BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-2
	)	(Enforcement)
JERSEY SANITATION CORPORATION, an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

RESPONDENT'S CLOSING BRIEF

NOW COMES Respondent, JERSEY SANITATION CORPORATION, through its undersigned attorney, and for its closing brief following hearing in this enforcement case, states as follows:

HISTORY OF JERSEY SANITATION CORPORATION

According to Respondent's unrebutted testimony, the landfill known as Jersey Sanitation Corporation, which is a small (10 acre) landfill located outside of Jerseyville, was established in 1975 by a man named Ralph Johnson, who had inherited some 200 acres of farmland that included a deep natural ravine. (T. 328). At the time, Pamela Shourd and her family lived in a house barely 100 yards away from the ravine. (TR. 328-329). The Shourds had moved in a year earlier, before there was any landfill. (TR. 328-329). The ravine stretched down the hill toward Sandy Creek, with a natural gradual slope. (TR. 329-331). Mr. Johnson operated the landfill from the summer of 1975 clear into the 1980s as a virtual open dump. (TR. 331- 333). In Mrs. Shourd's own words, "there was no--no people, no equipment, nobody worked there. It was a place where people could come and drop off their trash and drive away and leave it." (TR. 333).

Through a contract with the city of Jerseyville, literally anyone from Jerseyville could drive out at any time and toss whatever trash they wanted into this ravine, as even the city of Jerseyville itself did. (TR. 333-334). In terms of appearance, the landfill "was just piles of trash." (TR. 334). The trash was virtually never covered, although "occasionally, he [Ralph Johnson] would hire a man with a bulldozer to come and push it around a little bit, to push it down, that stack, so they could pile some more on." (TR. 334).

In addition, Mr. Johnson burned huge piles of materials, including landscaping brought from other sources, at this ravine location. According to Mrs. Shourd, these conflagrations were so significant that they caused flames to rise hundreds of feet in the air--"he always lit the fires at night, and then I'm talking about huge fires, fires where sparks were going up into the air, I guess hundreds of feet." (TR. 336). Mrs. Shourd was very concerned about the safety of her family during these fires: "I had four kids asleep at the time in house, so I would sit up all night and watch it until it had died down enough to be safe." (TR. 336).

As might be expected, this open dump was a perfect habitat for rats. Mrs. Shourd testified, in fact, that she had to redesign her chicken house to keep the rats from getting in and eating the baby chicks. The trash also attracted flies and birds, and created an ever-present odor. (TR. 335-336).

Mrs. Shourd, and a few others living in the same area (see TR. 340), complained to the authorities. They complained to the Sheriff, they complained to the city of Jerseyville, and they complained to the Illinois Environmental Protection Agency. (TR. 336). Despite all of this complaining, the only enforcement initiative of which she was

aware was a single administrative citation violation that cost Ralph Johnson $1,500, issued by the IEPA--Johnson, though, laughed off the penalty as simply his "only overhead" (TR. 337). Significantly, the IEPA inspector assigned to the Jersey Sanitation area during Ralph Johnson's ownership also recollected only a single administrative citation action ever brought against this nightmare facility during Ralph Johnson's ownership. (TR. 142-143).

By the late 1980s the neighbors living near the Jersey Sanitation Landfill had had enough, and determined to purchase the landfill from Ralph Johnson as an act of self preservation. (TR. 341- TR. 344). The IEPA recommended that the shareholders not purchase the landfill, but after 18 years of Ralph Johnson's unchallenged behavior, understandably the neighbors did not believe the IEPA would clean up the landfill, so they went through with the purchase. (TR. 345-346). A stock purchase occurred in November 1989, and the buyers' sole purpose in making the purchase was "to clean it up, and close it." (TR. 346). According to Mrs. Shourd, "[w]e figured that was the only way we would ever be taken care of is if we did it." (TR. 346).

The landfill operated only two more years, until September 1992, when it ceased accepting waste. (TR. 346). According to Mrs. Shourd, they needed to operate it during those two years to have enough money to adequately close the facility: "we didn't really have the money to just--just be able to buy equipment and bring it in and close it up. We had to operate it for awhile to try and generate enough income to shut it down." (TR. 346).

The landfill literally had no operating equipment at the time these new shareholders purchased the facility in 1989 (and yet the IEPA had allowed the facility to

remain open) (TR. 346). By the time the facility was closed in 1992, the landfill had purchased ten pieces of equipment, and was leasing another; the purpose of all of the equipment was "[i]n order to compact trash, haul dirt over there, and cover it up, and compact the dirt." (TR. 346-347).

