ILLINOIS POLLUTION CONTROL BOARD
March 1, 2012

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 04-16
	)	(Enforcement - Air)
PACKAGING PERSONIFIED, INC.,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

This is an enforcement action brought by the Office of the Attorney General, on behalf of the People of the State of Illinois (People), against Packaging Personified, Inc. (Packaging). Today's order denies in part and grants in part Packaging's motion for reconsideration of the Board's final opinion and order of September 8, 2011 (People v. Packaging Personified, Inc., PCB 04-16 (Sept. 8, 2011) (Order)). In granting partial reconsideration, the Board, on its own motion, directs that the parties expeditiously return to hearing solely to address a discrete "economic benefit" matter concerning penalty, to be followed by briefing. The hearing officer is directed to close this record by August 28, 2012, which is the 180th day after the date of this order.

Below, the Board first sets forth an overview of its September 8, 2011 final decision, followed by the procedural history of the case. The Board then summarizes Packaging's motion for reconsideration, the People's response, and Packaging's reply. Next, the Board analyzes and rules upon the motion. Lastly, the Board discusses the reasons for and the nature of the supplemental penalty hearing and briefing being ordered today.

OVERVIEW OF BOARD'S SEPTEMBER 8, 2011 FINAL DECISION

On September 8, 2011, the Board issued a 44-page, final opinion and order in this enforcement action, which the People brought against Packaging, an extruder and printer of plastic bags. The People filed an amended 12-count complaint on July 11, 2005, alleging that Packaging violated statutory, regulatory, and permit requirements for air pollution control at the company's polyethylene and polypropylene film processing and printing facility. The facility is located at 246 Kehoe Boulevard in Carol Stream, DuPage County.

In its final decision, the Board found that Packaging violated nearly all of the requirements at issue. Specifically, the Board found that Packaging violated the Board's "flexographic printing rule" (35 Ill. Adm. Code 218.401) by failing to control printing press emissions of volatile organic material (VOM). The Board also ruled that Packaging failed to comply with permitting, reporting, recordkeeping, and compliance demonstration requirements of the Environmental Protection Act (Act) (415 ILCS 5 (2010)) and regulations adopted under

the Act, including requirements of the Clean Air Act Permit Program (CAAPP) for major sources in a "severe" ozone nonattainment area. Additionally, the Board found that Packaging violated conditions of a construction permit issued by the Illinois Environmental Protection Agency (IEPA). In all, Packaging violated numerous provisions of the Act (415 ILCS 5/9(a), 9(b), 39.5(5)(a), and 39.5(6)(b) (2010)), the Board's regulations (35 Ill. Adm. Code 201.142, 201.143, 201.302(a), 203.201, 203.203(a), 203.301, 203.601, 205.300(a), 205.310(a)(1), 218.401(a), and 218.404(c)), the IEPA's regulations (35 Ill. Adm. Code 254.137(a), 254.501, and 270.201(b)), and a 2003 construction permit (Conditions 5, 15, and 16). The Board found that the People failed to prove a violation of Condition 4(c) of the construction permit.

The People asked the Board to impose a civil penalty of $861,274 on Packaging, consisting of "an economic benefit of $711,274.00 resulting from the delayed installation of a pollution control device and avoided annual costs" and $150,000 "attributable to factors other than economic benefit." People's Post-Hearing Brief (Comp. Br.) at 23, 41. The People also requested that the Board issue an order requiring Packaging to cease and desist from future violations of the Act and Board regulations. Packaging argued that the Board should not assess a significant penalty and that the People's requested penalty was excessive. The only specific penalty proposal offered by Packaging was that the company's economic benefit from noncompliance ranged from $16,853 to $119,020. Packaging's Post-Hearing Brief (Resp. Br.) at 42-45.

Based on the factors of Section 33(c) of the Act (415 ILCS 5/33(c) (2010)), the Board ruled that a civil penalty was warranted, but declined to issue a cease and desist order. As to the amount of the penalty, the Board held as follows:

> The Board imposes a $456,313.57 civil penalty on Packaging based upon the Section 42(h) factors of the Act (415 ILCS 5/42(h) (2010)). Specifically, the following factors support this substantial penalty: the many years of Packaging's numerous and grave violations in a severe ozone nonattainment area, resulting in actual excess VOM emissions to the environment and a hindrance to IEPA carrying out its duties; the company's lack of due diligence in making itself aware of its air pollution control obligations; the $356,313.57 economic benefit accrued by Packaging from noncompliance, which is the statutory minimum penalty amount; the need to deter future violations by Packaging and aid in voluntary compliance by Packaging and companies similarly situated; and Packaging's failure to self-disclose its violations. The civil penalty would be higher if Packaging had prior adjudicated violations of the Act or if the company had not initiated compliance measures once made aware of its violations and taken the steps necessary to come into compliance. Order at 43.

PROCEDURAL HISTORY

This action was initiated when the People filed an eight-count complaint against Packaging on August 5, 2003. Packaging filed an answer to the complaint on January 16, 2004. On July 11, 2005, the People filed a motion for leave to file an amended complaint, attaching the

amended 12-count complaint. In an order of August 18, 2005, the hearing officer granted the motion for leave. Packaging filed an answer to the amended complaint on October 31, 2005.

Hearing was held on June 29, 2009 (Tr.1) and June 30, 2009 (Tr.2) in Elmhurst, Will County, before Board Hearing Officer Bradley P. Halloran. Seven witnesses testified. The following witnesses testified on behalf of the People: Mr. David Bloomberg, Compliance Unit Manager with IEPA's Bureau of Air, Division of Air Pollution Control; and Mr. Gary Styzens, Economic Benefit Analyst and Manager with IEPA. Mr. Richard Trzupek of the environmental consulting firm of Mostardi Platt Environmental also testified for the People, but as an adverse witness. The following witnesses testified on behalf of Packaging: Mr. Trzupek; Mr. Dominic Imburgia, founder and president of Packaging; Mr. Joseph Imburgia, General Manager of Packaging; Mr. Timothy Piper, Quality Compliance Manager with Packaging; and Mr. Christopher McClure, Director and Economic Benefit Analyst with Navigant Consulting. The People offered 13 exhibits at hearing, all of which were admitted into the record (Comp. Exh.). Packaging offered 51 exhibits at hearing, all of which were admitted (Resp. Exh.).

