ILLINOIS POLLUTION CONTROL BOARD
June 16, 2005

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-2
	)	(Enforcement – Land, Water)
JERSEY SANITATION CORPORATION, an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by N.J. Melas):

Jersey Sanitation Corporation (Jersey Sanitation) operated a 10-acre sanitary landfill two miles from Jerseyville in Jersey County. In its February 3, 2005 final opinion and order, the Board found Jersey Sanitation violated numerous provisions of the Board's rules and the Environmental Protection Act (Act) for over a dozen years. Among other things, the Board fined Jersey Sanitation $65,000 and ordered it to pay the People $24,100 in attorney fees.

On March 21, 2005, Jersey Sanitation moved the Board to reconsider its February 3, 2005 final opinion and order (Board Op.). The People responded in opposition to the motion on April 4, 2005. For the reasons set forth below, today's order grants the respondent's motion for reconsideration, but declines to modify the Board's final opinion and order.

BACKGROUND

Violations Alleged

On July 8, 1996, the Attorney General's Office, on behalf of the People of the State of Illinois (People) filed an eight-count complaint against Jersey Sanitation. The People filed their second amended complaint on January 8, 2001, adding a ninth count (2nd Am. Comp.).

In the second amended complaint, the People allege violations under nine separate counts: (1) count I of the complaint alleges groundwater violations; (2) count II alleges failure to monitor and control leachate so as to prevent and control leachate seeps and flows; (3) under count III, the People allege instances of refuse in waters of the State; (4) in count IV, the People allege numerous permit violations; (5) count V alleges failure to provide adequate cover on refuse; (6) count VI alleges financial assurance violations; (7) in count VII, the People allege violations of closure requirements; (8) in count VIII, the People assert Jersey Sanitation caused or allowed open burning of landscape waste; and (9) in count IX, the People allege failure to have a chief operator with prior conduct certification at the facility. Board Op. at 2-4.

Relief Requested

The People ask the Board to impose a civil penalty of $65,000 against Jersey Sanitation, award the People $24,100 in costs and attorney fees, and order Jersey Sanitation to perform a trend analysis of groundwater sample results, submit a groundwater assessment plan to the Agency for approval and implement the plan within 30 days of approval by the Agency. If the sampling and assessments demonstrate violations, then the People request that Jersey Sanitation submit a corrective action/remediation plan to the Agency for approval and implement the plan within 30 days of that approval. Board Op. at 4.

The People also ask the Board to order Jersey Sanitation to cease and desist from all violations of the Act and Board regulations. Accordingly, the People also request that the Board order Jersey Sanitation to comply with its permit by submitting a biennial revision to its cost estimates within 60 days of the date of the Board's final disposition of this matter. *Id*.

Board's Final Opinion and Order

On February 3, 2005, the Board issued its final opinion and order finding that Jersey Sanitation knowingly and willingly violated 15 provisions of the Act and 16 Board regulations. The Board also found that groundwater violations lasted 13 years.

The Board ordered Jersey Sanitation to comply with the requirements of its permits, including groundwater sampling, analysis, and reporting, financial assurance requirements, and a biennial revision of its cost estimates. Further, the Board ordered Jersey Sanitation to develop a groundwater assessment plan, submit the plan to the Agency for approval, and implement the plan within 30 days of the Agency's approval. If the results of the groundwater sampling and assessment plan demonstrate exceedences attributable to Jersey Sanitation Landfill, this order requires Jersey Sanitation to develop and submit a corrective action plan to the Agency for approval, and implement the plan within 30 days of the Agency's approval.

MOTION FOR RECONSIDERATION

Timeliness of Filing

As a preliminary matter, the People contend that Jersey Sanitation's motion for reconsideration is untimely. The People state they received the Board order on February 9, 2005 and the motion is dated March 18, 2005, 37 days after the complainant received the Board order. Resp. at 1.

A party may move the Board to reconsider and modify a decision within 35 days after receiving a final Board order. 35 Ill. Adm. Code 101.520(a). In the case of service by certified mail, service is complete on the date specified on the certified mail receipt. 35 Ill. Adm. Code 101.300(c). The certificate of service shows Jersey Sanitation received the Board's final order on February 11, 2005. A document filed by U.S. Mail is considered filed on the postmark date. 35 Ill. Adm. Code 101.300(b). Jersey Sanitation's motion for reconsideration, mailed on March 18, 2005 by U.S. Mail, is therefore timely.

Substance of Motion

In its motion, Jersey Sanitation moves the Board for reconsideration of its final opinion and order arguing that the Board "misconstrued and misapplied the law, overlooked and/or misunderstood many facts, and deprived Respondent of statutory and constitutional rights." Mot. at 1.

In response, the People assert that Jersey Sanitation has raised "no new evidence, or change in the law, or any law for that matter that would suggest any error in the Board's order of February 3, 2005." Resp. at 15.

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, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. A motion to reconsider may specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 5 (Feb. 19, 2004). "Reconsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character so as to make it probably that a different judgment would be reached." Patrick Media Group, Inc. v. City of Chicago, 255 Ill. App. 3d 1, 8, 626 N.E.2d 1066, 1071 (1st Dist. 1993).

The Board grants Jersey Sanitation's motion for reconsideration, but only to discuss the assertions and further clarify the Board's reasoning for the benefit of any reviewing court. Upon reconsideration, the Board declines to make any of the requested changes and reaffirms its February 3, 2005 opinion and order in its entirety. Below the Board discusses each of these arguments, analyzes the arguments, and gives the Board's findings and reasons for those findings.

