BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, *by* LISA MADIGAN, Attorney General of the State of Illinois,	)	
Complainant,	)	
-vs-	)	
EDWARD PRUIM, an individual, and ROBERT PRUIM, an individual,	)	
Respondents.	)	PCB No. 04-207
	)	PCB No. 97-193
	)	(Consolidated)
	)	(Enforcement)
PEOPLE OF THE STATE OF ILLINOIS, *by* LISA MADIGAN, Attorney General of the State of Illinois,	)	
Complainant,	)	
-vs-	)	
COMMUNITY LANDFILL COMPANY, INC.,	)	
Respondent.	)	

to: Mr. Mark La Rose, La Rose & Bosco
200 N. La Salle Street, #2810
Chicago, IL 60601

Mr. Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph, #2001

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that we have today, November 18, 2011, filed with the Office of the Clerk of the Illinois Pollution Control Board, by electronic filing, Complainant's Brief on Apportionment of Penalty, a copy of which is attached and herewith served upon you.

Electronic Filing - Received, Clerk's Office, 11/18/2011

PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN
Attorney General of the
State of Illinois

BY: ________________________

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COMPLAINANT'S BRIEF ON APPORTIONMENT OF PENALTY

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and hereby presents its brief regarding apportionment of the $250,000.00 civil penalty assessed by the Illinois Pollution Control on

August 20, 2009 ("Board Order").

I. INTRODUCTION

The August 20, 2009 Board Order assessed a civil penalty of $250,000.00, joint and several among all Respondents, for the violations found by the Board. However, the Board did not find Respondents Edward Pruim and Robert Pruim ("Pruims") personally liable for the violations alleged in Counts I, II, III, VI, and XII, ("Daily Management Violations"). In addition, the Pruims were not Respondents in Counts XIV, XV, XVI, and XVII ("CLC-Only Violations"). The Board did find the Pruims jointly and severally liable with CLC on Counts V, IV, VII, VIII, IX, X, XVII, and XIX (hereinafter "Joint Violations").

The Illinois Appellate Court, Third District, affirmed personal liability against the Pruims where applicable, and also affirmed the finding that liability was joint and several on the Joint Violations. However, the Court has remanded the matter to the Board for apportionment of the total $250,000.00 civil penalty.

For the reasons set forth herein, Complainant recommends that a civil penalty of $8,000.00 be assessed against CLC for the Daily Management Violations, a civil penalty of $4,700.00 be assessed against CLC for the CLC-Only Violations, and that a civil penalty of $237,300.00 be assessed against CLC and the Pruims, jointly and severally, for the Joint Violations. Complainant believes that this apportionment is supported by record, and the civil penalties factors listed in Section 42(h) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/42(h) (2010).

II. PRELIMINARY MATTERS

1. Dissolution of Community Landfill Company

On May 10, 2010, CLC was involuntarily dissolved by the Illinois Secretary of State. As of the date of filing this Brief, CLC has not been reinstated. The dissolution does not affect the Board's authority to continue an action against CLC, since dissolution does not abate a civil proceeding pending against a corporation on the effective date of dissolution[1]. Moreover, a new action may be brought against a dissolved corporation within five years of the date of dissolution[2].

This Supplemental Brief is brought based on the evidence produced at the 2008 hearing, at which time CLC was still viable. Therefore, Complainant does not believe that the 2010 dissolution should have any bearing on the Board's apportionment. Complainant's arguments are based solely on information in the record as of the date of hearing.

2. Robert Pruim Bankruptcy Filing

On October 27, 2011, Respondent Robert Pruim filed a Voluntary Chapter 7 Petition in the United States Bankruptcy Court, Northern District of Illinois. The Case Number is 11-43636. In the Petition, Mr. Pruim lists "Illinois Environmental Protection Agency....Government fine.... [amount]Unknown" on Schedule F ("creditors holding unsecured nonpriority claims")[3].

While Complainant believes it appropriate to bring this matter to the Board's attention, Complainant does not believe that Robert Pruim's Bankruptcy filing should affect further proceedings in this case. Specifically, Complainant does not believe that the automatic stay provisions of 11 U.S.C. 362 apply to the Board's determination on Remand from the Appellate Court.

[1] 805 ILCS 5/12.30(c)(5)
[2] 805 ILCS 5/12.80
[3] No other references to this case are listed in the petition. The Board is not named under any category of creditors.

