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.	)	

MOTION FOR RECONSIDERATION

NOW COMES Respondent, JERSEY SANITATION CORPORATION, through its undersigned attorney, and pursuant to this Board's procedural rule 101.520, 35 Ill. Adm. Code §101.520, moves this Board to reconsider its Order entered on February 3, 2005. In support of this motion, Respondent states as follows:

1. This Board entered an order on or about February 3, 2005, purporting to mandatorily enjoin Respondent to conduct certain activities, as well as to pay a penalty and Complainant's attorney fees, and to cease and desist violations. (Respondent did not receive its copy of the opinion until February 11, 2005, and therefore this motion is timely pursuant to 35 Ill. Adm. Code §101.520). In so ruling, this Board misconstrued and misapplied the law, overlooked and/or misunderstood many facts, and deprived Respondent of statutory and constitutional rights.

2. For one thing, paragraphs 5 and 6 of this Board's order (at pages 38 and 39 of the opinion) purport to order Respondent to conduct certain activities; in other words, these paragraphs purport to enter a mandatory injunction requiring Respondent to do certain things. However, this Board lacks the statutory power and authority to enter any such order. The only statutory authority for this Board's action, 415 ILCS 5/33(b),

allows this Board to enter an order to cease and desist violations, to impose penalties, and for revocation of permits, but does not provide any mandatory injunction authority. In People v. Agpro, Inc., 2005 Ill. LEXIS 311 (Feb. 3, 2005), the Supreme Court held that section 42(e) of the Environmental Protection Act, 415 ILCS 5/42(e), did not authorize any mandatory injunction authority for the circuit courts. Like this Board's limited authority to order a party to "cease and desist from violations," section 42(e) permitted circuit courts only to award "an injunction to restrain violations." And, although section 42(e) has subsequently been amended to allow circuit courts to issue mandatory injunctions, no such amendment has ever been made to Section 33(b) with respect to this Board's authority. Therefore, this Board, like the circuit courts formerly, lacks authority to order Respondent to take any particular action, including those expressed.

3. The Complainant never requested attorney fees in its opening brief, despite the 138 page length of that tome. Instead, Complainant requested that relief for the first time in its reply brief. This Board's ruling upon the fees relied upon the claim that Respondent "did not contest the rate or number of hours that the People request." In fact, though, Respondent was given no opportunity to respond, in violation of Respondent's statutory rights and constitutional right to due process of the laws. Inasmuch as Complainant failed to provide detail either as to justification for the hourly rate claimed or the hours allegedly spent, no fees should be awarded. Moreover, it is axiomatic that Complainant's failure to have asked for fees in its opening brief waived the issue—issues not raised in an opening brief are waived and cannot be raised for the first time in a reply brief. See People v. Brown, 169 Ill. 2d 94, 108, 660, N.E.2d 964, 970 (1995); Gunn v. Sobucki, 352 Ill. App. 3d 785, 789-90, 817 N.E.2d 588, 591 (2d Dist. 2004).

4. This Board's Opinion and Order is premised upon numerous serious misunderstandings of the facts.

a. This Board believes that the Respondent's shareholders moved to their homes after the landfill was sited (See Opinion, at 31), but the opposite is true—no landfill exited at all until a neighbor started dumping junk into an open ravine more than a year after the innocents had moved in! (TR. 328-329). (Moreover, this dump was foisted upon these neighbors in 1975, long before any local siting approval was required for new landfills, which didn't happen until 1981!). The record also reveals (without any contradiction from Complainant!) that the open dump was a dangerous nuisance, with vermin, major conflagrations, terrible odors—and despite repeated requests, the IEPA simply refused to do anything to improve the situation! The innocents were forced to protect themselves, and so purchased the landfill so they would have legal authority to clean it up. And they did, accomplishing something in a few short years that IEPA had refused to do for more than a decade! They rolled all of the landfill's revenues into machinery, equipment and manpower, and successfully closed the landfill! This Board's suggestion that the landfill quality diminished or did anything other than improve is simply, and completely, unfounded. See Respondent's brief at 1-5, and citations set forth herein.

b. It is an undisputed fact that the landfill was granted closure effective September 30, 1994. This was an administrative action taken by the IEPA, and as a matter of law closure can only be granted if the landfill is in compliance with all permit, regulatory and statutory obligations. See Brief of Respondent at 5-6, and

citations therein. This Board's assertion of a different date of closure and compliance (see Board opinion, at 1, 2, 5 and 7) therefore is unsupported by the record, and is erroneous as a matter of law.

c. The only competent evidence of the location of open burning and composting came from Pam Shourd, who lived right next to the landfill for decades, and worked at the landfill daily at the time the inspections in question were performed. See Respondent's brief, at 8-9, and citations therein. Virtually no authority exists in the record to support this Board's supposition that the IEPA inspector had any idea where these activities were conducted in relation to permitted boundaries, and Pam Shourd's unrebutted and uncontroverted testimony was that at the time composting was not even a regulated activity (contrary to this Board's conclusion that the activity was illegal no matter where conducted). See Board opinion, at 16, 24, 28-30. Moreover, this Board's ruling relied upon a ground never argued by Complainant; the ground therefore was waived, and this Board's ruling deprived Respondent of its right, statutory and constitutional, to address the charges leveled against it.