Also at the time of the purchase, only one part-time employee worked at the facility--"a man who unlocked the gate and hung around there on Saturday afternoon." (TR. 347). During the following two years, the new stockholders themselves learned to operate the landfill, and hired (and fined) numerous employees in an effort to adequately staff the facility. (TR. 347-349). Significantly, far from assisting in this process by offering advice or counseling, which was not forthcoming ("the EPA doesn't really want to tell you how to do anything. They just want to tell you, find a way and do it." (TR. 349)), the IEPA substantially increased its inspections and other presence at Jersey Sanitation. Yet according to Mrs. Shourd, during that two year period the operations and condition of the landfill were improved substantially. (TR. 349).

After the landfill quit accepting trash in September 1992, the revenue stream to pay for the improvements also ceased. "During the time we accepted waste, we paid into the [closure/post-closure] fund and tried to have the equipment and dirt we needed to cover up the landfill. From that point on, we had no income." (TR. 352-353). Virtually no profit was realized by the shareholders through the efforts, aside from a peace of mind from knowing that the terrible nuisance located next to their properties was abated--"every cent that came into that landfill went into either the post-closure or closure/post-closure fund or into equipment to operate the landfill and to cover it up and close it." (TR. 353).

The IEPA's unfortunate response to the efforts of these neighbors to adequately close the landfill has regrettably been hostile, and continues to be so to this very day. As Mrs. Shourd testified, following the disclosed transfer of shares to the new owners, the IEPA responded by increasing enforcement and finally addressing operational deficiencies, despite the improvement from the time of Ralph Johnson's ownership. No explanation has been given as to why the IEPA waited until 1990 to begin its vigorous enforcement concern with this landfill. Even to this very day, in its closing brief, the IEPA claims that the fault lies with the victim, rather than the perpetrator of the offense. The Complainant's closing brief argues that this whole enforcement case is a result of the actions and behavior of the Jersey Sanitation owners--the very ones who through their own financial risk and personal efforts assured that this landfill would be closed without costing the State of Illinois millions of dollars (as other landfills in this state have)! (Complainant's brief, at 127, citing People v. Gilmer, PCB 99-27 (August 24, 2000), and noting there that IEPA had itself conducted closure at a cost of $3..5 million to the State). See also Illinois FIRST Abandoned Landfill Program (IEPA Dec. 2000), which chronicles the $50 million spent on just 32 abandoned landfills in Illinois, plus another $15 million spent at another abandoned landfill, Paxton II, in southwest Chicago. (A copy of this document is available from the IEPA's website at www.epa.state.il.us/land/publications).

Despite the hostility of the regulators, Jersey Sanitation persevered and eventually obtained the IEPA's certification that the landfill had been properly closed in compliance with all permit, regulatory and statutory requirements. Indeed, the IEPA 1999 letter certifying closure acknowledged that the closure had been achieved, and the post-closure

care had begun, as of September 30, 1994! (Parties' Ex. #42). In granting that, of course, the IEPA acknowledged, both as a matter of fact and of law, that the landfill was in compliance with all such requirements as of that September 30, 1994 date. See Bradd v. Illinois EPA, PCB 90-173 (May 9, 1991); see also 35 Ill. Adm. Code 807.508.

Notwithstanding Jersey Sanitation's success in accomplishing certified closure as of 1994, the IEPA included in the post-closure permit certain conditions relating to post-closure activities (specifically, concerning groundwater monitoring and assessment, and concerning the need for a certified operator), which Jersey Sanitation challenged as unnecessary. This Board, of course, is well aware that it agreed with Jersey Sanitation that these conditions were not required for the Jersey Sanitation facility, and were therefore properly stricken. See Parties' Ex. #44. The IEPA appealed that ruling to the appellate court, which promptly affirmed this Board's decision. Parties' Ex. #48.

Despite this Board's ruling on the permit appeal, and the appellate court's unambiguous affirmance, in this very case the IEPA (through the Office of the Attorney General, of course) has claimed that those very permit conditions which were stricken should still serve as the basis for enforcement against Jersey Sanitation! In response to Jersey Sanitation's straightforward motion for summary judgment asking that allegations relating to those stricken provisions be removed from this case, the IEPA argued that somehow Jersey Sanitation was still bound by those conditions and its failure to have complied with the stricken requirements was somehow actionable. This Board, of course, rejected that position and granted Jersey Sanitation's motion to strike allegations relating to the stricken conditions. See Parties' Ex. #46

As discussed in more detailed below, the IEPA is persisting even in its testimony at hearing and in its closing brief in this case in its position that it is entitled to the relief addressed in the stricken permit conditions, despite having lost every challenge to that ruling. The IEPA argues that despite the fact this Board (and the appellate court) unambiguously ruled that statistical analyses and other groundwater evaluation techniques included in the post-closure permit were not required for this facility, that the same relief should be ranted to it here. If nothing else bespeaks the IEPA's animosity toward Jersey Sanitation, this surely does.

