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.	)	

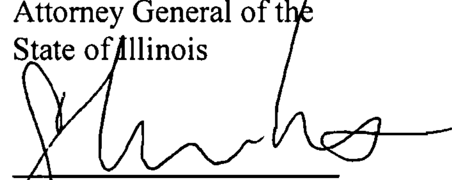
to: Mr. Mark La Rose, La Rose & Bosco
200 N. La Salle Street, #2810
Chicago, IL 60601

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, June 11, 2012, filed with the Office of the Clerk of the Illinois Pollution Control Board, by electronic filing, Complainant's Response to Respondents' Motion for Reconsideration of the Board's Order Dated April 5, 2012, a copy of which is attached and herewith served upon you.

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

BY: 

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Complainant,	)	
-vs-	)	
EDWARD PRUIM, an individual, and ROBERT PRUIM, an individual,	)	
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Complainant,	)	
-vs-	)	
COMMUNITY LANDFILL COMPANY, INC.,	)	
Respondent.	)	

COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR RECONSIDERATION OF THE BOARD'S ORDER DATED APRIL 5, 2012

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and responds to the Motion for Reconsideration the Board's Order Dated April 5, 2012 ("Motion to Reconsider") filed by Respondents Community Landfill Company ("CLC"), Edward Pruim, and Robert Pruim

("Respondents").

I. INTRODUCTION

Motions for Reconsideration are limited to newly discovered evidence, changes in law, or claimed errors in the Board's previous application of existing law[1]. However, the Respondents have not presented any new facts. Instead, they merely reargue evidence from the December 2-4 2008 hearing. Nor are Respondents able to point to any errors in the Board's decision on Remand, or any changes in the applicable law promulgated since the Board's August 20, 2009 decision. Respondents' Motion for Reconsideration must therefore be denied.

II. THE BOARD CORRECTLY FOUND THE RESPONDENTS JOINTLY AND SEVERALLY LIABLE FOR THE JOINT CLC AND PRUIM VIOLATIONS (COUNTS IV, V, VII, VIII, IX, X, XVII, and XIX)

A. The Appellate Court Found Joint and Several Liability to be Appropriate

The Respondents' argument that joint and several liability is not available under the Illinois Environmental Protection Act ("Act") completely ignore the Appellate Court's holding in this case. First, the Court's order did not disturb the Board's earlier finding of joint and several liability on the Counts common to both Community Landfill Company ("CLC"), Edward Pruim, and Robert Pruim ("Joint Counts"). To the contrary, the Court expressly found that the Board could impose joint liability, stating:

> Therefore, we reverse the Board's order imposing joint liability on CLC and the Pruims for all of CLC's violations, and remand with instructions to the Board to apportion the penalty between the violations for which CLC is liable and those for which both CLC and the Pruims are personally liable. The Board may then impose joint liability on the violations concurrent to CLC and the Pruims individually. Agpro, 345 Ill. App. 3d at 1018 (affirming joint and several

[1] *Citizens against Regional Landfill v. County Board of Whiteside,* PCB 93-156 (March 11, 1993); *People v. Community Landfill Company, Inc. and the City of Morris,* PCB 03-191 (June 1, 2006).

judgment against corporate and individual defendants) (emphasis supplied) [2].

Thus, based on its evaluation of the specific facts in this case, the Appellate Court has already ruled on the issue of joint and several liability under the Act. The Board need go no further in finding that Respondents' argument are without merit.

B. The Act Grants the Board Discretion to find Joint and Several Liability

Section 33 of the Act, 415 ILCS 5/33 (2010), provides all of the authority necessary for the imposition of joint and several liability in this case. This Section provides, in pertinent part, as follows:

> Section 33. Board Orders.
>
> (a) After due consideration of the written and oral statements, the testimony and arguments that shall be submitted at hearing, or upon default in the appearance of the respondent on return day specified in the notice, the Board shall issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstance (emphasis added).

Pursuant to Section 2 of the Act, the General Assembly has directed that the terms and provisions of the Act be *liberally construed to effectuate its purposes*, one of which is to assure that adverse effects are borne by "those who cause them"[3]. The broad discretion granted to the Board has been universally recognized by the Courts, including the Appellate Court in this case:

> [C]ourts reviewing the decision of an administrative agency generally accord the agency broad discretion when making decisions[4].

