BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, Complainant, vs. COMMUNITY LANDFILL COMPANY, INC., Respondent.	)	PCB No. 97-193 (Enforcement – Land) (consolidated)
PEOPLE OF THE STATE OF ILLINOIS, Complainant, vs. EDWARD PRUIM and ROBERT PRUIM, Respondents.	)	PCB No. 04-207 (Enforcement – Land)

NOTICE OF FILING

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PLEASE TAKE NOTICE that on **DECEMBER 16, 2011**, the undersigned caused to be electronically filed with Mr. John Therriault, Clerk of the Illinois Pollution Control Board, 100 West Randolph Street, Suite 11-500, Chicago, Illinois 60601, the **RESPONDENTS COMMUNITY LANDFILL COMPANY, INC., ROBERT PRUIM AND EDWARD PRUIM'S RESPONSE BRIEF ON APPORTIONMENT OF PENALTY,** a copy of which is attached and hereby served upon you.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 04-207
	)	(Enforcement – Land)
EDWARD PRUIM and ROBERT PRUIM,	)	
	)	
Respondents.	)	
	)	
PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-193
	)	(Enforcement – Land)
	)	(Consolidated)
COMMUNITY LANDFILL COMPANY, INC.	)	
	)	
Respondent.		

RESPONDENTS' RESPONSE BRIEF ON APPORTIONMENT OF PENALTY

Respondents, COMMUNITY LANDFILL CO., INC. ("CLC"), ROBERT PRUIM AND EDWARD PRUIM (collectively "the Pruims") by and through their attorneys, LaRose & Bosco, Ltd., in response to Complainant's Brief on Apportionment of Penalty state as follows:

I. Introduction

This matter arises out of the imposition of a $250,000 civil penalty assessed by the Board on August 20, 2009 jointly and severally among all Respondents. As the Complainant's Brief notes, the Third District Appellate Court remanded the matter to the Board on August 5, 2011.

Based on the fact that the Pruims were not in charge of the daily management of the landfill, as well as the practical aspects of the stated goal of deterrence of future violations and compliance with the Illinois Environmental Protection Act, 415 ILCS 5/1 et seq., ("the Act") ,

Respondents disagree with Complainant's recommended apportionment. For the reasons set forth below, Respondents recommend that the civil penalty be apportioned as follows: $100,000 to CLC for the "Daily Management" and "CLC- Only" violations, $140,000 to CLC and $10,000 to CLC and the Pruims, jointly and severally, for the joint violations.

II. Daily Management and CLC-Only Violations

Respondents have no issue with CLC being apportioned part of the penalty based on the "Daily Management" violations (Count I – Refuse and Litter Count II - Leachate, Count III – Landscape Waste, Count VI – Water Pollution and Count XII – Waste Tires) and the "CLC-Only" violations (Count XIV – Temporary Fencing, Count XV – Gas Management System, Count XVI – Erosion and Count XVII – Improper Use of Leachate). These violations were the most numerous and had a potential direct effect on the environment. Board Order of August 20, 2009 at 35. The Board found that these violations included leachate seeping out of the landfill causing possible water pollution around the landfill, inadequate management of refuse and litter, as well as tires being improperly mixed with waste. Board Order of August 20, 2009, pp. 28-35; Board Order of October 3, 2002, p. 15. Also included in this group of violations are a variety of permit condition violations, including leachate disposal and gas control system operations. Board Order of August 20, 2009, pp. 28-35

As 415 ILCS 5/42(h) states, the Board may consider a variety of factors when determining the appropriate penalty, including the duration and gravity of the violation. Though taken individually the aforementioned violations are relatively minor in nature, Respondents believe that, due to the overall quantity of environmental violations and the accompanying permit issues they warrant a far greater portion of the civil penalty than the *de minimus* amounts suggested by

Complainants. Therefore, Respondents recommend that CLC be apportioned $100,000 for the "Daily Operations" and "CLC-Only" violations.