OPERATIONAL ALLEGATIONS

With only the exceptions discussed below, Jersey Sanitation concedes that it violated the Environmental Protection Act and this Board's regulations with respect to the various operational allegations included in the Complainant's complaint. In commenting on the IEPA's photographs of some of these conditions, Mrs. Shourd made clear that Jersey Sanitation has no claim that the various photographs are not accurate: "I mean, they have the pictures. I'm sure that--that there were days that we were not able to cover it." (TR. 347-348). Hence, with respect to these operational allegations, Jersey Sanitation concedes the existence of these violations. Moreover, Jersey Sanitation recognizes that mere good faith or extenuating circumstances do not change the existence of such a violation or violations; on the other hand, these extenuating circumstances and the history of this situation should serve as a substantial mitigating factor in the Board's determination of any appropriate penalty. Notably, Jersey Sanitation is in the eleventh year of its post-closure care, and is not in any landfill business anymore.

The specific concessions are the following, as summarized in Complainant's post-hearing brief:

1. Count II, brief section I.
2. Count II, brief section J.
3. Count III, brief section K.
4. Count IV, brief section L.;

   L.2 and L. 4.
5. Count IV, brief section M. 1 and M. 2
6. Count V, brief section O.
7. Count VI, brief section P.

The exceptions to the above consists of the following:

(a) The opening burning allegations. As Mrs. Shourd testified, the landscape waste fire at issue in that allegation was not on any part of the permitted landfill area, but instead was on farm ground located next to the landfill. The IEPA inspector, Mr. Johnson, disagrees with Mrs. Shourd's assertion, but he has provided no basis to believe that he had a better understanding of the specific boundaries of the permitted landfill and the neighboring farm than the owner and a nearby resident since 1974 would have. As the party with the burden of proof, it would have been a simple matter for the IEPA to have definitively identified the location of the fire with respect to the permitted landfill boundary.

(b) Composting—Count IV, brief section L. 6. Once again, Mrs. Shourd testified that the composting which took place in the early 1990s was done on the farm property and not on the permitted landfill property. (TR. 351). In fact, she explained that the

incident occurred right after the law changed to prohibit the disposal of lawn waste in permitted landfills, and as an accommodation to customers Jersey Sanitation attempted to apply the lawn waste to the adjacent farm property, as was allowed by the law at the time. That experience was a failure, and Jersey Sanitation soon thereafter quit accepting lawn waste. (Id.). In any event, despite Mr. Johnson's unsubstantiated claims to the contrary, this composting was conducted outside the permitted boundaries of the landfill.

(c) All Section 12 allegations-- As will be discussed in more detail below, while Jersey Sanitation concedes that waste in water, and leachate flowing toward water on the surface, can constitute Section 12(a) or (d) violations, the IEPA's assertions that a groundwater "problem" exists here or that Jersey Sanitation is guilty of not providing analyses and studies which this Board held to be inapplicable to this facility, are completely unfounded.

(d) Previously adjudicated allegations. As the Complainant recognizes, certain allegations included in this complaint were previously the subject of administrative citation proceedings brought against Jersey Sanitation, concerning which Jersey Sanitation, was imposed and paid a penalty. The Complainant has magnanimously agreed not to seek penalties for those specific violations. However, Jersey Sanitation would also add all violation identified in the same inspection reports used to prosecute the administrative citations. As a matter of law, the IEPA cannot proceed both of the basis of administrative citation and straight enforcement, but it is attempting to do so here with respect to those violations.