Section 362(b)(4) of the Bankruptcy Code provides that the automatic stay does not apply to the "commencement or continuation of an action or proceeding by a governmental unit... to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgment." 11 U.S.C. 362(b)(4). The basis of the exception is the theory that bankruptcy should not become a 'haven for wrongdoers'[4]. The regulatory exception "embod[ies] Congress' recognition that enforcement of the environmental protection laws merits higher priority than the bankruptcy policies underlying the automatic stay" [5]. Section 362(b)(4) is to be broadly construed so as not to override laws enacted to protect the public interest[6].

Courts have universally held that actions based on environmental protection statutes are precisely the type of regulatory actions that Congress exempted from the automatic stay under Section 362(b)(4)[7]. Enforcement cases brought by under the Illinois Environmental Protection Act ("Act") are likewise deemed to be exempt from the automatic stay. See: In re Mateer[8] (enforcement action taken under the Act to eliminate hazardous environmental condition not stayed); In re Lenz Oil Services, Inc.[9] (State action seeking fixing of civil penalties under the Act, and order directing remedial action, not stayed).

Moreover, Courts almost universally hold that *fixing* the amount of monetary judgments in environmental cases is within the police and regulatory exception to the automatic stay. *See,*

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[4] *Lockyer v. Mirant Corp.*, 398 F. 3d 1098, 1107 (9th Cir. 2005).
[5] *United States v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir. 1988).
[6] *In re Commonwealth Oil Refining Co.*, 805 F.2d 1175, 1184 (5th Cir. 1986).
[7] *See: Penn Terra Ltd. v. Department of Environmental Resources,* 733 F.2d 267, 272 (3rd Cir. 1984); *In re Commonwealth Oil Refining Co.*, 805 F.2d 1175 (5th Cir. 1986) (Resource Conservation and Recovery Act); *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077 (3rd Cir. 1987) (Clean Air Act); *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348 (6th Cir. 1986) (Clean Air Act); *In re Commerce Oil Co.*, 847 F.2d 291 (6th Cir. 1988) (Tennessee Water Quality Control Act).
[8] 205 B.R. 915, 920 (C.D. Ill. 1997)
[9] 65 B.R. 292, 294 (N.D. Ill. 1986)

e.g. U.S. v. Nicolet, Inc.[10], (legislative history clearly indicates that attempting to calculate damages for violation is not stayed); *In re Commonwealth Oil Refining Co.*[11], (mere entry of a money judgment is not affected by the automatic stay); *In re Commerce Oil Co.*[12], (State's action to fix penalties not stayed); *In re Lenz Oil Service, Inc.*[13], (fixing of penalties and ordering injunctive relief under the Illinois Environmental Protection Act does not violate the automatic stay). Thus, this matter, which seeks to calculate or *fix* the amount of civil penalties pursuant to the Appellate Court's Remand, is not stayed or otherwise affected by Robert Pruim's bankruptcy filing.

III. THE DAILY MANAGEMENT VIOLATIONS SHOULD BE ALLOCATED A PENALTY OF $8,000.00

The Board found CLC solely liable for the violations alleged in Counts I, II, III, VI, and XII. These violations all involve one-day operating violations identified by Illinois EPA inspectors during unannounced inspections of the Landfill[14] . Complainant believes, that, under the circumstances of this case only, and for purposes of allocation of the $250,000.00 combined penalty, the Board should find these violations akin to violations addressed through Administrative Citations under the Act, and assess a penalty of $500.00 per violation, per day. If the Board chooses to do so, it will assess a total penalty of $8,000.00 for the CLC violations. Specifically, the Board should note the following:

1. Count I: <u>Failure to Adequately Manage Refuse and Litter</u>

[10] 857 F2d 202, 208 (3d Cir 1988)
[11] 805 F.2d 1175, 1186
[12] 847 F.2d 291, 297 (6th Cir. 1988)
[13] 65 B.R. 292 (N.D. Ill 1986)
[14] In its decision the Board noted that "the daily operations violations are single day events". Board Order, p. 53.

In its decision, the Board found all the violations alleged in Count I of the Complaint[15].

