENTITLED TO PROTECTION UNDER THE NO-FURTHER-REMEDIATION LETTER THAT CSC OBTAINED

Respondents also contend that Complainant's cause of action is barred because The Illinois Environmental Protection Agency issued an NFR letter to CSC in connection with CSC's clean up of the waste that was illegally disposed on its property. *See* Seiber's Motion at p. 6; Fairmount's Motion at pp. 7, 13. Apparently in an attempt to prove this point, Fairmount in its Motion identifies certain of the beneficiaries of NFR letters identified in the Environmental Protection Act (albeit the incorrect section, which relates to underground storage tanks), but apparently missed the fact that the list of beneficiaries does not include a party in Seiber's or Fairmount's position; *i.e.*, the polluter - the illegal disposer or the party whose waste was illegally disposed. *See* 415 ILCS 5/58.10(d). The list of beneficiaries simply does not cover the generator of pollution that was cleaned up by another party, at that other party's expense. The list of NFR letter beneficiaries is as follows:

(1) The remediation applicant or other person to whom the letter was issued;

(2) The owner and operator of the site;

(3) Any parent corporation or subsidiary of the owner of the site;

(4) Any co-owner, either by joint-tenancy, right of survivorship, or any other party sharing a legal relationship with the owner of the site;

(5) Any holder of a beneficial interest of a land trust or inter vivos trust, whether revocable or irrevocable, involving the site;

(6) Any mortgagee or trustee of a deed of trust of the owner of the site or any assignee, transferee, or any successor-in-interest thereto;

(7) Any successor-in-interest of the owner of the site;

(8) Any transferee of the owner of the site whether the transfer was by sale, bankruptcy proceeding, partition, dissolution of marriage, settlement or adjudication of any civil action, charitable gift, or bequest;

(9) Any heir or devisee of the owner of the site;

(10) Any financial institution, as that term is defined in Section 2 of the Illinois Banking Act and to include the Illinois Housing Development Authority, that has acquired the ownership, operation, management, or control of a site through foreclosure or under the terms of a security interest held by the financial institution, under the terms of an extension of credit made by the financial institution, or any successor in interest thereto; and

(11) In the case of a fiduciary (other than a land trustee), the estate, trust estate, or other interest in property held in a fiduciary capacity, and a trustee, executor, administrator, guardian, receiver, conservator, or other person who holds the remediated site in a fiduciary capacity, or a transferee of such party.

See 415 ILCS 5/58.10(d). While there are eleven categories of NFR letter beneficiaries, not surprisingly, none of them include: (1) Seiber – the party who illegally disposed of the waste and did not pay for the cleanup; or (2) Fairmount – the generator whose waste contaminated the site and who did not pay for the cleanup. As such, Seiber's and Fairmount's "newly figured out legal argument" is unsupported by the applicable statute and must fail. *See* Fairmount's Motion at p. 7.

III. RESPONDENTS' ARGUMENTS FAIL PROCEDURALLY

Respondents disagreed with the Board's rulings denying their Motions to Dismiss and Fairmount's Motion for Summary Judgment, and thus filed their Motions in the hopes that the Board would review the same facts and law that were originally before it and somehow decide differently the second time around. Notwithstanding the difficulties with the substance of their

arguments (both the arguments previously raised (see the Board's February 3, 2011 Order) and in their pending Motions (see Section II above)), Respondents' Motions are procedurally flawed and should be denied.

A. RESPONDENTS HAVE NOT SATISFIED THE REQUIREMENTS FOR RECONSIDERATION

Respondent's Motions for Reconsideration are procedurally flawed because they do not raise new issues of fact or law that did not exist when they filed their Motions to Dismiss and Fairmount filed its Motion for Summary Judgment. Specifically, Board rules state that: "in ruling on a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Admin. Code 101.902. In their Motions, Respondents raise arguments that are not based either on new evidence or a change in the law, and Fairmount in fact admits as such. Regarding its argument that past violations cannot be pursued, Fairmount states: "this is a threshold issue *that we all should have seen when this was first filed*," and cites to inapposite 1992 and 1987 case law to support its arguments. *See* Fairmount's Motion at pp. 3-4 (emphasis added). Similarly, regarding its argument that a claim is precluded because an NFR letter was issued, Fairmount states that its argument is "newly figured out." *See* Fairmount's Motion at p. 7. All of Respondents' other arguments were previously raised in their Motions to Dismiss and Fairmount's Motion for Summary Judgment. The fact is, as proven by Fairmount's own admission, that Respondents make no arguments based upon new evidence or new law, and their Motions should be denied on that basis alone.