GROUNDWATER ISSUES

The bulk of Complainant's closing brief, as indeed was the bulk of Complainant's evidence at hearing, is devoted to convincing this Board to revisit the issue decided in the prior permit appeal, and the prior summary judgment proceeding in this case, and to rule that Jersey Sanitation must do a full-fledged evaluation of the groundwater flowing through its property. In the successful permit appeal, this Board excised from the permit the requirement that Jersey Sanitation obtain significant amounts of new data concerning the groundwater at this facility and then evaluate that information using a variety of complicated techniques, including a statistical analysis. As both this Board and the appellate court noted, Jersey Sanitation has been closed pursuant to the 35 Il. Adm. Code Part 807 regulations, which do not have requirements as stringent as those imposed by the IEPA's condition. (See testimony of Andy Rathsack, TR. 375-397). In contrast, new landfills--those remaining in operation after September 1992--are required to prepare such sophisticated groundwater analyses. This Board recognized that the IEPA's proposed condition was an attempt to impose the more stringent regulations upon Jersey Sanitation's closed Part 807 landfill, whereas only the more general requirements of Part 807 were actually required. In fact, this Board, and the appellate court, found that instead of the groundwater analyses and evaluations promoted by the IEPA, Jersey Sanitation's facility was subject to the groundwater analysis suggested in its own application for certification of closure and commencement of post-closure care, which this Board expressly found to be sufficient for compliance with Section 12 of the Environmental Protection Act and Part 807 of this Board's regulations. The permit application established the number of samples that would be retrieved from the four monitoring wells

currently on-site: "[n]o changes in the groundwater monitoring program are anticipated during closure or post-closure care." Further, the permit application stated that "groundwater monitoring results would be evaluated each quarter against background data, General Use Water Quality Standards, and other historic water analysis information. If a trend is believed to be developing, more frequent sampling, (e.g. monthly) may be performed to substantiate or dismiss the likelihood of site impact. A professional engineering firm should be retained to develop future actions and/or plans for subsequent IEPA approval." (See Parties' Ex. #44, at 13).

According to this Board's permit appeal ruling and the appellate court's affirming opinion, the above language constitutes the groundwater evaluation for Jersey Sanitation. See Parties' Exs. 44 and 48.

Despite these rulings, the IEPA's primary issue in this case concerns the groundwater monitoring program at Jersey Sanitation. The IEPA's premiere witness, Karen Nelson, devoted her testimony during two separate days of hearing to issues pertaining to conducting a Part 811-style groundwater analysis, and modifying substantially the groundwater monitoring network in place at the landfill to fulfill her own professed beliefs about an appropriate groundwater monitoring system. All of this testimony, though, is incompetent, and the relief sought, aside from having been barred by this Board's previous order, is unnecessary in this enforcement action.

It appears that Complainant is arguing that the groundwater analysis it proposes is necessary to remediate the alleged Environmental Protection Act violations. In other words, Complainant appears to argue that because of certain section 12 alleged

violations, remedial strategies must be employed which, miraculously, appear to be exactly the same as with the IEPA's stricken groundwater monitoring conditions.

Unfortunately for Complainant, neither prong of its mini-syllogism has any validity. First, the Complainant has completely failed to establish that Jersey Sanitation is causing violation of section 12 of the Environmental Protection Act. To be sure, Complainant has attempted to establish this by arguing that in the Watts case this Board found that the existence of contaminated groundwater underlying the respondent's landfill constituted sufficient evidence to find a violation of section 12. Here, that relief is not available, because the IEPA's own witnesses admitted that in this case the mere existence of certain levels of contaminants in the groundwater could not and do not establish that Jersey Sanitation was the source. See TR. 43; TR. 45-46 (Joyce Munie); TR. 305-306 (Karen Nelson). Complainant's closing brief raises alarmist claims that the iron levels underlying Jersey Sanitation's facility are the "highest" that Karen Nelson has ever seen, but in addition to the fact that other witnesses were not nearly so concerned (Kenn Liss, for instance, specifically opined there appears no public health danger at this facility—see TR. Of 1-13-04, at 28-29), in any event even she admitted that she had inadequate information to conclude that those levels resulted from the Jersey Sanitation landfill. (In fact, she even question the validity of the groundwater monitoring system, rendering her guarded belief that Jersey Sanitation might be impacting the ground water of even more doubtful validity). And Joyce Munie, the head of the IEPA's Bureau of Land Permit section, and a registered professional engineer, also acknowledged that she had insufficient information to conclude that any constituent levels coming from the

Jersey Sanitation groundwater monitoring system were a result of Jersey Sanitation's activities.

Complainant, having the burden of proof in this enforcement case, cannot simply infer that the contamination must be from Jersey Sanitation, particularly where its own witnesses acknowledge that that inference does not exist.

It should also be noted that the IEPA's premier witness, Karen Nelson, is not now currently engaged by the IEPA in the capacity of professional geology, but instead her job duties concern setting up training programs for the entire agency throughout the state. (TR. 284-286). For several years at least, Ms. Nelson has had no contact with field geological concerns, apparently with the exception of continuing her dogged pursuit of Jersey Sanitation. Moreover, even before her transfer to a new job duty, her prior experience before this Board consisted of the affidavits she submitted in support of administrative citation complaints filed with this Board. See AC 89-265 (Jan. 11, 1990); AC 89-152 (Aug. 10, 1989); AC 89-66 (May 11, 1989); AC 89-39 (April 6, 1989); AC 89-9 (Feb. 23, 1989); AC 88-37 (June 16, 1988). Simply put, Ms. Nelson has precious little experience with the matters for which she has attempted to provide expert testimony.