As alleged these violations included:

a) 415 ILCS 5/21(o)(1): March 22, 1995, May 22, 1995;
b) 415 ILCS 5/21(o)(5): March 22, 1995
c) 415 ILCS 5/21(o)(12) April 7, 1994, March 22, 1995, May 22, 1995, July 28, 1998, March 31, 1999, May 11, 1999, July 20, 1999;

In Count I, Complainant alleged ten separate daily violations of Section 21(o) of the Act, 415 ILCS 5/21(o). At $500.00 per day, per violation, the penalty for the violations in Count I would total $5,000.00.

2. Count II: Failure to Prevent or Control Leachate Flow

As alleged these violations included: 415 ILCS 5/21(o)(2) or 5/21(o)(3): April 7, 1994, March 22, 1995, May 22, 1995. The violations all relate to leachate seeps and leachate flows from the sides of the landfill.

Thus in Count II, Complainant alleged three separate daily violations of Section 21(o) of the Act, 415 ILCS 5/21(o). At $500.00 per day, per violation, the penalty for the violations in Count I would total $1,500.00

3. Count III: Failure to Properly Dispose of Landscape Waste

As alleged, this violation involved two days of violation of 415 ILCS 5/22.22(c), the presence of process/composted waste in the active area of the Landfill on August 8, 1993, and the presence of tree branches and brush in the active area on April 17, 1994[16]. The violations were conceded on summary judgment.

At $500.00 per day, per violation, the penalty for the violations in Count III would total

[15] Board Order, p.29

[16] October 3, 2002 Board Order granting partial summary judgment, p.9

$1,000.00.

4. Count VI: Water Pollution

The violation alleged in Count VI relate to the same leachate control violations alleged in Count II, but are limited to the May 22, 1995 inspection. Complainant alleges that on that date the leachate that seeped from the sides of the Landfill migrated into the north perimeter ditch at the Landfill, thereby causing water pollution.

The same acts or omissions which caused the violations in Count II caused the violations in Count VI. For the purpose of this case only, Complainant suggests that no additional penalty be allocated to Count VI.

5. Count XII[17]: Improper Disposal of Used Tires

This violation is alleged only on July 28, 1998, when an inspector observed two tires mingled with waste in the active disposal face[18]. Complainant believes that the limited gravity of the violation and the single day of violation suggest that a $500.00 penalty is appropriate.

Summary of Daily Management Violations

Complainant believes that the penalties recommended for these violations are consistent with the penalty factors contained in 415 ILCS 5/42(h). None of the violations appear to have resulted in a large, identifiable economic benefit to the Defendants. Most were the result of sloppy maintenance or lack of attention to permit requirements. The duration for each of the violations was a single day. Also, as the Board observed in its decision, several of the violations were corrected prior to the subsequent inspections, which demonstrated a degree of diligence[19].

[17] This Count was Count XIII in the Second Amended Complaint in PCB 97-193, but Count XII in the complaint in PCB 04-207. In its decision, the Board lists the waste tire disposal count as Count XII.
[18] October 3, 2002 Board Order granting partial summary judgment, p.15
[19] Board Order, P.55

Finally, the amount of penalty recommended herein, i.e. $500.00 per violation, is consistent with a prior adjudicated violation against CLC in an administrative citation case. In 1989, the Board entered an order directing a penalty of $500.00 for violation of Section 21(p)(5) of the Act[20]. The violation related to uncovered refuse from a previous operating day, a violation that was observed only on November 23, 1988.

Complainant does not suggest that all future daily operating violations at Illinois landfills be limited to penalties similar to administrative citation proceedings. However, in this case, where the Board's total assessed penalty amount is fixed at $250,000.00, Complainant believes that the harm resulting from the daily operational violations was temporary and minor when compared to the remaining Joint Violations.

Complainant recommends a total civil penalty of $8,000.00 be assessed against Respondent CLC for the violations found by the Board on Counts I, II, III, VI, and XII.

IV. THE CLC-ONLY VIOLATIONS SHOULD BE ALLOCATED A PENALTY OF $4,700.00

1. Count XIV: <u>Violation of Permit Condition</u>

This violation relates to the failure of CLC to install temporary fencing to prevent blowing litter. The violation is alleged only on March 31, 1999.

Although a permit condition was violated, the single day of violation and the similarity to the Daily Management Violations suggests that a penalty allocation of $500.00 is warranted.