On September 25, 2009, the People filed a 42-page post-hearing brief. In the brief, the People stated that they voluntarily dismissed count XI of the amended complaint, which the Board construed and granted as a motion for the voluntary dismissal of count XI. On November 6, 2009, Packaging filed a 49-page post-hearing brief. On December 3, 2009, the People filed an 18-page reply brief.

The Board issued its final opinion and order on September 8, 2011. Packing timely filed a motion for reconsideration (Mot.) on October 19, 2011. The People filed a response (Resp.) in opposition to the motion for reconsideration on November 2, 2011. On November 15, 2011, Packaging filed a motion for leave to reply, attaching a reply. The People have not responded to Packaging's motion for leave (Mot. Lv.), which is granted. The Board therefore accepts Packaging's reply (Reply).

SUMMARY OF THE PARTIES' POST-DECISION FILINGS

Packaging's Motion for Reconsideration

Packaging concedes that before installation of the regenerative thermal oxidizer (RTO), the company "never performed a formal stack test on press #5 and thus did not formally prove that [press 5] was in compliance." Mot. at 5. Packaging argues, however, that the "undisputed evidence" at hearing was that Mr. Trzupek's "engineering test" (or "informal emissions test") of the capture and control efficiency of the press 5 "recirculating oven" (or "tunnel dryer") "demonstrated [volatile organic material] VOM capture efficiency of 82.6 percent, destruction efficiency of 93.6 percent, for overall VOM control of 77.3 percent."[1] *Id*. at 1, citing Tr.2 at 18.

[1] "As an alternative to compliance" with the 40% and 25% VOM content limits for applying inks under the flexographic printing rule (35 Ill. Adm. Code 218.401(a)), an owner or operator could have complied with the rule by equipping the flexographic printing line with "a capture system and control device" (35 Ill. Adm. Code 218.401(c)). The capture system and control device was required to meet numerous specifications, such as "reduc[ing] the captured VOM emissions by at

According to Packaging, the Board acknowledged the engineering test results "but then disregarded this undisputed evidence when making its penalty determination." Mot. at 1.

Packaging states that Mr. Trzupek's testimony, "based upon having performed several hundred formal stack tests," was that the results of the required stack test would not have varied from the informal emissions test, "except that a formal stack test would actually have reflected an even higher destruction efficiency." Mot. at 1, citing Tr.2 at 21-22. Packaging maintains that it therefore voluntarily reduced VOM emissions from press 5 "below the already compliant levels" by connecting the press to an RTO, which the Board "erroneously construed . . . as evidence that press #5 lacked adequate VOM capture and control" absent the RTO. Mot. at 2.

Packaging argues that it did not enjoy any economic advantage by operating presses 4 and 5 without the RTO. Mot. at 5-6. The lowest cost alternative for achieving compliance with the capture and control requirements was, according to the company, to "shut down press #4, transfer the production from press #4 to press #5 and demonstrate that press #5 complied with VOM emission requirements through a formal stack test" of the tunnel dryer. *Id*. at 3. At no cost and even at a cost savings, Packaging continues, press 4 was shut down and all of the production from press 4 was shifted to press 5 after 2002. *Id*. at 3-4, citing Tr.1 at 204-06. The "unrefuted evidence" was that press 5, without the RTO, would have passed a formal stack test if the company "would have incurred an additional $15-$30,000 cost of constructing total temporary enclosure [TTE] for press #5 and performed a $6,180 stack test." Mot. at 3, citing Tr.2 at 18-22, 102 (for TTE cost). According to Packaging, using $30,000 for the TTE cost and $6,180 for the formal stack test cost "results in a total economic benefit to Packaging of $12,077." Mot. at 4, Exh. A. Packaging asserts that this $12,077 benefit from the deferred cost of this lowest cost compliance alternative should constitute the economic benefit component of the penalty assessed against the company. Mot. at 4-5.

Exhibit A to Packaging's motion for reconsideration is an October 19, 2011 letter from Mr. McClure, described as "a supplemental calculation of the economic benefit of $12,077 enjoyed by Packaging." Mot., Exh. A. Attached to Mr. McClure's two-page letter are two documents. First, there is Mr. McClure's one page of calculations for arriving at the figure of $12,077. Second, there is a one-page invoice, dated March 4, 2004, from ARI Environmental, Inc. (ARI) to Packaging in the amount of $6,180 for the February 26, 2004 formal stack test on the RTO. *Id*.

Packaging argues that because an RTO was "unnecessary," the Board erred in attributing any RTO cost toward press 4 or press 5. Mot. at 4. Packaging maintains that there are uncontroverted facts about the "environmental impact" of presses 1, 2, 4, and 5: presses 1 and 2 used water based inks with less than 40% VOM content; press 4 used noncompliant inks and had

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least 90 percent by weight" through carbon adsorption or incineration or otherwise providing "90 percent control device efficiency" and "provid[ing] an overall reduction in VOM emissions of at least . . . 60 percent." 35 Ill. Adm. Code 218.401(c). Whether compliance was sought based on VOM content of inks or capture and control, a formal compliance demonstration through applicable analysis test methods and procedures was required. *See* 35 Ill. Adm. Code 218.401(a), (c)(6).

no emission control device but was shut down in December 2002; and press 5 used noncompliant inks but "has always been equipped with a re-circulating oven that Mr. Trzupek testified met the substantive control requirement of the Board based upon his experience and based upon his engineering stack testing." *Id*. at 5. These tenets, Packaging continues, are unchanged by the company's failure to perform a formal stack test on the press 5 tunnel dryer. *Id*. According to Packaging, the company "decided to proceed to include press #5 along with the new press [6] for purposes of [RTO] control in hopes that IEPA would find that to be something that would lead them to be reasonable." *Id*. Packaging asserts that the correct assessment for its failure to conduct a formal stack test would be to use the cost of a formal stack test in assessing economic benefit. Mot. at 5-6. Packaging requests that the Board "reduce the economic benefit component of the penalty to $12,077 as established by the attached supplemental report of Mr. McClure." *Id*. at 6.