Moreover, even Ms. Nelson acknowledges (as she must) that the Jersey Sanitation groundwater, including its groundwater monitoring well system as well as most of the results she has compiled, were all presented to the Bureau of Land permit section and considered by that section prior to the 1999 issuance of the certification of closure effective September 1994. Ms. Nelson had to admit that the permit section has plenary authority, at least in comparison with her, over issues pertaining to a landfill's

groundwater and monitoring system. See TR. Of 1-13-04, at 90-92 (admitting that groundwater monitoring system had been approved by permit section, which has authority to do so). Significantly, the head of the IEPA's Bureau of Land permit section, Joyce Munie, also testified in this matter on behalf of the IEPA--but she was silent with respect to the issues championed Ms. Nelson, and specifically did not testify that there was anything wrong with Jersey Sanitation's groundwater monitoring system (a system which had been approved by her own staff), nor that anything about the groundwater results compiled by Ms. Nelson suggested any basis for concern or conclusion that Jersey Sanitation had caused any groundwater contamination. Indeed, Ms. Munie, once again, said just the opposite—the data simply does not establish where the exceedances are coming from.

The second prong of the IEPA's argument is that the alleged section 12 violation should be addressed by imposing the same groundwater evaluation protocol that had been stricken by this Board and the appellate court. In point of fact, even if it is concluded that Jersey Sanitation is causing the constituent levels noted in Ms. Nelson's work product, Jersey Sanitation's permit application (quoted above, from this Board's permit appeal ruling) defines the next step of investigation. Indeed, the irony here is that, as recognized by Kenn Liss, pursuant to Jersey Sanitation's approach analyzing the groundwater monitoring data for "trends" is an ongoing process and is not triggered by any particular constituent levels. (See TR. Of 1-13-04, at 7-29). Instead, with virtually every pound of sampling results Jersey Sanitation is to consider whether "a trend is believed to be developing." In the event that such a determination is made, then additional sampling is called for, and a professional engineering firm is to be retained to consider the next step.

This Board has all ready approved of this protocol (which, in turn, was approved by the IEPA in approving this permit). See TR. Of 1-13-04, at 26-27, in which Kenn Liss answers that compliance with the permit is the appropriate response in the event it is determined a trend is developing. This Board may recall Mr. Liss' participation on behalf of the IEPA in the Tiered Approach Corrective Action Objectives (TACO), R. 97-12(A) (April 17, 11997).

Similarly, there is virtually no justification for Complainant's argument that the whole groundwater monitoring system needs to be revamped. That system, of course, was specifically approved by the Bureau of Land's permit section, and simply put, Ms. Nelson has no authority to re-visit that section's professional decisions, as she herself acknowledges. Moreover, she has completely misunderstood the site's geology. See TR. Of 1-13-04, at 44-55, and 97-101.

Hence, no basis exists for Complainant's repeated attempts to convince this Board to impose on Jersey Sanitation the groundwater monitoring protocol proposed by the IEPA, nor to penalize Jersey Sanitation for not doing things which this Board, and the appellate court, have ruled to be beyond IEPA's power to require.

ECONOMIC BENEFITS

Complainant has presented evidence through the testimony of Mr. Blake Harris, and has argued in its brief, that Jersey Sanitation achieved an "economic benefit" in the amount of $25,233.53 "by not meeting financial assurance requirements for the subject landfill" (Complainant's brief at 136). Mr. Harris claims that during the years 1994-1998, Jersey Sanitation did not have sufficient money in its closure/post-closure care fund. Mr. Harris calculated the amount each year that the fund was in arrears, and then

he opined that, had that money been invested, Jersey Sanitation would have reaped a profit on the investment of $25,33.53. See TR. 71-77.

Notably, Mr. Harris is not an accountant--he has never sat for the certified public accountant exam, and in fact he does not even know the requirements to sit for such an examination. (TR. 79-80). The fallacy of Mr. Harris' work is self-evident, even if Mr. Harris himself cannot recognize it. Mr. Harris assumed, in calculating this supposed "economic advantage," that Jersey Sanitation had sufficient resources to pay the full amount into the closure/post-closure fund, but chose not to do so. In point of fact, though, the unrebutted evidence in this case reveals that every cent of money that came into the landfill, at least from 1989 on, was put toward paying not only for proper (meaning compliant with statutory and regulatory standards) landfill operations, but also to fund the closure/post-closure account. Indeed, not a cent of the revenue coming into the landfill went into the owners' pockets, and the facility was only operated for two years after the current shareholders took control--just long enough to bring the facility into (or close to) compliance. After it closed, no money came in.