III. Joint Violations Should Not be Assessed Jointly and Severally against CLC and the Pruims

In its brief, Complainant makes no attempt to differentiate between the remaining violations (the "joint violations"), grouping them together and allocating the remaining penalty dollars jointly and severally amongst CLC and the Pruims. Complainant's Brief, pp. 10-13. Complainant lays out a series of eight "joint" violations against CLC and the Pruims, but this presentation causes the violations seem more numerous than they actually are. Complainant's Brief, p. 10. Counts VII, VIII, IX and X all arise from a single violation; overheight. Therefore, the joint violations boil down to four, not eight violations: overheight, significant modification permit, financial assurance and closure estimates.

Furthermore, the Complainant's attempt to weigh the penalty equally for the joint violations between CLC and the Pruims is not supported by the record and law. Generally, a corporate officer is not liable for the environmental violations of his company, unless he has personal involvement in the commission of those violations. See, *People v. C.J.R. Processing, Inc.*, 269 Ill.App.3d 1013, 1018 (3rd Dist. 1995). In this case, the Board did not apply the so-called "responsible corporate officers doctrine", set forth in *C.J.R. Processing, Inc.* Board Order of August 20, 2009, p. 49. As the Board correctly noted, the Pruims, individually, had little to do with the day-to-day operations of the site, and all of the actions the Pruims took regarding the landfill were done as corporate officers. Board Order of August 20, 2009, pp. 41-49. The Pruims, as individuals, and CLC did not have an equal part in the violations; CLC as a corporation, acting through its corporate officers was almost solely responsible for the joint

violations. As such, it is not appropriate to apportion the full remaining penalty amount jointly and severally amongst CLC and the Pruims: CLC should shoulder the brunt of this amount.

Furthermore, Complainant makes a cursory allegation that a penalty against CLC will likely have no deterrent effect, Complainant's Brief at 12, FN 30, so any amounts apportioned must be joint and several to achieve the desired result. This stands in contrast to Complainant's earlier position, which expressly ask the Board to ignore the 2010 dissolution of CLC in regards to the Board's apportionment. Complainant's Brief at 3.

This is an inconsistent position and one that is not supported by facts and law. The principal reason for the issuance of civil penalties under the Act is to aid in the enforcement of the Act, *Metropolitan Sanitary District v. Pollution Control Board*, 62 Ill.2d 38, 45 (1975), as well as to deter future violations. See 415 ILCS 5/42(h)(4). An examination of the effect of Robert Pruim's current bankruptcy proceedings, as well as §42(h) of the Act, particularly 42(h)(4), will show that Respondents', not Complainant's, proposed apportionment would best achieve the stated goal of the civil penalties under the Act.

A. Robert Pruim's Bankruptcy is Relevant to the Apportionment

Respondents wish to draw the Board's attention to the ongoing bankruptcy proceedings of Robert Pruim, case number 11-43636 in the U.S. Bankruptcy Court, Northern District of Illinois. Though the Complainant may have accurately stated the immediate legal aspects of Robert Pruim's bankruptcy filing as it pertains to apportionment, they have completely ignored the practical effect. Complainant's Brief, pp. 3-5, 12.

Under §362(b)(4) of the bankruptcy code, the automatic stay provided by the filing of the bankruptcy action does not apply to "[the] commencement or continuation of an action or proceeding by a governmental [unit]." 11 USCA 362(b)(4) (West 2011). It is established that

under this provision a suit "attempting to fix damages for violation of ... [an environmental protection] law is not stayed." *In re Lenz Oil Service, Inc.*, 65 B.R. 292, 296 (N.D. Ill 1986). As the Complainant states, the instant suit is to fix the amount of civil penalties for violations of an environmental protection law. Complainant's Brief, pp. 4-5. Under *In re Lenz Oil Service, Inc.*, the apportionment should be exempt from the automatic stay provisions of §362 of the bankruptcy code. Complainant's Brief , pp. 3-5, see *In re Lenz Oil Service, Inc. 65 B.R. at* 296.