Finally, Packaging also moves the Board to reconsider findings of testing and recordkeeping violations. Packaging states that it "has always maintained records of its ink usage and the VOM and [hazardous air pollutant] HAP content associated with its operations vis-a-vis [Material Safety Data Sheets] MSDS sheets and its daily production records." Mot. at 2, citing Tr.1 at 195-98. According to Packaging, "Board Rule 218.105(2)" allows for the use of "formulation data" equivalent to Method 24 results in lieu of "actual ink testing analysis." Mot. at 2. Packaging states that "[i]n practice, this means keeping MSDS sheets for the inks used on file." *Id*. The production records and MSDS maintained by Packaging "included the relevant formulation data in satisfaction of this recordkeeping Rule for all presses and in satisfaction of the VOM content Rule for presses #1 and #2." *Id*. at 2-3, citing Tr.2 at 27; Tr.1 at 242-46. Further, Packaging maintains that had IEPA timely issued the company's requested Federally Enforceable State Operating Permit (FESOP), Packaging would no longer be subject the ongoing recordkeeping obligations of the 2003 construction permit, "which the Board finds Packaging to be violating." Mot. at 3. Packaging therefore also asks that the Board "reduce the gravity component of the penalty." *Id*. at 6.

People's Response

The People recount that the Board hearing officer held a two-day hearing "in which the parties put forward their evidence through the testimony of seven witnesses and sixty-four (64) exhibits." Resp. at 1. Both parties' post-hearing briefs, the People continue, "were duly submitted and fully apprised the Board of each party's arguments." *Id*. The People assert that Packaging now "merely reargues the evidence put forward at hearing, evidence which has already been contemplated by the Board." *Id*. at 2. The People maintain that Packaging's motion fails to set forth any recognized basis for reconsideration. *Id*.

According to the People, Packaging requests that the Board "reconsider its findings on three issues: (1) the compliance of Press #5, (2) Packaging's recordkeeping obligations in its permit and (3) the amount of economic benefit enjoyed by Packaging for its delayed compliance." Resp. at 2. On the first issue, the People note Packaging's concession that the Board's order acknowledged and decided against the company's argument that press 5 was compliant, which the People maintain "clearly shows that the Board has carefully considered, and rejected, this argument." *Id*. at 2-3. Also, the People continue, Packaging's "claim that there

was 'no evidence presented' to contradict the results of the informal test is not compelling." *Id*. at 3. The People assert that the Board is well aware of the hearing evidence, including evidence identifying the components of a formal stack test, Packaging's admission that it knew it was required to perform a formal stack test, and Packaging's decision not to perform a formal stack test. *Id*. Packaging's arguments on this first issue, continue the People, "do nothing but rehash the position put forward and argued by the Packaging before the Board at hearing and in its posthearing brief." *Id*.

As to the second issue, the People assert that Packaging just "reargues" its MSDS recordkeeping claim, which the Board already considered and rejected. Resp. at 3-4. Additionally, Packaging's suggestion that it was "somehow penalized" by not timely receiving a FESOP from IEPA is "absurd" because the People's complaint only alleged violations from August 13, 2003 to August 13, 2004, while Packaging did not apply for the FESOP until August 30, 2004. *Id*. at 4.

On the third and final issue, the People state that Packaging already "presented three 'alternatives to compliance' for the Board to consider in determining the lowest cost alternative to compliance." Resp. at 4. In the motion to reconsider, according to the People, Packaging "puts forward a fourth 'alternative to compliance' with an entirely new economic benefit calculation." *Id*. The People describe Packaging's "'supplemental report'" as "a new exhibit containing new evidence based on information that was available to Packaging at the time of hearing and could have been presented *but was not.*" *Id*. (emphasis by the People).

The People claim that the "new evidentiary exhibit should be barred as improper." Resp. at 4. According to the People, "Packaging cannot come back now and make new arguments based on old facts because it is unhappy that its original arguments were not strong enough." *Id*. at 5. "[I]t is improper," the People conclude, "for Packaging to put forth a new exhibit and make a new factual argument that it chose not to include at hearing." *Id*.

Packaging's Reply

Packaging claims that its motion for reconsideration "raises the Board's error in the application of existing law . . . with regard to the lowest cost alternative for achieving compliance in the calculation of economic benefit (415 ILCS 5/42(h)([3])(2010))." Mot. Lv. at 1. Packaging maintains that it does not seek reconsideration of the finding that press 5 was out of compliance. Reply at 1. Rather, Packaging asks for reconsideration of the $356,313.57 economic benefit component of the penalty "because the 'lowest cost alternative for achieving compliance' for both press #4 and press #5 based upon the evidence presented at hearing is $12,077.00." Reply at 1, quoting 415 ILCS 5/42(h)(3) (2010).

According to Packaging, the Board rejected the economic opinion testimony of both parties' financial experts. Reply at 1-2. Packaging maintains that the company therefore "had no opportunity to evaluate or respond to the Board's (as opposed to the State's) economic benefit analysis at the hearing." *Id*. at 2. As the Board "performed its own economic benefit analysis which was not previously presented to Packaging," it is "appropriate" for the company to

respond to the Board's "new and different economic analysis" through the motion to reconsider and attached supplemental report of Mr. McClure. *Id*. at 3.

Packaging now "agrees that moving press #4 to Michigan is not a part of achieving compliance." Reply at 2. According to Packaging, "[d]ecommissioning press #4 in 1995 and shifting all press #4 production to press #5, as it ultimately did in 2002, would have brought press #4 into compliance without regard to any ownership of land in Michigan." *Id*.[2] Packaging argues that because it cost the company nothing to decommission press 4 in 2002 and shift all press 4 production to press 5 "by adding a second shift to press #5's operation," Packaging "accrued no economic benefit as a result of the seven year delay in implementing this press #4 compliance." *Id*. at 2-3, citing Tr. 1 at 205-06.

Packaging states that it "addresses press #5's non-compliance in its Motion for Reconsideration." Reply at 2. According to Packaging, the company had Mr. McClure "supplement his economic benefit opinion testimony," as reflected in the attachment to the motion for reconsideration. *Id*. at 3, citing Mot., Exh. A. Packaging explains that Mr. McClure's supplemental report addresses the "delayed cost component of demonstrating press #5 compliance," resulting in an "economic benefit calculation for the non compliance of press #5 going back to 1995 and adding post compliance interest." Reply at 3. Packaging adds that the People do not suggest any error in Mr. McClure's supplemental calculation. *Id*.

