ILLINOIS POLLUTION CONTROL BOARD
March 1, 2012

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

DISSENTING OPINION (by D. Glosser and C. K. Zalewski):

We respectfully dissent from the Board's March 1, 2012 order, as we believe that the motion for reconsideration should have been denied in all respects.

Packaging Personified moved for reconsideration to challenge 1) the Board's decision on the economic benefit accrued by Packaging Personified's failure to achieve compliance, and 2) the Board's findings of violations of testing and recordkeeping provisions of the Environmental Protection Act (Act) and Board regulations. The majority appropriately denied the motion to reconsider the finding of violations for testing and recordkeeping. However, the majority incorrectly granted the motion to reconsider the economic benefit achieved by Packaging Personified, and incorrectly applied prior precedent in discussing economic benefit issues and setting this matter for a supplementary hearing.

The Board has consistently held that 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 also specify evidence in the record that was overlooked. *See* People v. Prior, PCB 02-177, slip op. at 2 (July 8, 2004).

Here, Packaging Personified did not present "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. Rather, Packaging Personified presented a new argument in the motion to reconsider, based on the evidence that was presented in the record at hearing. Consistent with the Board's long standing precedent, the motion to reconsider should have been denied in its entirety.

In its argument presenting new evidence, Packaging Personified persuaded the majority that the Board erred in finding "the least costly alternative for compliance" within the meaning of Section 42 of the Environmental Protection Act. 415ILCS 5/42(h)(3). We disagree. The Board's September 8, 2011 opinion and order thoroughly and completely examined the evidence and arguments timely raised by the parties. Based on the only evidence and argument in that record, the Board found that Packaging Personified realized an economic benefit of $356,313.57 for failing to comply with the Act and various Board rules from at least 1989 until at least 2005.

The arguments now presented by Packaging Personified could have been raised to the Board in briefing prior to entry of the Board's September 8, 2011 opinion and order. Notably, the case had 2 hearing with 7 witnesses, was represented on both sides by council and fully briefed in post-hearing briefs. However, Packaging Personified failed to timely make these arguments. The majority correctly states that the rule of law is generally that such untimely arguments are waived, but the Board can allow the arguments when there is a "reasonable explanation" for Packaging Personified not raising the arguments.[1]

Packaging Personified's "reasonable explanation" is summarized by the majority as:

> 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

[1] The majority states:

> 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 (emphasis added). People v. Packaging Personified, PCB 04-16 slip op at 12 (Mar. 1, 2012).

The majority's reliance on City of Quincy and Gonzalez is misleading. In both those cases the Board agreed with the rule of law, but determined that the new information would not be allowed.

> company should be allowed to present its new argument and additional evidence through the motion to reconsider. People v. Packaging Personified, PCB 04-16 slip op at 13 (Mar. 1, 2012)

We find this argument to be wholly without merit and note the majority agrees that this explanation is lacking.[2] As a result, the majority gives a new "reasonable explanation" for Packaging Personified to explain how the Board may have erred in applying the law on economic benefit under Section 42(h)(3) of the Act. 415 ILCS 5/42(h)(3) (2010). We are not persuaded that a "reasonable explanation" has been sufficiently articulated by the respondent or the majority to justify reconsideration here. Grounds for reconsideration are clearly defined in the Code, Board precedent and other case law, which are simply not present here.

We are troubled by the majority's statements on reconsideration, particularly those on economic benefit. We believe that the majority improperly narrows the scope of the Board's examination of economic issues in enforcement actions. Under Section 42(h) of the Act, the Board must consider multiple factors in aggravation or mitigation of a civil penalty including "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 4/42(h)(3) (2010). For example, the Board must also consider the duration and gravity of the violation (Section 42(h)(1) of the Act), and the amount of monetary penalty that will serve to deter further violations (Section 42(h)(4) of the Act). 415 ILCS 5/42(h)(1) and (h)(4) (2010). The economic benefit that accrued is but one of the statutory factors for consideration; and while the economic benefit may be the lowest level of penalty the Board can assess, it is by no means the maximum penalty that may be assessed.

The majority, in deciding that the Board had erred in applying the law and "overlooking" evidence on Section 42(h)(3) of the Act, appears to accept as proven fact an argument that a stack test could have demonstrated compliance. *See* People v. Packaging Personified, PCB 04-16 slip op at 13 (Mar. 1, 2012). Packaging Personified is now arguing that as a compliance alternative, a stack test could have been done, and if a stack test had been done, the presses would have been in compliance. The proven facts of the case are that no stack test was performed on Press 5, so that the Board found that Press 5 was in violation of the Act and Board regulations. *See* People v. Packaging Personified, PCB 04-16 slip op. at 22 (Sept. 8, 2011). Respondent's new argument is meritless, especially considering the Board's finding that Press 5 was not in compliance.

[2] "[T]he Board's decision should not have surprised Packaging…[and]..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." People v. Packaging Personified, PCB 04-16 slip op at 13 (March 1, 2012).

For all these reasons, we respectfully dissent from the majority opinion. We would have denied the motion to reconsider in its entirety and affirmed the Board's September 8, 2011 opinion and order.

Deanna Glosser

Carrie K. Zalewski

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that above dissenting opinion was submitted on March 1, 2012.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board