That is as far as the Complainant's analysis goes, and it is not far enough. Though fixing damages alone is exempted from the automatic stay of bankruptcy, a suit to actually enforce that money judgment falls outside of the §362(b)(4) exception. *In re Lenz Oil Service, Inc.*, 65 B.R. at 295, stating "Section § 362(b)(4) 'extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment.' H.R.Rep. at 343, 1978 U.S. Code Cong. & Ad.News at 6299." Because all of the assets of the debtor are in possession of the bankruptcy court as a common fund out of which all creditors are paid a share, to allow enforcement of a full money judgment by a unit of government would grant them "preferential treatment to the detriment of all other creditors." *In re Lenz Oil Service, Inc.*, 65 B.R. at 295.

In short, though Complainant is correct that this suit can fix a money judgment against Robert Pruim, such a judgment will not be enforceable. *In re Lenz Oil Service, Inc.*, 65 B.R. at 295-96. The practical effect of attempting to ascribe a money judgment to Robert Pruim is nothing: any attempt to collect the judgment or otherwise enforce it will be frustrated by the ongoing bankruptcy proceeding. *In re Lenz Oil Service, Inc.*, 65 B.R. at 95. This is absolutely a factor when performing an analysis under §42(h) of the Act.

B. The §42(h) Factors Weigh in Favor of Respondents' Proposed Apportionment

i. Duration, Gravity, and Due Diligence (§42(h)(1-2))

With respect to the duration and gravity of the joint violations, §42(h)(1) the Board found that the overheight may not have been as significant as initially reported. Board Order of August 20, 2009, p. 55. Though the significant modification application was submitted late, a pending lease agreement was the reason behind the delay; it was not as though Respondents blatantly ignored the Act for years on this issue with no affirmative action. Although the joint violations were ongoing for an extended period of time, the above facts should not weigh in favor any further "aggravation" of the penalties allocated to the joint violations as suggested by Complainant, as they were already considered by the Board in determining the amount of the civil penalty. See, Board Order of August 20, 2009, pp. 55-58, Complainant's Brief, p. 11.

Additionally, the Board did find that there was due diligence, on behalf of the Respondents in attempting to and finally securing financial assurance, which is a mitigating factor under §42(h)(2). Board Order of August 20, 2000, p. 55. The Board went so far as to say that "diligence can be found in the record" and concluded that this factor would weigh neither for nor against Respondents. Id.

There is no reason for this conclusion to change. Complainant argues that a supposed lack of due diligence factor should be an aggravating factor for the joint violations, but merely rehashes the due diligence aspects that did not favor the Respondents while ignoring the facts that the Board found to be in favor of Respondents on this factor. Complainant's Brief, pp. 11-12. As the Board correctly noted, the evidence in this area is mixed and that supports a finding that §42(h)(2) weighs neither for nor against the aggravation of a penalty for the joint violations.

ii. Economic Benefit (§42(h)(3))

The Board conceded that the economic benefit numbers that Complainant offered on the overheight issue may be incorrect. Board Order of August 20, 2009, p.55. In addition to that finding, §42(h)(3) should weigh against the apportionment of the penalty jointly and severally to CLC and the Pruims. As Complainant states, Robert Pruim is currently bankrupt and CLC itself is dissolved. Complainant's Brief, pp. 2-5. For all intents and purposes, any economic benefit derived from the violations was not realized by the Respondents.

Additionally, §42(h) of the Act provides that if the Board finds that arbitrary or unreasonable hardship would result from the penalty, then the Board is not required to make the penalty at least as great as the economic benefits accrued. A large joint and several penalty imposed on a bankrupt individual is certainly an unreasonable economic hardship. §42(h)(3) should weigh against an apportionment of a large portion of the penalty jointly and severally.

iii. Deterrence (§42(h)(4))

The only point Complainant makes in regards to deterrence is that the penalty must be joint and several against CLC and the Pruims. Complainant's Brief, p. 12. The argument is that a penalty against CLC alone would likely be uncollectable and have no deterrent effect. Complainant's Brief, p. 12, FN 30. This is in stark contrast to Complainant's assertion earlier in its brief that the dissolution of CLC should have no bearing on the Board's apportionment in this matter. Complainant's Brief, pp. 2-3.

Complainant seems to want to have it both ways. On one hand, Complainant implores the Board to ignore CLC's dissolution for the purposes of apportionment. Complainant's Brief, pp. 2-3. Then Complainant seeks to impose a very large portion of the penalty jointly and severally on CLC and the Pruims, because of the alleged difficulty of enforcement against CLC.