d. This Board's opinion with respect to alleged groundwater violations found Respondent guilty of conduct that had never been charged by Complainant, and confused the Complainant's case against Respondent. The totality of Complainant's case on this issue was that the permit stated certain groundwater analysis obligations which Respondent failed to comply with, and the IEPA claimed certain activities were necessary to determine whether the landfill was causing alleged groundwater exceedances. In the same breath, Complainant

questioned the reliability of information pertaining to the groundwater. Respondent's experts, with far greater experience and expertise than Complainant's (Ken Liss, after all, ran the IEPA's groundwater program!) testified without contradiction that no trends were developed, that no evidence existed to suggest the landfill was causing any exceedances, and that the groundwater activities at the site were in full conformance with the permit, applicable regulations, and the statute. The IEPA's insistence to the contrary, in fact, was nothing less than an attempt to reimpose permit conditions that both this Board and the appellate court had previously ruled to be improper. See Respondent's brief, at 10-15, and authorities cited therein. Somehow this Board, however, changed the issue to one of violation of groundwater standards, concluded without support (in fact, contrary to the IEPA's own conclusion that inadequate evidence existed) that the landfill was the cause of the unproven contamination, and adjudged Respondent guilty. These leaps simply are unsupported by the record, and have deprived Respondent of its statutory rights and constitutional right to due process of the laws.

e. This Board reached the confounding conclusion that Respondent reaped some economic benefit because it lacked the financial resources to both close the landfill (which it successfully accomplished), and to fully fund the closure-post closure account. See Board opinion at 15-16, 32, 34-36; compare Respondent's brief at 15-17, and authorities cited therein. At no time, however, either through logic or facts, has Complainant shown in what way anyone could be economically benefited who lacked financial resources in the first place. The

uncontradicted evidence shows that Respondent used virtually all of its resources—every dollar of revenue from the disposal of trash at the landfill—to improve the environmental condition of the landfill, and ultimately to achieve its full, unconditional closure. The "economic benefit" penalty is suggested by Complainant, and imposed by this Board, based upon the mere fact that there were insufficient economic resources to do both things. Respondent posits that this Board's economic benefit decision is unsupported by the facts and/or is premised upon a gross misunderstanding of the law. The case would be greatly different if there were any evidence that profits had been spent on non-environmental activities, but virtually no such facts exist or are even suggested by this record, and in the absence of such facts, as a matter of law there can be no economic benefit.

f. Finally, no evidence supports this Board's conclusion that there is any reason to deter Respondent from anything. The unrebutted, uncontradicted facts reveal that Respondent's stock ownership changed in the late 1980s for the express reason that the landfill was being run in a way that was literally an immediate threat to the health and safety of its neighbors. After the ownership change every dime put into its operations was used by Respondent to improve its environmental condition. The result is a safely closed landfill that has generated virtually no complaints or objections from any neighbor for over 15 years. The landfill was closed without any cost to the State of Illinois. The operating violations, conceded in these proceedings by Respondent, ended as soon as the landfill closed; they are ancient history at this time, and the only testimony on the

issue reveals that Respondent is no longer involved at all in the landfill business. Accordingly there is nothing to deter. As for matters relating to financial ability, again the only evidence presented to this Board was that at least upon the change in ownership (which notably corresponds with the enforcement activity in this case), all available financial resources were devoted to improving the landfill's environmental condition. That is behavior this Board should encourage, not deter!

5. It appears from this Board's Opinion that the voluminous (175 pages total!) briefs submitted by Complainant completely dominated this Board's consideration, and confused and obfuscated the simple, unrebutted facts of this case. Already this Board and the appellate court have rebuffed, several times, efforts by Complainant (including both the Attorney General's Office and the IEPA) to illegally impose upon Respondent obligations that are impermissible by statute, regulation or law. This enforcement action, pursuing a 10 acre landfill for 15 year old operating violations and fabricated groundwater troubles, is another instance of the animus of this administrative Agency. No one—not the environment, not the People, certainly not the landfill's neighbors—is benefiting in any way from this ridiculous pursuit. The only explanation, in fact, is the IEPA's institutional embarrassment in so thoroughly falling short of its own responsibilities that neighbors were forced to purchase the nuisance, fix it, and close it in accordance with all applicable laws and regulations. The thanks of a grateful sovereign? This enforcement action. Respondent urges this Board to re-evaluate the record and the briefs, and to reconsider its ruling in this case. See Southern Illinois Asphalt Co. v. Pollution Control Board, 60 Ill. 2d 204, 208, 362 N.E.2d 406, 408 (1975) (General

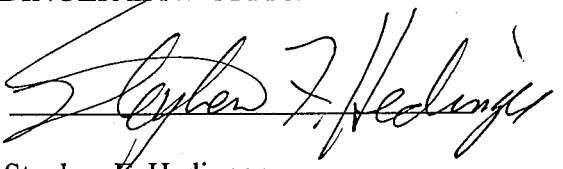
Assembly did not intend Pollution Control Board to impose monetary fine in every case of violation of the statute or regulations); see also Metropolitan Sanitary District v. Pollution Control Board, 62 Ill.2d 38, 338 N.E.2d 392(1975); Archer Daniels Midland v. Pollution Control Board, 149 Ill. App. 3d 301, 500 N.E.2d 580 (4th Dist. 1986); Wells Manufacturing Co. v. Pollution Control Board, 48 Ill. App. 3d 337, 363 N.E.2d 26 (1st Dist. 1977), aff'd, 73 Ill. 2d 226, 383 N.E.2d 148 (1978).

WHEREFORE Respondent, „JERSEY SANITATION CORPORATION, requests that this Board reconsider its opinion entered February 3, 2005, re-evaluate the record and the briefs previously submitted in this matter, and enter the relief sought by Respondent in its Respondent's Closing Brief.

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
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JERSEY SANITATION CORPORATION, an Illinois corporation,	)	
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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 Motion for Reconsideration 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 5:30 p.m. on March 18, 2005.

Stephen F. Hedinger

Hedinger Law Office
2601 South Fifth Street
Springfield, IL 62703
(217) 523-2753 phone
(217) 523-4366 fax
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