2. Count XV: <u>Violation of Permit Condition</u>

This violation continued from March 31, 1999, when an inspector noted that the

[20] In the Matter of Community Landfill Company, AC 89-6 (February 23, 1989)

landfill gas control system was operating, until at least April 22, 1999, when CLC transmitted the required authorization request to Illinois EPA[21]. Complainant recommends that a penalty of $100 per day be assessed, for a total of $2,200.00.

3. Count XVI: Violation of Permit Condition

The violations in this count were found in summary judgment, and related to maintenance issues, such as erosion fissures. The violations were found during inspection on March 3, 1999 and July 20, 1999. Complainant recommends that a $500.00 penalty be allocated for each violation, for a total penalty of $1,000.00 for this Count.

4. Count XVII: Violation of Permit Condition

This Count relates to improper disposal of leachate in active waste disposal cells on March 3, 1999 and July 20, 1999. Complainant recommends a penalty allocation of $1,000.00 for the violations alleged in this Count.

Summary of CLC-Only Violations

Complainant suggests that the Board allocate a total penalty of $4,700.00 against CLC for the violations in Counts XIV, XV, XVI, and XVII. Under the circumstances of this particular case, the recommended allocation is consistent with the Section 42(h) penalty factors. None of the violations suggest the need to recover a significant economic benefit derived from the violations. As with the Daily Management violations, the duration of each is limited. No permanent harm resulted from (for example), the one day failure to control litter with moveable fencing. While the violations continue to demonstrate the sloppy operating history of the Landfill, the gravity of these violations do not compare to gravity of the Joint Violations.

[21]The authorization was received by Illinois EPA on May 5, 1999, but was dated April 22d..

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IV. THE JOINT VIOLATIONS SHOULD BE ALLOCATED A CIVIL PENALTY TOTALING $237,300.00

The Joint Violations include Counts V, IV, VII, VIII, IX, X, XVII, and XIX. The Board found Respondents CLC, Edward Pruim, and Robert Pruim liable for these violations jointly and severally. The Appellate Court directed that a separate penalty be apportioned for these violations as a group, but did not require the Board to allocate a separate penalty for each of Count.

Complainant believes that the Joint Violations must be assessed the highest share of the $250,000.00 penalty to accomplish the purposes of the Act. Without question, these violations were the most serious. They include serious permitting violations, repeated failure to meet minimal financial assurance requirements, and continuing operations of a municipal solid waste landfill well after capacity had been reached. The duration of these violations was astounding, with several continuing through the date of hearing. The economic benefit accruing to the Respondents, especially the individual respondents, was significant. As no penalty has yet been paid, the Respondents continue to retain these funds.

The Board has subdivided these Joint Count violations in four categories: Significant Modification (Count V), Financial Assurance (Counts IV and XVII), Overheight (Counts VII, VIII, IX and X), and Closure Estimates (Count XIX). Complainant believes that a review of these violations under the section 42(h) factors supports its position on penalty.

42(h)(1): *Duration and Gravity of the Violation*

Duration: The Board found that the Significant Modification violations were ongoing for 1,178 days[22]. Also, the Board noted that the Overheight Violations had continued through

[22] Board Order, p.55

at least 2000[23]. While the Board did not feel the need to calculate the exact duration, it noted in its decisions that the Overheight Violations, as well as the Financial Assurance Violations, continued for 'hundreds of days'[24]. Complainant notes that the evidence at hearing showed that no later than January 1, 1995, the overheight existed. Using even the earliest possible date in the record (i.e. January 1, 2000), the overheight violations continued for at least 1,826 days.[25]

The Boards findings show that the duration of the Joint Violations was extreme[26]. This factor weighs heavily in aggravation of the Joint Violations.

Gravity: All of the Joint Violations have a high degree of gravity. The failure to submit a new permit application at a time when the RCRA Landfill regulations were being significantly strengthened allowed the Respondents to continue operation under the old standards for years, and avoid the expenses involved in updating their facility (as other landfills were required to do). This violation is extremely serious. Likewise, the lack of proper financial assurance threatened the welfare of all Illinois taxpayers, and is very serious. Finally, the Overheight Violations were the result of a decision to continuing operations well after the Respondents knew that Parcel B should be shut down. Respondents' actions related to the Overheight Violations demonstrated utter contempt for the regulations, the requirements of the Landfill's permits, and the Act.