Packaging also claims that its motion for reconsideration "raises the Board's error in the application of existing law . . . with regard to the approved use of formulation data for inks in lieu of actual testing." Mot. Lv. at 1. Packaging specifies that it seeks reconsideration of "the recordkeeping violation determinations of the Board in Count VII (Rule 218.401(a)), Count VIII (Rule 218.404), as well as Count XII (Permit Conditions 15 and 16.)" Reply at 1. According to Packaging, the Board's findings of violation are based upon the "erroneous view that actual ink testing" is the only manner of complying, when the Board rule "authorizes use of formulation data that are equivalent to Method 24 test results in lieu of actual ink testing analysis." *Id*. at 4, citing 35 Ill. Adm. Code 218.105(a)(2)(B), 218.501(a)(2)(B).

Packaging concludes by requesting that the Board:

> reduce the economic benefit component of the penalty to $12,077.00 as the lowest cost alternative for achieving compliance for press #4 and press #5, and further, reduce the gravity component of the penalty to account for the fact that Packaging's records, including MSDS sheets and job tickets satisfied both the recordkeeping requirements of the Board Rules and Packaging permit. Reply at 4-5.

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[2] The Board found that "Packaging did not acquire the Michigan facility until 2002, some 7 years after the violations began" and that "moving press 4 to another state cannot bring the press [5] into compliance with the flexographic printing rule." Order at 37. The Board also found that shutting down press 4 in 2002 ended press 4's noncompliance. *Id*. at 39.

DISCUSSION

The Board first sets forth the standards for ruling upon motions for reconsideration. The Board then rules upon Packaging's motion to reconsider. Packaging's motion makes two requests, which the Board addresses in turn: first, that the Board find no violations of ink testing and recordkeeping requirements and, on that basis, make an unspecified reduction to what Packaging calls the "gravity component" of the penalty imposed; and second, that the Board reduce the calculation of economic benefit in the penalty from $356,313.57 to $12,077.

Motions for Reconsideration

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902 ("In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error."). A motion to reconsider may specify evidence in the record that was overlooked. *See* People v. Prior, PCB 02-177, slip op. at 2 (July 8, 2004).

Testing and Recordkeeping Violations; "Gravity Component" of Penalty

In its motion for reconsideration, Packaging argues that the Board erred in applying existing law by finding the company committed ink testing and recordkeeping violations. Packaging claims that the "gravity component" of the civil penalty imposed should therefore be reduced. Packaging argues that its manner of keeping MSDS and production records qualified as "formulation data" under 35 Ill. Adm. Code 218.105(a)(2)(A) and therefore the company was not required to test its inks for VOM content.[3] Section 218.105(a) provides in pertinent part:

> a) Coatings, Inks and Fountain Solutions
> The following test methods and procedures shall be used to determine compliance of as applied coatings, inks, and fountain solutions with the limitations set forth in this Part.
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> ***
>
> 2) Analyses: The applicable analytical methods specified below shall be used to determine the composition of coatings, inks, or fountain solutions as applied.
>
> A) Method 24 of 40 CFR 60, appendix A, incorporated by reference in Section 218.112 of this Part, shall be used to

[3] Packaging refers to Sections "218.105(2)," "218.501(a)(2)(B)," and "218.105(a)(2)(B)." Mot. at 2; Reply at 4. The former two are not provisions of the Board's rules and the latter applies only to "rotogravure printing." The Board assumes that Packaging meant Section 218.105(a)(2)(A).

> determine the VOM content and density of coatings. If it is demonstrated to the satisfaction of the Agency and the USEPA that plant coating formulation data are equivalent to Method 24 results, formulation data may be used. In the event of any inconsistency between a Method 24 test and a facility's formulation data, the Method 24 test will govern. 35 Ill. Adm. Code 218.105(a), (a)(2), (a)(2)(A).

Nowhere in Packaging's post-hearing brief does the company refer to Section 218.105(a)(2)(A) or "formulation data." The Board finds that this argument is forfeited because it is being raised for the first time in a motion to reconsider, without any reasonable explanation as to why it was not previously presented. *See, e.g.*, Daniels v. Corrigan, 382 Ill. App. 3d 66, 71, 886 N.E.2d 1193 (1st Dist. 2008); City of Quincy v. IEPA, PCB 08-86, slip op. at 34-35 (June 17, 2010) (submission of new matter with a motion to reconsider will not be allowed absent a reasonable explanation of why such matter was not timely presented); RACT Deficiencies - Amendments to 35 Ill. Adm. Code Parts 211 and 215, R89-16(A), slip op. at 18 (May 10, 1990) (arguments, made in a motion for reconsideration without justification as to why they were not raised earlier, are waived). Even if the Board were to find that Packaging has not forfeited this argument, Section 218.105(a)(2)(A) is not available to the company. By its terms, the rule allows the use of "formulation data" only where "it is demonstrated to the satisfaction of the [IEPA] and the USEPA [United States Environmental Protection Agency] that plant coating formulation data are equivalent to Method 24 results." 35 Ill. Adm. Code 218.105(a)(2)(A). There is no evidence that Packaging made this required demonstration to the satisfaction of IEPA and USEPA.

Finally, Packaging continues to blame its violations of recordkeeping conditions in the 2003 construction permit on alleged IEPA delay in issuing a FESOP to the company. The Board finds no merit in this argument. As the People indicate, Packaging's permit violations pre-date the company's submittal of a FESOP application to IEPA. Order at 25-27.

The Board denies Packaging's motion for reconsideration of the company's testing and recordkeeping violations and therefore denies Packaging's related request for penalty reduction.

Economic Benefit Component of Penalty

Section 42(h)(3) of the Act

In its motion to reconsider, Packaging asserts that the Board erred in applying existing law by finding a $356,313.57 economic benefit under Section 42(h)(3) of the Act (415 ILCS 5/42(h)(3) (2010)). Packaging moves for a $344,236.57 reduction in the Board's calculation of the economic benefit accrued by the company from noncompliance. Section 42(h) of the Act (415 ILCS 5/42(h) (2010)) reads in pertinent part as follows:

> In determining the appropriate civil penalty to be imposed . . . , the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

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(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; *** 415 ILCS 5/42(h), (h)(3) (2010).[4]

Accordingly, for purposes of calculating a civil penalty, any economic benefits accrued by Packaging from its noncompliance must be determined by the "lowest cost alternative for achieving compliance." 415 ILCS 5/42(h)(3) (2010).