It is simply absurd to suggest that Jersey Sanitation reaped any economic benefit through this ordeal. Certainly that is not the case with the current shareholders, whose only benefit, if it could be called such, is that they no longer have to live next to a public health hazard. And for its own reasons, Complainant has not pursued Mr. Johnson for the violations it has alleged.

Complainant's other claim of economic benefit is even more absurd. Specifically, Complainant argues that, since a groundwater assessment of the type stricken by the Board in the previous permit appeal would cost $6,000 (as calculated by Jersey

Sanitation's engineers), not having spent that $6,000 constitutes an "economic benefit." This suggestion is outrageous in light of this Board's and the appellate court's unambiguous ruling that the groundwater assessment is not properly part of Jersey Sanitation's post-closure care permit! Complainant's suggestion that Jersey Sanitation should be penalized for not having done something that it did not lawfully have to do is nothing short of frivolous.

RCS LANDFILL

The only respondent in this case is Jersey Sanitation. However, for some reason Complainant, in its closing brief, has chosen to attempt to paint the neighboring landfill, known as RCS Inc., as somehow a part of Jersey Sanitation and responsible for, liable for, or at least a party to, the alleged violations at Jersey Sanitation. These claims are utterly ridiculous and preposterous.

First, although Complainant repeatedly raises issues pertaining to RCS and the supposed involvement between RCS and Jersey Sanitation, Complainant cites to virtually nothing in the record, aside from speculation and conjecture, to support these assertions. Nothing in the record supports the hypothesized relationships between the shareholders of Jersey Sanitation and those of RCS, nor of the work performed at either facility. While it is true that the record reflects that RCS collects samples from the groundwater monitoring system at Jersey Sanitation and assists in the performance of post-closure care by Jersey Sanitation, one would suppose that to be a good thing, that has assisted in assuring the continued post-closure care of the Jersey Sanitation facility. Whether RCS does such activities voluntarily as a service to its neighbors, or through some business relationship, is neither of any relevance to this proceeding nor to any extent defined in

this record. Complainant's repeated claims about the nature of that relationship is nothing more than pure and rank speculation, and should be stricken from this record.

Most particularly troubling is Complainant's assertion that somehow RCS is owned, managed, or controlled by Jersey Sanitation and/or its shareholders. This is particularly odious because Complainant is aware of the truth, but has attempted through a vague record to misrepresent the facts. The IEPA's own documentation reveals this assertion not to be true; according to its own Non-Hazardous Solid Waste Management and Landfill Capacity in Illinois (2002 Annual Report October 2003), RCS Inc., the owner and operator of RCS landfill in Jersey County, is a subsidiary of Allied Waste Industries, Inc. See id, at R5.8. (A copy is attached, but the entire document can be viewed or downloaded at the IEPA's website at: www.epa.state.il.us/land/landfill-capacity/2002/index.html).

All references to RCS, Inc. by Complainant should be stricken.

PROCEDURAL OBJECTIONS

Complainant opened its brief with a lengthy objection about certain procedural situations that arose during the hearing. Complainant's continuing argument about these procedural issues is elevating these matters into a sideshow, probably in order to deflect attention from the weakness of Complainant's groundwater case. In any event, these objections should fall upon deaf ears; if anything, the hearing officer was overly lenient in allowing Complainant to bring in surprise evidence in this matter.

Complainant's specific continued objections are to the continuance of the hearing from September 24, 2003, to the identification by Respondent of witnesses to respond to brand new opinions tendered by Complainant just prior to first day of hearing, and to the

sur-rebuttal testimony of one of Respondent's witnesses, in response to another brand new opinion first raised by Complainant during the continued hearing in January 2004. Again, no justification exists for Complainant's objections--Complainant got much more than it was properly entitled to in this case, given Complainant's own derelictions in preparing its case.

During the course of raising its objections and arguing in its brief, Complainant suggests that somehow Respondent was remiss in its trial preparation, and specifically suggests that the continuance and additional witnesses and surrebuttable testimony came about as a result of some failure on the part of Respondent. This is a baseless assertion. As a starting point, of course, Complainant has the burden of proof in this enforcement action, not Respondent; it is unclear why Respondent would develop particular testimony prior to an indication by Complainant of an intention to pursue a theory.