Contrary to Respondents' assertion, an express grant of joint and several liability in the Act is unnecessary. The Board has exercised its discretion by finding joint and several liability

[2] *Community Landfill Co. et al v. Pollution Control Board*, 2011 IL App (3d) 091026-U, July 27, 2011, at 28

[3] 415 ILCS 5/2(b) (2010)

[4] *Community Landfill Co. et al v. Pollution Control Board*, 2011 IL App (3d) 091026-U, July 27, 2011, at 25 (quoting from *Hollinger International, Inc. v. Bower*, 363 Ill. App. 3d 313 (2005)

between the three Respondents in this case. The Board's assessment of a penalty jointly and several among the Respondents was within the Board's broad discretion.

C. The Board's Joint and Several Penalty is Consistent with Illinois Law

As noted by the Appellate Court, joint and several liability is appropriate in the case of are a single indivisible injury[5]. Joint liability may be found even where the actors found liable did not act together[6]. Also, contrary to Respondents' assertion, joint liability is not limited to personal injury cases[7]. Moreover, the Board has assessed penalties joint and several on numerous occasions for violations of the Act[8].

All of the joint counts should be considered "indivisible injuries". The harm from, for example, knowingly continuing to operate Parcel B after it had reached capacity is not severable. Even if Robert Pruim, Edward Pruim, and CLC had acted completely independent of one another, liability would be joint because the harm is the same. However, they did not act independently, they acted jointly. Both Robert and Edward signed Landfill Capacity Certifications which showed the Landfill was reaching and exceeding its permitted capacity[9]. Only Robert Pruim and Edward Pruim, sole owners and officers of CLC, possessed the authority to shut down the Landfill once it reached capacity. Similarly the failure to submit the SigMod permit application is indivisible. Only Robert and Edward Pruim had authority to submit permit documents[10]. The same is true for arrangements for financial assurance, or any other task that required the expenditure of funds, because only Robert and Edward Pruim had authority to arrange funds for

[5] Id., at 28, citing *Sakellariadis v. Campbell*, 391 Ill App. 3d 795,801 (1st Dist 2009).
[6] *Burke v. 12 Rothchild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 438 (1992)
[7] See, e.g.: *Board of Trustees of Community College District No. 508 v. Coopers & Lybrand*, 208 Ill. 2d 259 (2003) (financial losses were 'indivisible injury' and joint and several liability applied to accounting firms)
[8] See, e.g.: People v. State Oil Co et al, PCB 97-103, aff'd , 352 Ill. App. 3d 813 (2d Dist 2004)
[9] Complainant's Hearing Exhibits 14(d) [signed by Edward], 14(e) [signed by Robert]
[10] Hearing Transcript, 12/4/08, pp.14-16

these expenditures. Also, as sole owners of CLC, only Robert and Edward Pruim benefitted economically from this noncompliance. Clearly, the Pruims and CLC acted jointly for these violations. As clearly, the harm from each violation is indivisible. Under Illinois Law, joint and several liability is appropriate.

Respondents claim that the "only authority" for imposition of joint and several liability is contained in Section 2-1118 of the Code of Civil Procedure, 735 ILCS 5/2-1118. Clearly this is incorrect. All of the cases cited above found joint and several liability to be appropriate on the basis of joint action or indivisible harm, yet none cite this Section of the Code of Civil Procedure. Complainant agrees that Section 2-1118 may provide a *separate* basis for Joint liability. In fact, Section 2-1118 may be applied in this case as well. The waste disposed at the Landfill above permitted elevations was 'discharged into the environment' in violation of the Act. This waste remained 'in the environment' as of the date of hearing[11]. However, with or without Section 2-1118, Illinois law provides for a joint and several penalty in this case.

D. Respondents Have Waived Argument on Joint and Several Liability under the Act

Even if the Appellate Court and Illinois Law had not confirmed the appropriateness of a joint and several penalty, the Respondents waived this argument by failing to raise it earlier. It is well settled that issues not raised in the Trial Court are waived[12].