Parties' Positions Before the Board's Decision

In post-hearing briefing, the People argued that Packaging's presses 4 and 5 violated the flexographic printing rule (35 Ill. Adm. Code 218.401) and that the lowest cost alternative under Section 42(h)(3) for press 4 and press 5 to comply required installing an RTO. Comp. Br. at 10, 29. The People asserted that Packaging's economic benefit from noncompliance was $711,274. *Id*. at 33. In its post-hearing brief, Packaging argued that press 5 was in "substantive compliance," reserving the company's arguments on lowest cost compliance alternatives for press 4. Resp. Br. at 8-9, 42-45 (*e.g.*, "Press #4 was the only press that was not in compliance with the Flexographic regulations"). Packaging presented three lowest cost alternatives for bringing press 4 into compliance, each supported by the economic benefit report and testimony of Mr. McClure: (1) obtaining an adjusted standard for press 4 ($33,707 economic benefit); (2) moving press 4 to the company's Sparta, Michigan facility ($16,853 economic benefit); or (3) installing a refurbished RTO on press 4 ($119,020 economic benefit). Resp. Br. at 42-45; Resp. Exh. 4A; Resp. Exh. 55 at 6. Packaging urged the Board to accept Mr. McClure's economic benefit analysis "because it appropriately captures Packaging's true cost of noncompliance." Resp. Br. at 42; *see also id*. at 36 ("only Mr. McClure's analysis is consistent with the facts in this case and, therefore, the Board should defer to Mr. McClure's analysis").

Board's September 8, 2010 Decision on Economic Benefit

Compliance with the flexographic printing rule was required by March 15, 1995. Order at 21. Press 4 and press 5 used noncompliant inks. *Id*. at 22. Press 4 never had a control device. *Id*. Mr. Trzupek's "informal emissions test" of the press 5 tunnel dryer in December 2001 did not meet the requirements for a formal demonstration of capture and control compliance. *Id*. The Board found both presses in violation of the flexographic printing rule. *Id*. at 21-23. Packaging ended press 4's noncompliance by shutting the press down in December 2002. *Id*. at 39. Packaging brought press 5 into compliance by installing an RTO for the press in late 2003, constructing a Permanent Total Enclosure (PTE), and performing a formal stack test on the RTO in February 2004. *Id*.

[4] Further, "the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation," except in narrow circumstances not applicable here. 415 ILCS 5/42(h) (2010).

The Board rejected all three of Packaging's proposed lowest cost compliance alternatives under Section 42(h)(3) of the Act, in part because Mr. McClure's economic benefit analysis did not address press 5's noncompliance. For example, Packaging proposed an RTO sized only for press 4. The Board also rejected the People's proposed lowest cost compliance alternative, partially because Mr. Styzen's economic benefit analysis was based upon an RTO sized for three presses, rather than two. Order at 36-40.

Based upon the record, the Board found that an RTO sized for presses 4 and 5 presented the lowest cost compliance alternative. In doing so, the Board relied upon aspects of the RTO economics analysis of both Mr. McClure and Mr. Styzen. Order at 36-41. The Board found that "while there is a divergence of over $450,000 in the respective economic benefit totals of the parties' experts, there is very little difference between their calculations when considered on a per-year and per-emission unit basis." *Id*. at 39. Based upon each presses' respective noncompliance periods (7 years for press 4; 8 years for press 5) and the experts' lowest delayed and avoided cost estimates on a per-year, per-unit basis, the Board arrived at a total delayed and avoided cost benefit to Packaging of $285,900 from its noncompliance. *Id*. at 39-40. Adding interest to this figure for nonpayment of the economic benefit resulted in a total economic benefit of $356,313.57. *Id*. at 40-41. Neither party disputes these calculations. The Board concluded:

> The $356,313.57 figure reflects the economic benefit to Packaging from not having timely installed an RTO on presses 4 and 5 to comply with the flexographic printing rule. As noted, *the People do not seek any economic benefit penalty for Packaging's failure to timely comply with the* permitting, reporting, recordkeeping, and *compliance demonstration requirements*. *No such economic benefit is quantified in the record and the Board declines to speculate what any such benefit might be*. The Board finds that imposing a $356,313.57 economic benefit penalty recoups the entire economic benefit to Packaging established in this record. *Id*. at 41 (emphasis added).

Forfeit

As the People point out, Packaging's motion for reconsideration now seeks to present a fourth alternative under Section 42(h)(3) of the Act: that the lowest cost compliance alternative would have been to perform a formal stack test of the press 5 tunnel dryer, and that Packaging's economic benefit from not doing so is $12,077. The Board finds that Packaging's motion to reconsider presents a new argument for the company's lowest cost compliance alternative and resulting economic benefit. The Board also finds that Packaging's motion presents additional evidence in the form of Mr. McClure's supplemental report to support the claimed $12,077 economic benefit.

Generally, an issue raised for the first time in a motion to reconsider is forfeited. *See, e.g.*, Gonzalez v. PCB, 2011 IL App (1st) 093021, ¶ 38 ("We agree with the Board that the issue was forfeited because Gonzalez raised it for the first time in his motion for reconsideration."); Holzer v. Motorola Lighting, Inc., 295 Ill. App. 3d 963, 978, 693 N.E.2d 446 (1st Dist. 1998) ("it is well-settled that one may not raise a legal theory for the first time in a motion to reconsider"); Gardner v. Navistar International Transportation Corp., 213 Ill. App. 3d 242, 248-49, 571 N.E.2d

1107 (4th Dist. 1991) (litigants should not be permitted to "stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling"). When, as here, a motion to reconsider is based upon the submittal of "new matters, such as additional facts or new arguments or legal theories" not previously presented, the motion:

> asks the trial court to allow the losing party a "second bite of the apple," *i.e.*, requiring the court to determine whether it should admit these new matters into evidence and, in turn, reconsider its prior decision based upon them. That determination is subject to the trial court's discretion. O'Shield v. Lakeside Bank, 335 Ill. App. 3d 834, 838, 781 N.E.2d 1114 (1st Dist. 2002).