More importantly, it is clear from this record that the pre-trial preparation conducted by Respondent would not at all have avoided the situations, even had Respondent done more discovery. [1]

On September 19, 2003 (four days before the start of trial, and a Friday), Complainant sent to Respondent a newly disclosed document, drafted by Karen Nelson, for the first time, opining that certain "trends," or "worsening," was occurring with respect to constituents in the groundwater at Jersey Sanitation. Again, in virtually no previous document submitted by Complainant had any of Complainant's witnesses contended that any such trend existed--to the contrary, prior to that time Complainant's

[1] Of course, pre-trial strategy is the province of the lawyer involved, not the opposing counsel. In this case, Respondent's attorney is more than certain that the pre-trial steps taken were appropriate for this case.

argument was that Respondent should investigate to see if a trend existed! (Indeed, even at trial that was Joyce Munie's testimony). Of course, this Board's ruling in the permit appeal, followed by the appellate court's affirmance, should have done away with that theory altogether. Apparently Complainant realized that fact approximately one week prior to trial, and so dispatched to Respondent this new evidence and opinion.

Karen Nelson candidly admitted that she did not develop that evidence nor the opinion until the day the document was sent to Respondent. In light of that fact, Complainant's assertion that Respondent could have discovered this opinion in discovery is perplexing--unless all discovery is postponed until virtually a couple of days prior to trial, no amount of discovery will uncover opinions that are not even generated until just before trial!! Indeed, avoidance of this kind of situation is the reason most courts now require that cases essentially be ready for trial 30-60 days prior to the actual trial date.

Rather than seeking to bar Complainant from using this new evidence (a possibility discussed by the parties at hearing), Respondent took the reasonable alternative position that it be given some opportunity to reasonably respond. Because of the lateness of the disclosure, counsel for Respondent had not had previous opportunity to discuss the new opinion with any consulting or testifying experts, and obviously in light of the ongoing trial, such consultation was not immediately available, either. However, Respondent believed that consultation could take place with a short continuance of the final day of trial, and the hearing officer agreed. Continued hearing was thus set for October 17, 2003, which was only three weeks after the last date of hearing.

On Complainant's motion, though, that October 17 hearing was continued to the next available date (which turned out to be January 13, 2004). The reason Complainant

wanted that delay was to have the opportunity to depose the two witnesses identified by Respondent as necessary to respond to the new opinions advanced by Ms. Nelson. Notably, this was an accommodation available to Complainant (who otherwise conducted no depositions in this case) that was not made available to Respondent upon production of Ms. Nelson's new opinion. No matter, Respondent agreed and Complainant deposed the two new witnesses. When hearing resumed on January 13, though, after presentation of Respondent's two witnesses and their disclosed testimony, Complainant once again called Ms. Nelson to the stand, and she again stated yet another new opinion (this one being that one of the ground water monitoring wells was improperly located in a sand seam). Again, candidly Ms. Nelson admitted that she had only developed this brand new opinion a month or less prior to this hearing date, (see TR. Of 1-13-04, at 84-85), and notably no notice was ever provided by Complainant of the new opinion until Ms. Nelson once again took the witness stand.

In order to level the playing field once again, the hearing officer allowed Respondent to present some brief additional testimony to rebut this brand new opinion; anything less would have completely deprived Respondent of any opportunity to even address this brand new position. The hearing officer was clearly correct in allowing the surrebuttal.

Again, in light of Complainant's own failure to have timely and adequately prepared its case for trial--a trial in which it bore the burdens of persuasion and of proof--it is fortunate that the hearing officer was as tolerant of these new disclosures as she was. Respondent, for its part, can live with the result, but if any relief is granted changing the

hearing officer orders, Respondent would request that it be to completely strike all new or last-minute opinions tendered by Complainant.

CONCLUSION

As stated early in this brief, Respondent acknowledges violations of the Environmental Protection Act, and mitigating circumstances go toward penalty, not violation. In this case, though, many of the claims of Complainant simply are nonexistent. Particularly is this true of Complainant's "worst case" allegations, and specifically those of "dread" groundwater contamination. In point of fact, no evidence exists to suggest that Jersey Sanitation is not following the requirements of its permit, as this Board and the appellate court have determined.