While the Respondents contested joint and several liability with the Pruims on the violations found only against CLC, they did not challenge the Board's authority to impose joint and several liability under any circumstances until their this Motion. The Board should find that,

[11] Respondents claim that they removed 100,000 cubic yards of the overheight waste. However, as shown by Complainant's Exhibit 14(e), in 2005 alone, Respondents deposited 540,135 cubic yards of waste after the landfill's capacity had been exceeded.
[12] Haudrich v. Howmedica, Inc., 169 Ill. 2d 525, 536 (1996)

by failing to raise this argument earlier, the Respondents are subject to the doctrine of waiver.

E. Assessment of a Joint and Several Penalty is Equitable

Respondents claim that, because of the pending Bankruptcy of Robert Pruim, assessment of a $225,000 penalty will put an unfair burden on Edward Pruim. This argument is also without merit.

The Board issued its 2009 Final Order based on the evidence presented at the December, 2008 hearing. Its July 2009 decision was based on that evidence, not events that occurred subsequent to the hearing. Moreover, the Appellate Court's mandate only called for an allocation of the total penalty between the "Joint" violations and the "CLC only" violations, not for consideration of additional facts.

Robert Pruim did not file for bankruptcy until October 27, 2011, almost 14 months after the Board assessed its penalty against the Pruims and CLC. Between July 2009 and October 2011 Robert, his brother Edward, and CLC filed numerous pleadings before the Board and Appellate Court. Robert Pruim could have (and in fact, may have) made provision with his brother for his share of the assessed penalty. Or Robert and Edward could have left sufficient funds in CLC to pay the entire penalty, as only they had control of CLC's funds. However, even if Edward Pruim is required to pay the entire civil penalty personally, that is simply the consequence of joint liability for joint violations. The penalty is not overwhelmingly large, considering the Pruims have retained economic benefit from the violations since at least 1994[13].

III. THE BOARD CORRECTLY ALLOCATED THE $250,000 CIVIL PENALTY

The Respondents argue for a reallocation of the $225,000.00/$25,000.00 penalty split, but

[13] The evidence showed that the Parcel B Landfill reached capacity in 1994, but continued operation until at least 1997. All dumping revenues after 1994 constitute economic benefit from the violations in Counts VII-X

fail to provide new evidence, or an error in the law related to the Board's division. However, The Board's April 5, 2012 Decision provides a more than adequate basis for its allocation, including extensive review of the penalty factors from Sections 33 and 42 of the Act.

A. The Relative Number of Counts is Not Significant

Respondents incorrectly state that the Board improperly assigned 75% of the penalty to only 10% of the violations, claiming that the CLC-only counts resulted in 36 violations. But their math is faulty. Each day of each violation constitutes a violation of the Act[14]. The Board found 1,178 days of violation in the significant modification permit count (Count V). And, even using the most conservative dates possible for the overheight violations, the duration of each is at least 1,826 days. There are four overheight counts (Counts VII-X). Therefore, the total number of violations for the overheight and significant modification permit Counts is 8,482, compared to 36 for the CLC-only Counts. Therefore, the CLC-only violations represent only 0.4% of the total.

But there is more to penalty than arithmetic. The Board properly evaluated the gravity, duration, and economic benefit of noncompliance in allocating $225,000.00 for the Joint violations. Significantly, all of the economic benefit of noncompliance found by the Board resulted from the Joint violations. And, as found by the Board, the gravity of the permitting and overheight violations is severe.

B. A Large Penalty Against CLC Would Not Deter Violations

As the Board and Appellate Court have found, personal liability against Robert and Edward Pruim is appropriate. On Remand, the Board followed the penalty guidance contained in the Act, and has appropriately divided the penalty to address duration, gravity, and recovery of economic benefit. Conversely, Respondents' recommendations would defeat one of the main

[14] Respondents also count each day of violation as a separate violation to arrive at 36 violations.

purposes of civil penalty, deterrence of violations by others.

Respondents note that CLC is "defunct and insolvent[15]" while, at the same time arguing that it should be assessed $225,000.00 of the total civil penalty. Obviously, as of the date of filing this Response, such an allocation would be absurd. CLC is judgment proof, and all parties must agree that no penalty assessed against it would ever be paid.