42(h)(2): *The presence or absence of due diligence on the part of the respondent in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefore as provided by this Act.*

All of the Joint violations demonstrated a complete lack of diligence. As the Board noted in its decision, the Respondents delayed filing the required permit application (and

[23] CLC conceded that the overheight continued to exist in summary judgment. See: October 3, 2002 Board Order granting partial summary judgment, p.13
[24] Board Order, p. 55
[25] Complainant believes that the overheight continues to be in place as of the date of filing this brief.
[26] The potential daily penalty for the Significant Modification Violation alone is $11,780,000.00

benefitted financially therefrom) while they continued negotiations with the Landfill owner after the due date . The Respondent continued disposal operations, in flagrant violation of the law, during this period. Also, as the Board noted, "...the overheight issue remains"[27]. The Respondents have taken no effective action to fix the problem, which, by the time of hearing, had existed for 13 years. The absence of diligence is an aggravating factor for the Joint Violations.

> **42(h)(3):** *Any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance.*

All of the demonstrable economic benefit of noncompliance in this case was derived from the Joint Violations. The Board found that the economic benefit from filing Significant Modification violation alone was more than $140,000.00.[28] The Board also noted that economic benefit was derived from the Overheight Violations, stating "....clearly additional economic benefit was had".[29] Recovery of the economic benefit of noncompliance is necessary and appropriate in this case, and supports the penalty allocation recommended by Complainant.

> **42(h)(4):** *The amount of monetary penalty which will serve to enhance voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;*

Complainant believes that only a significant penalty, joint and several against Edward Pruim, Robert Pruim, and Community Landfill Company, will serve to deter future violations[30].

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[27] Board Order, p.55
[28] Board Order, p.56
[29] Id.
[30] Complainant does not need to refer to the recent dissolution of CLC. In its post-hearing brief in this matter, filed while CLC was still a viable corporation, Complainant noted that a penalty against CLC only would likely be uncollectible and have no deterrent effect. See: Complainant's Closing Argument and Post-Hearing Brief, p.52 (2/6/2009).

42(h)(5): *the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;*

CLC has prior adjudicated violations, including the Board's findings in PCB 03-191. The Board's finding against CLC in this case were affirmed on Appeal. Also, in 1989, Community Landfill Company received an Administrative Citation in the case AC 89-6. Complainant is not aware of prior adjudications involving Edward and Robert Pruim individually.

42(h)(6): *Whether the respondent voluntarily self disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency;*

Respondents did not voluntarily self-disclose the Joint Violations.

42(h)(7): *Whether the respondent has agreed to undertake a 'supplemental environmental project'....*

No supplemental environmental project was proposed by Respondents as remedy for the Joint Violations.

Summary of Joint Violations

The record shows that the Joint Violations were far and away the most serious in this case, and should be apportioned the bulk of the penalty. The duration, gravity, and future impact of these violations were orders of magnitude greater than the Daily Management and CLC-Only Violations. Further, they are the only violations where clear, demonstrable economic benefit accrued to the Respondents. The Respondents still retain this benefit.

To accomplish the purpose of the Act and aid in effective enforcement, the Board should allocate the largest portion of the $250,000.00 civil penalty in this matter to these violations. Complainant request that the Board apportion a penalty of $237,300.00 for these violations.

V. CONCLUSION

Based on the record and the arguments set forth herein, Complainant requests that the Board apportion the $250,000.00 Civil Penalty assessed in this matter as follows:

Counts I, II, III, VI, and XII: $8,000.00 against Respondent CLC;

Counts XIV, XV, XVI, and XVII: $4,700.00 against Respondent CLC;

Counts V, IV, VII, VIII, IX, X, XVII, and XIX: $237,300.00 against Respondents CLC, Edward Pruim, and Robert Pruim, jointly and severally.

RESPECTFULLY SUBMITTED

PEOPLE OF THE STATE OF ILLINOIS
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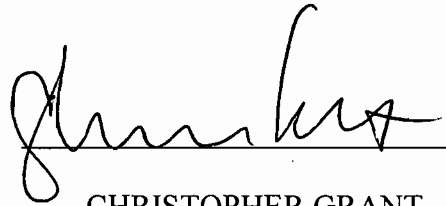
CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 18th day of November, 2011, the foregoing Complainant's Brief on Apportionment of Penalty, and Notice of Electronic Filing, upon the persons listed on said Notice by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago Illinois.



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