A trial court "has the discretion to address new issues presented for the first time in a motion to reconsider 'where there is a reasonable explanation for why the additional issues were not raised at the original hearing.'" Daniels, 382 Ill. App. 3d at 71, quoting Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd., 376 Ill. App. 3d 1006, 1022, 876 N.E.2d 218 (1st Dist. 2007) (emphasis omitted); *see also* Delgatto v. Brandon Associates, Ltd., 131 Ill. 2d 183, 195, 545 N.E.2d 689 (1989); Cabrera v. First National Bank of Wheaton, 324 Ill. App. 3d 85, 101, 753 N.E.2d 1138 (2nd Dist. 2001) ("Generally, evidence submitted for the first time during a motion for reconsideration should not be considered absent some reasonable explanation of why it could not have been submitted in a timely manner."). The Board has held likewise. *See, e.g.*, City of Quincy, PCB 08-86, slip op. at 34-35 (submission of new matter with a motion to reconsider lies in the Board's discretion and will not be allowed absent a reasonable explanation of why such matter was not timely presented); Gonzalez v. City of Chicago Dept. of Env., AC 06-39, 06-40, 06-41, 07-25 (consol.), slip op. at 4 (Oct. 1, 2009), *aff'd sub nom.* Gonzalez v. PCB, 2011 IL App (1st) 093021.

In its post-hearing brief, Packaging conceded that press 4 was in violation of the flexographic printing rule, but the company argued that press 5 was in "substantive compliance." This argument was based in part upon the informal emissions test of press 5's tunnel dryer conducted by Mr. Trzupek. Packaging's brief also pointed to Mr. Trzupek's testimony that based upon the informal emissions test and his extensive experience, press 5, with the tunnel dryer alone, would have passed a formal stack test had one been conducted (Trzupek Testimony). Resp. Br. at 8, 31, 37; *see also* Tr.2 at 20-21. In addition, Packaging's brief referred to the evidence that Packaging did not incur any costs in shutting down press 4 and shifting press 4's production to press 5 (Shutdown/Shift Evidence). Resp. Br. at 35, 44-45; *see also* Tr.1 at 204-07. The Trzupek Testimony and the Shutdown/Shift Evidence are underpinnings of Packaging's new economic benefit claim.

Packaging's post-hearing brief did not, however, argue that a formal stack test of the press 5 tunnel dryer was Packaging's lowest cost compliance alternative. The Board finds that Packaging's brief could have made this argument. Nor did Packaging present any evidence that the company accrued an economic benefit from its failure to perform the tunnel dryer stack test, let alone an economic benefit of $12,077. Packaging now seeks to introduce that evidence, Mr. McClure's supplemental report (McClure Supplement), which is an attachment to the motion for reconsideration. The Board finds that the McClure Supplement could have been offered at hearing. Therefore, these issues are forfeited by Packaging, absent any "reasonable explanation"

as to why they were not timely presented. Delgatto, 131 Ill. 2d at 195; *see also* Cabrera, 324 Ill. App. 3d at 101.

Reasonable Explanation

Packaging's reply in support of its motion offers the following explanation for the company's omissions: because the Board did not adopt the People's position on the economic benefit accrued by Packaging, the company had no opportunity to respond at hearing to the Board's economic benefit analysis and, therefore, the company should be allowed to present its new argument and additional evidence through the motion to reconsider.

Packaging cites no authority for this proposition. When applying the law to the facts in the record, the Board is not bound to accept one party's position or the other's. *See* 415 ILCS 5/33(a)-(c), 42(h) (2010). In fact, the Board's economic benefit calculation here relied upon both parties' evidence. Order at 36-41. As the People proposed an economic benefit based upon an RTO and the noncompliance of presses 4 and 5, and Packaging provided an alternative calculation based upon an RTO, the Board's decision should not have surprised Packaging. Further, the Board's reasoning had no bearing upon Packaging's ability to have presented the McClure Supplement or the company's new argument that a tunnel dryer stack test was Packaging's lowest cost compliance alternative. Finally, the primary difference between the People's proposed economic benefit for Packaging and the one found by the Board was based upon the size of the RTO necessary for compliance, to which Packaging's new claim does not respond.

The Board finds, however, that there is a reasonable explanation for Packaging's failure to present the McClure Supplement and argue the tunnel dryer stack test as the lowest cost compliance alternative. Packaging's post-hearing brief did include the following statement: "If the plain language of 42(h)[3] of the Act were to be applied, then the lowest cost alternative for compliance would be $0 as Packaging did not incur any expenses in shutting down its Press #4 and shifting production to Press #5." Resp. Br. at 35. In arguing that the People's proposed manner of compliance was not the lowest cost alternative, Packaging also stated that the press 5 tunnel dryer "could have demonstrated compliance by undergoing the formal stack test." *Id*. at 37. Compliance with the "capture and control" alternative required a stack test. Packaging now seeks to substantiate the costs of a stack test on the tunnel dryer and the economic benefit from not having performed the test. Logically, though, the cost of a stack test, plus "$0," is less than the cost of the stack test, plus the cost of acquisition and operation of an RTO. Packaging did not make explicit what could be readily implied: that in Packaging's view, performing a stack test on the tunnel dryer was a *lower* cost compliance alternative than acquiring an RTO, performing the stack test, and operating the RTO for a period of years.

Neither a complainant nor a respondent is required by the Act to establish a respondent's economic benefit, if any, from noncompliance.[5] Here, neither the People nor

[5] However, if the record establishes a respondent's economic benefit from noncompliance based upon the lowest cost compliance alternative, the Board must impose a penalty at least as great as the economic benefit. *See* footnote 4 above.

Packaging sought to introduce evidence of any economic benefit from Packaging's delay in performing a formal compliance demonstration.[6] Accordingly, neither party was put in a position of needing to rebut any such evidence.

That neither party accounted for the costs of a formal stack test, even though such a test was mandatory for "achieving compliance" (415 ILCS 5/42(h)(3) (2010)), may be due to the lack of precedent on this specific issue. Neither the appellate court nor the Board has applied Section 42(h)(3), in its current form (P.A. 93-575, eff. Jan. 2004), to assess the economic benefit of not performing a formal compliance demonstration. *See*, *e.g.*, People v. Toyal America, Inc., PCB 00-211, slip op. at 16-17, 58-60 (July 15, 2010) (economic benefit based upon emission control device costs, but not compliance demonstration costs), *aff'd sub nom*. Toyal America, Inc. v. Illinois Pollution Control Board, 2012 IL App (3d) 100585; *see also* People v. Panhandle Eastern Pipe Line Co., PCB 99-191, slip op. at 30 (Nov. 15, 2001) (same but applying Section 42(h)(3) before "lowest cost" language was added).[7]

Nor does the Board underestimate the complexities posed by the instant case's many contested economic benefit issues. In the Toyal and Panhandle air enforcement cases, the emission control measures required for compliance, and the calculations of economic benefit from not having undertaken those measures, were largely uncontested. *See* Toyal, PCB 00-211, slip op. at 60; Panhandle, PCB 99-191, slip op. at 30-31.[8] In contrast, nearly every aspect of the economic benefit here was in dispute. Order at 36-40.