CLC was not involuntarily dissolved until May 4, 2010, after the close of the Record. Complainant believes that the Board's allocation was done based on facts in the Record, and not subsequent events. However, even at the time of hearing the Record showed that CLC was no more than a shell company. In its Closing Argument and Post-Hearing Brief (filed on February 6, 2009), Complainant noted:

> *However, a penalty entered against Community Landfill Company alone will have no deterrent value whatsoever. From testimony at this hearing and the hearing in PCB 03-191, Complainant has come to the conclusion that CLC has few if any remaining assets. Certainly the amount of money remaining in CLC's name is at the sole discretion of Edward Pruim and Robert Pruim, the owners of CLC. Complainant believes that a penalty entered solely against CLC will be uncollectible, and have no deterrent value on the Pruims or any other person[16].*

Nothing (besides the company's inevitable dissolution) has changed since Complainant first pointed this out to the Board. Therefore, there is no reason for Board to reverse its position. As sole owners and officers of CLC, the Pruims benefited personally for the violations. Clearly the lion's share of the penalty should be assessed against them, and CLC, jointly.

C. <u>The Board should not Reconsider the Overheight Violations</u>

Without providing any new facts or law, Respondents again argue that the overheight violations (Counts VII-X) should constitute "really only on violation of the Act, not four"...."have

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[15] Motion, P.10

[16] Complainants Closing Argument and Post-Hearing Brief, p.52

never been proved to exist at any identifiable level"...and have "never been alleged to have threatened or cause any harm to the environment"[17]. But the Board has consistently rejected these arguments.

The Board denied Respondents' "one violation not four" claim almost ten years, ago in its ruling on partial summary judgment[18]. Nothing has changed. Moreover, despite Respondents' claims, the Landfill Capacity Certifications and Respondents' permit applications clearly admit that the overheight exists[19]. For example, Respondents' permit application admits and quantifies the amount of overheight in place as of April 30, 1997: at least ten feet over permitted elevations, and at least 475,000 cubic yards of excess waste[20]. Finally, the claim that these violations did not cause harm to the environment ignores decades of environmental regulation. The harm is presumed.

IV. CONCLUSION

Respondents have provided no basis for the Board to reconsider its April 5, 2012 decision on Remand. They have not provided any new facts or novel legal arguments. The Board has properly determined, in accordance with the penalty factors contained in the Act, that the Joint violations should be allocated the majority of the civil penalty in this case. The Board's allocation of $225,000.00, joint and several against Respondents Robert Pruim, Edward Pruim, and CLC, for the Joint Counts was fair, reasonable, and in accord with the penalty provisions of the Act.

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[17] Motion, p. 9
[18] PCB 97-193, October 3, 2002, p.13
[19] Complainant's exhibits 14(a)-14(h), 1(f)
[20] Exhibit 1(f), p. 11

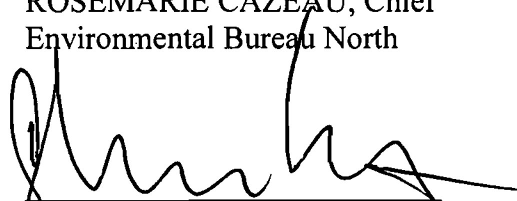
WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board deny Respondents' Motion for Reconsideration of the Board's Order Dated April 5, 2012.

RESPECTFULLY SUBMITTED

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN,
Attorney General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

ROSEMARIE CAZEAU, Chief
Environmental Bureau North

BY: 

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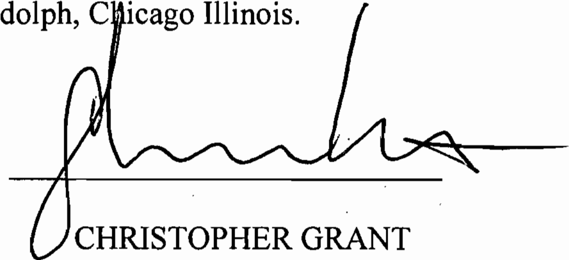
CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 11th day of June, 2012, the foregoing Complainant's Response to Respondents' Motion for Reconsideration of the Board's Order Dated April 5, 2012 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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