Complainant's Brief at pp, 2-5, 12, FN 30. Additionally, in making its argument about the enforcement issues involving a penalty against CLC, Complainant completely ignores the same concern for Robert Pruim. See Section III(A), infra.

§42(h)(4) advocates for a monetary penalty which will not only serve to deter further violations, but will also " [otherwise] aid in enhancing voluntary compliance with this Act by the [respondent]." From a deterrence perspective, any future violators can see that an entire company has been wiped out, as well as one of the shareholders by failing to comply with the Act and that's **before** any monetary penalty has been assessed. A large joint and several fine is not needed to further aid deterrence.

Additionally, though Respondents appreciate that a monetary penalty can be a deterrent, a large joint and several penalty will do nothing but harm the chances of the Respondents voluntarily complying with the Act. §42(h)(4). It's well established that all of the joint violations involve money in some form or another. Board Order of August 20, 2009, pp. 35, 49. As stated previously, Robert Pruim is bankrupt. If one also takes Complainant's assertion that a penalty against CLC is likely uncollectable, Complainant's Brief at p. 12, FN 30, as true, then the sole burden to pay the penalty **and** comply with the Act in the future would rest on Edward Pruim. As stated in Section III(B)(ii), infra, §42(h) allows for discretion in determining the amount of the civil penalty when the penalty would result in arbitrary or unreasonable financial hardship. In short, Complainant's proposal would amount to a single individual being responsible for the penalty that is meant to be shared between three respondents.

In essence, if the Board would adopt Complainant's proposal, every dollar ascribed in penalties "jointly and severally" among the Pruims and CLC would be Edward Pruim's burden to bear. To ask one individual to shoulder the burden for several respondents, as well as then

attempt to comply with the Act for violations that only money can fix, results in unreasonable financial hardship. That means that §42(h) weighs in favor of a minimal joint and several penalty and against Complainant's proposed apportionment.

C. Respondents' Recommended Apportionment for the Joint Violations Best Achieves the Goals of the Act.

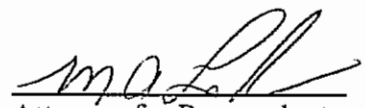
Instead of Complainant's arbitrary and unreasonable final apportionment, the Board should accept Complainant's initial position on CLC and set aside the dissolution of the corporation when apportioning the penalty. Complainant's Brief, pp. 2-3. Turning then to the Pruims, and given that the enforcement of a money judgment against Robert Pruim is not possible at the moment, it makes practical sense to apportion a small amount of the penalty to the two Priums. This would cause no undue financial burden and would aid in the future compliance of the Act, as any dollars spent on a penalty cannot be used to comply with the Act.

For these reasons, the Board should ascribe a practical amount of the penalty jointly and severally to the Pruims and CLC, with the remaining amounts to CLC for the joint violations. Therefore, Respondents propose the apportionment of a $140,000penalty for the joint violations against CLC only, and the remaining $10,000 be apportioned jointly and severally between CLC and the Pruims.

IV. Conclusion

For the foregoing reasons, the Respondents feel that the $250,000 civil penalty should be apportioned as follows: $100,000 to CLC for the "Daily Management" and "CLC- Only" violations, $140,000 to CLC and $10,000 to CLC and the Pruims, jointly and severally, for the joint violations.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Mark A. LaRose, an attorney, hereby certify that I caused to be served a copy of the foregoing **RESPONDENTS COMMUNITY LANDFILL COMPANY, INC., ROBERT PRUIM AND EDWARD PRUIM'S RESPONSE BRIEF ON APPORTIONMENT OF PENALTY,** by e-mailing and placing the same in first-class postage prepaid envelopes and depositing same in the U.S. Mail Box located at 200 North LaSalle Street, Chicago, Illinois, this **16th** day of **DECEMBER, 2011,** addressed as follows:

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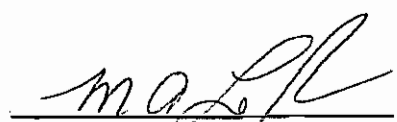

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