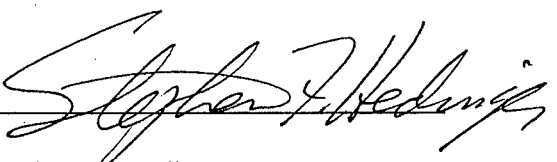
Operational violations, and violations of old, superceded permits, may have existed, and as set forth above, in many cases Jersey Sanitation will concede those points. However, the history of this site, the history of permitting (including the appeal) and enforcement process, and the history of environmental compliance, warrant a position of no penalty at all. The penalty provisions of the Environmental Protection Act are not intended for punitive purposes, but instead are intended to be an aid in enforcement. Jersey Sanitation at all times has voluntarily done all it could to be in compliance (at least following transfer of ownership in 1989). Through Jersey Sanitation's own self sacrifice, diligence and hard work, it is in compliance and is heading toward finalization of its post-closure care. The site is no longer an open dump—no longer a breeding ground for rats, flies and birds—but now is properly closed and nearly finished with its post-closure care period. No policy of the State of Illinois would be served by penalizing Jersey Sanitation in this situation. Accordingly, Jersey Sanitation requests this Board enter an order

finding the existence of certain violations, but issuing no penalty. Certainly this Board should reject Complainant's request of imposing the very same groundwater assessment requirements that have already been rejected by this Board and the appellate court.

Respectfully submitted,

JERSEY SANITATION CORPORATION,
Respondent,

By its attorneys
HEDINGER LAW OFFICE

By: 

Stephen F. Hedinger

HEDINGER LAW OFFICE
2601 South Fifth Street
Springfield, IL 62703
(217) 523-2753 phone
(217) 523-4366 fax
This document prepared on recycled paper

RCS Landfill

County	Jersey
Municipality	Jerseyville
Location	1336 W. Crystal Lake Road
Location ☎	618-498-2024
Hours of operation	Mon.-Fri.: 7 a.m. - 5 p.m.
Wastes accepted	Municipal, nonhazardous special
Tipping fee	$35 per ton
Owner	RCS Inc.**
Operator	RCS Inc.**

Facility Facts

Identification number	0830250012
Design capacity, airspace cu.yds.	2,526,239
Total permitted landfill area, acres	190.6
Permitted disposal area, acres	23.6
Highest permitted elevation, feet (msl)	662
Leachate monitoring stations	2
Groundwater monitoring wells	9
Methane collection system	None
Years remaining, estimated by landfill	28
Date/year to open -- Date/year to close	1-31-95 - 2031

Wastes Received: 2000, 2001, 2002

	TOTAL WASTES ACCEPTED			OUT-OF-STATE WASTES ACCEPTED		
	gate cu. yds	tons	tons/day	gate cu/yds.	tons	% of total
2000	47,416	14,368	55	0	0	0
2001	82,331	24,949	96	0	0	0
2002	108,522	32,885	126	0	0	0
2000 State of Origin: Illinois only		2001 State of Origin: Illinois only		2002 State of Origin: Illinois only		

Remaining Capacities: Jan. 1, 2002 and Jan. 1, 2003

2002 certified gate cu. yds. (tons)	3,194,000	(968,000)
2003 certified gate cu. yds. (tons)	3,073,000	(931,000)

Audits and Inspections

Solid Waste Mgt. Fees paid in 2002	$0.00
Last audited by Illinois EPA	6-20-00, 6-19-01 & 4-25-02
Facility inspected by	Illinois EPA, Springfield Regional Office

Fees were over paid at one time, and a credit remains.

Contacts

Owner
RCS Inc.**
1336 W. Crystal Lake Road
Jerseyville, IL 62052
Contact: Jay Ross
☎ 618-656-6912

Operator
RCS Inc.**
1336 W. Crystal Lake Road
Jerseyville, IL 62052
Contact: Jay Ross
☎ 618-656-6912

**A subsidiary of Allied Waste Industries Inc., 15880 N. Greenway-Hayden Loop, Suite 100, Scottsdale, AZ 85260 * 480-627-2700. Regional Office: 12976 St. Charles Rock Road, Bridgeton, MO 63044 * 314-739-5099

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JERSEY SANITATION CORPORATION, an Illinois corporation,	)	
Petitioner,	)	
v.	)	PCB No. 97-2 (Enforcement)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

The undersigned certifies that an original and nine copies of the foregoing Respondent's Closing Brief were served upon the Clerk of the Illinois Pollution Control Board, and one copy to each of the following parties of record in this cause by enclosing same in an envelope addressed to:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Suite 11-500
Chicago, IL 60601

Jane McBride
Office of Attorney General
500 South Second Street
Springfield, IL 62706

Carol Sudman
Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
Springfield, IL 62794

with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois before 7:00 p.m. on 22nd October, 2004.

Stephen F. Hedinger

Hedinger Law Office
2601 South Fifth Street
Springfield, IL 62703
(217) 523-2753 phone
(217) 523-4366 fax
This document prepared on recycled paper