The Board finds that these circumstances, taken together, constitute a reasonable explanation for Packaging having failed to present its new argument and the McClure Supplement. Accordingly, the Board finds that Packaging did not forfeit these issues.

Exercise of Discretion

Whether to consider Packaging's new claim remains in the Board's discretion. The Board does not take lightly the interests of the adversarial process and administrative finality. The Board finds, however, that in addition to the reasonable explanation for Packaging's omissions found above, several considerations militate in favor of the Board exercising its

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[6] The People also did not calculate any economic benefit for Packaging's failure to timely comply with permitting, reporting, and recordkeeping requirements. Order at 41.

[7] The September 1999 "USEPA BEN User's Manual," relied upon by both parties' economic experts, makes no explicit reference to compliance demonstration costs.

[8] The primary disputed economic benefit issue in both Toyal and Panhandle was whether the respective respondents should receive a penalty "credit" because they allegedly would have spent less money had they timely complied. *See* Toyal, PCB 00-211, slip op. at 60; Panhandle, PCB 99-191, slip op. at 31-32. The Board rejected this argument in both cases. The First District Appellate Court affirmed the Board on the issue in Toyal. *See* Toyal, 2012 IL App (3d) 100585 at ¶¶ 50-52.

discretion to take up this new matter. First, Packaging's claim concerns the only Section 42(h) penalty factor for which the General Assembly has specified the Board's calculation method: "the economic benefits *shall be determined by the lowest cost alternative* for achieving compliance." 415 ILCS 5/42(h)(3) (2010) (emphasis added).[9] Second, Packaging's new economic benefit claim is not, on its face, plainly devoid of merit. Third, the Board is reluctant to ignore the prospect that the actual economic benefit enjoyed by Packaging from noncompliance might have been some $344,000 less than the economic benefit component of the penalty imposed. Finally, Packaging's new claim is a natural outgrowth of the Trzupek Testimony and the Shutdown/Shift Evidence. The Board would not be inclined to entertain a new matter that lacked a significant basis in the existing record.

In this unique and compelling situation, the Board exercises its discretion to take into account Packaging's new argument and the McClure Supplement in ruling upon the motion for reconsideration.[10]

Board Ruling on Motion to Reconsider Economic Benefit

The Board did consider the Trzupek Testimony and the Shutdown/Shift Evidence, but not as to economic benefit under Section 42(h)(3). For example, evidence that noncompliant press 5 absorbed the production of noncompliant press 4 is irrelevant to press 5's *violation* of the flexographic printing rule. Evidence that the press 5 tunnel dryer *would have* passed a formal stack test is similarly irrelevant. It is also true that even had the Board considered the Trzupek Testimony and the Shutdown/Shift Evidence as supporting a different lowest cost compliance alternative, the record lacked evidence to quantify the economic benefit Packaging accrued by failing to perform or delaying a formal stack test. The ARI invoice for the February 2004 formal stack test of the RTO ($6,180) was not introduced at hearing and neither economic expert addressed any economic benefit concerning a formal stack test, either for the RTO or the tunnel dryer.[11] Nor did either economic expert calculate any economic benefit from not shutting down press 4 and shifting its production to press 5 by the compliance deadline.

Section 42(h)(3) of the Act, however, does not require the Board to find that an economic benefit has accrued from noncompliance simply because a possible economic benefit is quantified in the record. Any economic benefit found must be based upon the "lowest cost alternative for achieving compliance." 415 ILCS 5/42(h)(3) (2010). Accordingly, it would be an error in applying the law to find an economic benefit under Section 42(h)(3) based upon a compliance alternative where the record establishes that there was a *lower* cost compliance

[9] The economic benefit under Section 42(h)(3) is also the minimum penalty amount to be imposed. *See* 415 ILCS 5/42(h) (2010). *See* footnote 4 above.

[10] With no formal compliance demonstration of the press 5 tunnel dryer, the Board found that press 5 was in violation of the flexographic printing rule until the formal stack test of the RTO was performed. Order at 39. Nothing in today's order alters that ruling.

[11] Nor did Packaging's post-hearing brief mention Mr. Trzupek's cost estimate for constructing a TTE ($15,000 to $30,000). Tr.2 at 102.

alternative. The Board finds that the Trzupek Testimony and the Shutdown/Shift Evidence establish a colorable claim for a smaller, albeit unspecified, economic benefit from noncompliance than the one determined by the Board. Because this record evidence was overlooked with respect to Section 42(h)(3), the Board grants Packaging's motion to reconsider economic benefit.

Supplemental Penalty Hearing and Briefing

To properly reconsider its September 8, 2011 penalty determination, the Board finds that supplemental hearing and briefing on penalty amount is required. In so exercising its discretion, the Board is mindful of several additional considerations. The potential relevance of the Trzupek Testimony and the Shutdown/Shift Evidence to Section 42(h)(3) was not made plain until articulated in Packaging's motion for reconsideration and reply. The People have therefore not had a meaningful opportunity to address the evidence in this light. Of course, the People have also had no chance to cross-examine Mr. McClure about the unsworn McClure Supplement or to offer contrary testimony or documentary evidence. Fairness dictates that the People be given that opportunity and that the Board therefore neither decide the merits of these matters today nor accept the McClure Supplement into evidence at this time.

Though rare, the Board has returned parties to hearing in enforcement actions. For example, in IEPA v. City of Mt. Olive, PCB 74-431 (Apr. 10, 1975), the Board found that it "cannot make an informed judgment on the amount or necessity for a penalty without additional facts," such as evidence concerning the respondent's compliance efforts. Mt. Olive, PCB 74-431, slip op. at 1. The Board therefore ordered that the parties "return to hearing or file an amended stipulation [of facts] to correct the deficiencies in the record." *Id*. (parties had entered into stipulation of facts at original hearing) [12]; *see also* IEPA v. Village of Glendale Heights, PCB 70-8, slip op. at 1-4 (Feb. 17, 1971) (Board "ordered the Hearing Officer to reconvene the hearing" to address five issues specified by Board; additional evidence was admitted at reconvened hearing); 35 Ill. Adm. Code 103.212(d) ("Board in its discretion may hold a hearing on the violation and a separate hearing on the remedy.").