Further, a motion for reconsideration is only appropriate in response to a "final order" of the Board. 35 Ill. Admin. Code 101.520(a). A "final order" is defined as "an order of the Board that terminates the proceeding leaving nothing further to litigate or decide and that is appealable

to an appellate court. . . ." 35 Ill. Admin. Code 101.202. The Board's denial of Respondents' Motions to Dismiss and Fairmount's Motion for Summary Judgment is clearly not a "final order," as a hearing remains to be conducted in this matter. As such, Respondents' Motions for Reconsideration are improper and should be denied.

B. RESPONDENTS DO NOT SATISFY THE REQUIREMENTS FOR INTERLOCUTORY APPEAL

Respondents' alternative motions for interlocutory appeal fail to meet the requirements for granting such an appeal. By Fairmount's own admission, Fairmount admits that interlocutory appeal should be allowed "only in certain exceptional circumstances" and should be "strictly construed and sparingly exercised." *See* Fairmount's Motion at p. 22 (citing cases). Neither Fairmount nor Seiber cite anything it their Motions indicating why the issue they raise warrants exceptional treatment. In fact, without any evidence, one of Fairmount's primary bases for seeking interlocutory appeal is the avoidance of litigation costs that would endanger the Southern Illinois horse racing industry. *See* Fairmount's Motion at p. 23. If considering litigation costs was a basis for granting interlocutory appeal, every litigant would be entitled to appeal every order in every litigation – the very opposite of an exceptional circumstance. As such, Fairmount's Motion on this point is not persuasive, and interlocutory appeal should not be granted to either Respondent.

C. INTERVENTION DOES NOT APPLY TO E.R. 1 IN THIS CASE

In their Motions, Respondents argue that E.R. 1 does not have standing to pursue the claims of CSC in this matter without intervening in the case. *See* Seiber's Motion at p. 12-13; Fairmount's Motion at p. 8. Respondents' arguments are misplaced, in that E.R. 1 is not seeking to join the case as an additional party. *See* 35 Ill. Admin. Code 101.202 (defining "intervenor" as a person, not originally a party to a proceeding, who voluntarily participates as a party in the

proceeding with the leave of the Board"). CSC, the Complainant in this action, is financially unable to pursue its claims, and has assigned its claims to its creditor, E.R. 1. Because CSC has assigned its claims to E.R. 1 and will not itself pursue them further, E.R. 1 is not an intervening party, but is stepping into the shoes of the Complainant – the party prosecuting this action. As such, E.R. 1 has the same standing as CSC in this matter.

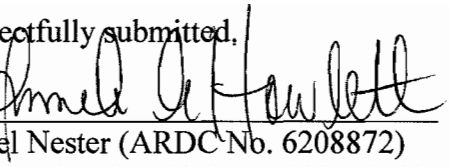
IV. CONCLUSION

On both substantive and procedural grounds, Respondents Motions are fundamentally flawed and should be denied. Substantively, the Act, by its terms, allows claims for past violations and, given the Act's language recognizing such claims, neither the Board nor an Illinois court has ever held that enforcement cannot be brought under the Environmental Protection Act for past violations, and in fact the Board has held exactly the opposite. Second, it is contrary to Illinois statute and would be nonsensical for the Board to find that an NFR letter issued to a party who cleaned up illegally disposed waste should benefit the polluter who generated or illegally disposed of the waste. Procedurally, Respondents' Motions do not satisfy the requirements for reconsideration or interlocutory appeal, and their claims that E.R. 1 does not have standing and must move to intervene are misplaced.

WHEREFORE, E.R. 1, LLC, as assignee of Complainant Caseyville Sport Choice, LLC respectfully requests that the Board deny Erma Seiber, administratrix of the estate of James A. Seiber and in her individual capacity and Fairmount Park Inc.'s Motions for Reconsideration and in the Alternative Motions for Interlocutory Appeal, and grant any other relief as the Board deems just and proper.

Dated: March 18, 2011

Respectfully submitted,

By: 

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	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I, the undersigned, on March 18, 2011, caused the foregoing E.R. 1, LLC, AS ASSIGNEE OF COMPLAINANT CASEYVILLE SPORT CHOICE, LLC, RESPONSE TO ERMA SEIBER, ADMINISTRATRIX OF THE ESTATE OF JAMES A. SEIBER AND IN HER INDIVIDUAL CAPACITY AND FAIRMOUNT PARK INC.'S MOTIONS FOR RECONSIDERATION AND IN THE ALTERNATIVE MOTIONS FOR INTERLOCUTORY APPEAL and NOTICE OF FILING to be electronically filed with the Office of the Clerk, and caused a true and correct copy of said documents to be served upon:

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By placing same in U.S. Mail at St. Louis, Missouri.

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