

ILLINOIS POLLUTION CONTROL BOARD

August 17, 2006

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 06-33
)	(Enforcement - Land)
J&S COMPANIES, INC., a Missouri)	
corporation, and FIRST CHOICE)	
CONSTRUCTION, INC., an Illinois)	
corporation,)	
)	
Respondents.)	

DISSENTING OPINION (by T.E. Johnson):

I respectfully dissent with the majority opinion. Not only am I unsure as to whether we have arrived at today's order in a procedurally correct fashion¹, I specifically disagree with the majority's imposition of a \$25,000 civil penalty on J&S Companies, Inc. (J&S). A review of the record reveals that J&S demolished the site in question, but did not actually dump the waste. Rather, First Choice Construction, Inc. (First Choice) was hired to bring waste from the demolition site to the disposal site.

Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation; whether the respondent showed due diligence in attempting to comply; whether any economic benefit was accrued by the respondent from delaying compliance; the need to deter further violations by the respondent and others similarly situated; whether the respondent voluntarily self-disclosed the violation; and whether the respondent has agreed to undertake a supplemental environmental project (415 ILCS 5/42(h) (2004)). Section 42(h) also requires the Board to ensure that the penalty is "at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id.*

The listed 42(h) factors clearly weigh in favor of mitigation in this instance. While the violations in this matter occurred over a period of time, J&S did not actually perform the open dumping. Further, the record does not contain, nor do the People allege any actual harm to the

¹ Please note that I also filed a dissent in this case on June 16, 2006. In that dissent I disagreed with the majority's finding that First Choice admitted the facts contained in the complaint without the benefit of either a motion to deem facts admitted or a motion for summary judgment. I stated that the majority's *sua sponte* decision to find that First Choice admitted the allegations in the complaint was neither necessary nor appropriate at that time. See People v. J&S Companies, Inc., PCB 06-33 (Jun. 16, 2006). Nothing in the interim has caused me to vary my opinion of June 16, 2006.

environment. *See* 415 ILCS 5/42(h)(1) (2004). The People do not state how responsive J&S was or how long it took J&S to come into compliance, but the record does show that J&S cleaned up the site. *See* 415 ILCS 5/42(h)(2) (2004). The record does not contain any evidence of an economic benefit, and J&S has no previously adjudicated violations. *See* 415 ILCS 5/42(h)(3), (4) and (5)(2004).

I think it important that J&S did not actually perform any dumping. Although it is true that J&S hired First Choice to haul the construction or demolition debris from the demolition site, it is also true that J&S was diligent in cleaning up the site and that any environmental-based risk has ended.

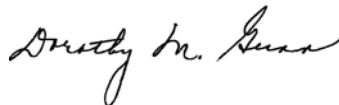
The People ask for a civil penalty of \$25,000. In light of the fact that J&S cleaned up the site, did not have any measurable economic benefit, and had no previously adjudicated violations, a consideration of the 42(h) factors clearly mandates mitigation of any penalty imposed. Accordingly, I feel that a civil penalty of \$25,000 is excessive.

For the above stated reasons, I respectfully dissent

A handwritten signature in black ink, consisting of a large, stylized capital 'T' followed by a horizontal line that ends in a small hook.

Thomas E. Johnson

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on August 17, 2006.

A handwritten signature in black ink, written in a cursive style, appearing to read 'Dorothy M. Gunn'.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board