In People v. Kershaw, PCB 92-164, after imposing a $250,000 penalty in granting an unopposed motion for summary judgment, the Board granted the respondents' motion for reconsideration of penalty. *See* Kershaw, PCB 92-164, slip op. at 1, 4, 7 (Apr. 8, 1993); Kerhsaw, PCB 92-164, slip op. at 1-2, 5 (Aug. 26, 1993). In granting reconsideration, the Board reserved making a final penalty decision, observing that the parties sought to pursue settlement. *See* Kerhsaw, PCB 92-164, slip op. at 5 (Aug. 26, 1993). When the parties failed to settle but attempted instead to introduce evidence through separate filings with the Board, the parties were

[12] The parties thereafter filed a supplemental stipulation of facts, after which the Board took final action, requiring performance of a stipulated compliance plan, provision of a $5,000 performance bond, and payment of a $300 civil penalty. *See* Mt. Olive, PCB 74-431, slip op. at 5-8 (Aug. 14, 1975).

ordered by the Board to address penalty at a hearing. *See* Kerhsaw, PCB 92-164, slip op. at 1 (May 5, 1994).[13]

The Board finds that the reasoning of these decisions for ordering the parties to hearing applies with even greater force in the instant case, where the "lowest cost" mandate of Section 42(h)(3) is at issue.

Accordingly, the Board, on its own motion, directs that the parties return to hearing solely to address the following:

1. Did the press 5 tunnel dryer system[14] constitute a "capture system and control device" under 35 Ill. Adm. Code 218.401(c)?[15]

2. Would press 5 and the tunnel dryer system have accommodated the entire production of both press 4 and press 5 from March 15, 1995 to February 26, 2004? What costs, if any, did Packaging avoid or delay by not shifting press 4's production to press 5 until after press 4 ceased operating in December 2002? [16]

3. Would a formal stack test of the press 5 tunnel dryer system have demonstrated compliance with the capture and control requirements of 35 Ill. Adm. Code 218.401(c)? What costs, if any, did Packaging avoid or delay by not building a TTE for press 5 and performing a formal stack test of the tunnel dryer system?

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[13] The hearing was ultimately cancelled on a joint motion and the parties instead filed a stipulation of facts. In briefing, the People argued for retention of the $250,000 penalty and the respondents argued for a penalty of no more than $10,000. On reconsideration, the Board imposed a $30,000 penalty. *See* Kerhsaw, PCB 92-164, slip op. at 2 (Aug. 1, 1994); Kerhsaw, PCB 92-164, slip op. at 3, 5, 14-16 (Apr. 20, 1995).

[14] The Board's opinion described the "tunnel dryer system." "To accelerate the ink-drying process, press 5 came with a 'tunnel dryer' or recirculating drying oven (Tr.1 at 25, 194-95, 220-21), which generated heat by burning VOM emissions, reducing natural gas usage (Tr.1 at 25-26, 198, 221; Tr.2 at 15-16; Resp. Exh. 55 at 3)." Order at 6. "Press 5 has ink-drying units associated with its printing stations, along with a tunnel dryer after the last printing station. Comp. Exh. 8 at 1. Fumes captured at the drying units are vented to the tunnel dryer, which has an 'internal, recirculating thermal oxidizer to destroy VOM emissions.' *Id*." Order at 7.

[15] *See* 35 Ill. Adm. Code 211.950 (definition of "capture system"), 211.1490 (definition of "control device").

[16] March 15, 1995, was the deadline for compliance with the flexographic printing rule. *See* 35 Ill. Adm. Code 218.106(c). February 26, 2004, was the date on which the formal stack test of the RTO was performed, the results of which were approved by IEPA. Tr.1 at 26-27, 46-47, 76-77; Tr.2 at 35-36, 38-39; Resp. Exh. 28; Resp. Exh. 29; Resp. Exh. 55 at 7; Comp. Exh. 5 at 11. Packaging ceased operating press 4 at the Carol Stream facility in December 2002 and thereafter shifted press 4's production to press 5. Resp. Exh. 4; Tr.1 at 29, 204-06, 220; Tr.2 at 91.

4. Interest due for nonpayment of the economic benefit component of the penalty.

Given the narrow scope of the supplemental penalty hearing and to avoid undue delay, the Board directs the hearing officer to close this record within 180 days after the date of this order. The supplemental hearing and subsequent briefing therefore must be concluded by August 28, 2012.

At the supplemental penalty hearing, both parties may present witnesses and exhibits. The parties, of course, may stipulate to facts. Post-hearing briefs may refer not only to evidence from the supplemental hearing, but also to evidence presently in the record. The parties' arguments may address "any matters of record in mitigation or aggravation of penalty," including each of the enumerated factors of Section 42(h). 415 ILCS 5/42(h) (2010). Accordingly, regardless of the positions taken previously by the parties, their respective briefs may advocate any total penalty amount, including any penalty calculation based upon economic benefit under Section 42(h)(3) (415 ILCS 5/42(h)(3) (2010)).

After the record closes, the Board, on reconsideration, will issue a supplemental opinion and order setting forth its reasoning for either retaining or modifying the $456,313.57 penalty imposed upon Packaging. The Board directs the hearing officer to proceed to supplemental hearing and briefing in accordance with the Act, the Board's procedural rules, and today's order.

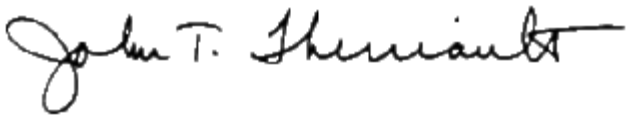
CONCLUSION

For the reasons provided in this order, the Board denies in part and grants in part Packaging's motion for reconsideration. On the Board's own motion, the Board orders supplemental hearing and briefing on penalty as detailed above. This record will close no later than August 28, 2012. Packaging's timely-filed motion to reconsider automatically stayed the effect of the Board's September 8, 2011 order pending disposition of the motion. *See* 35 Ill. Adm. Code 101.520(c). Although the Board rules upon the motion today, a stay of the September 8, 2011 order will continue pending final Board action.

IT IS SO ORDERED.

Board Members D. Glosser and C.K. Zalewski dissented.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 16, 2012, by a vote of 3-2.



John Therriault, Assistant Clerk
Illinois Pollution Control Board