The Parties' Arguments

Order of Compliance

First, Jersey Sanitation asserts that the Board lacks the statutory power and authority to order the respondent to conduct the activities described in the Board's order. Mot. at 1-2; citing People v. Agpro, Inc., 214 Ill. 2d 222, 824 N.E. 2d 270 (Feb. 3, 2005).

In response, the People state that Illinois decisions recognize the Board's authority to take whatever steps necessary to resolve the problem of pollution and correct instances of pollution on a case by case basis. Resp. at 2; citing Discovery South Group, Ltd. v. PCB, 275 Ill. App. 3d 547 (1st Dist. 1995); 656 N.E. 2d 51; W.F. Hall Printing Co. v. EPA, 16 Ill. App. 3d 864, 868; 306 N.E.2d 595 (1st Dist., 1973); Mystik Tape v. IEPA, 16 Ill. App. 3d 778, 306 N.E. 2d 574 (1st Dist. 1973). The People further state that the Agpro decision is not applicable to Board decisions, nor are the amendments to the Act that the legislature made in response to the Agpro holding. Resp. at 6.

Section 33(a) of the Act gives the Board broad discretion in matters of remedy by authorizing it to enter "such final order . . . as it shall deem appropriate under the circumstances."

After finding all of the alleged violations in the People's second amended complaint, the Board ordered Jersey Sanitation to comply with existing permit requirements as well as confirm or refute the existence of Class II groundwater quality standard exceedences through groundwater sampling and a groundwater assessment plan. "In an enforcement proceeding the Board may order the submission of a program or order further hearings to develop one." Currie, David, *Enforcement Under the Illinois Pollution Law*, Nw. U. L. Rev., Vol. 70, No. 3 (1976); citing EPA v. Champaign, PCB 71-51C (Sept. 16, 1971) (requiring respondent to report regarding the condition of the water body and steps taken to mitigate pollution and to report on a program for the policing and improving the water quality of the water body); *rev'd in part on other grounds* City of Champaign, v. PCB *et al*., 12 Ill. App. 3d 720; 299 N.E.2d 28 (4th Dist 1973).

The Board has exercised its authority to order compliance with the Act in the past. *See e.g*. Village of Matteson v. Discovery South Group, Ltd., *et al*., PCB 90-146 (Feb. 25, 1993). After finding noise pollution violations in Discovery South, the Board ordered the respondent amphitheater to conduct sound monitoring for three year and maintain specific sound levels. The respondent appealed on the grounds that the remedy violated the Act because it was beyond the scope of the Board's powers. The appellate court affirmed the Board's decision stating that the legislature gave the Board the power to order compliance with the Act and the Board's final order was an exercise of the Board's power to order compliance. Discovery South, 656 N.E. 2d 51.

Like in Discovery South, the Board finds that ordering Jersey Sanitation to complete groundwater monitoring as provided in its permit is not outside of the Board's authority because is an exercise of the Board's power to order compliance. Illustrating this point, in the final opinion and order, the Board stated: "In addition to imposing a penalty, the Board will also require Jersey Sanitation to take steps to bring the site into compliance and prevent further violations." Accordingly, Jersey Sanitation has presented no new facts, a change in the law, nor shown that the Board misapplied the law or its authority.

Attorney Fees

Second, Jersey Sanitation asserts that the People did not request attorney fees in its opening brief and, consequently, has waived the issue of attorney fees. Mot. at 2. According to Jersey Sanitation, issues not raised in an opening brief are waived and cannot be raised for the first time in a reply. Mot. at 2; citing People v. Brown, 169 Ill. 2d 94, 108, 660 N.E.2d 964, 970 (1995); Gunn v. Sobucki, 352 Ill. App. 3d 785, 789-90, 817 N.E.2d 588, 591 (2nd Dist. 2004).

In response, the People cite to the numerous places throughout the second amended complaint and post-hearing brief where the People have requested attorney fees. Resp. at 2.

Jersey Sanitation does not dispute the Board's finding that it committed a willful, knowing or repeated violation of the Act. Nor does it contest the rate or number of hours that the People request. Rather, Jersey Sanitation claims that the People raised the issue of attorney fees for the first time in the reply and, therefore, waived the issue. The Board finds that the issue of attorney fees was timely argued.

The record of this proceeding demonstrates that the People requested attorney fees in each count of the original complaint, as well as the first and second amended complaints. *See e.g*. 2nd Am. Comp. at 9, 12, 13, 28, 30, 33, 37, 40, and 42. Further, the People requested attorney fees in their post-hearing brief, stating that a calculation of the total fees and costs requested would be included in the People's reply brief. AG Br. at 138. In their reply, the People requested a total of $24,100 in costs and attorney fees. AG Reply at 36. Jersey Sanitation filed no response to the request. 35 Ill. Adm. Code 101.500(d). *See* People v. ESG Watts, Inc., PCB 01-167 (Apr. 1, 2004). Jersey Sanitation has failed to persuade the Board to modify its attorney fee order.

Alleged "Factual Errors"

Third, Jersey Sanitation contends that the Board's final opinion and order was decided upon numerous factual errors. The People arguein response that Jersey Sanitation's arguments regarding the Board's factual errors are either irrelevant to the standards that are to be applied or are not really facts but instead a "perpetuation of the erroneous statements and flawed arguments that have been repeatedly put forth by the Respondent in this matter." Resp. at 3. Below the Board addresses each of the alleged errors below.

Length of Residency of Respondent's Shareholders. Jersey Sanitation first argues that the Board misstated when the respondent's shareholders moved to the area. Mot. at 3. Jersey Sanitation asserts that the respondent's shareholders actually moved to their homes before, not after, the landfill was sited. *Id*.

In response, the People state that the date the shareholders established residency in the vicinity of the Jersey Sanitation Landfill is "completely and wholly irrelevant." Resp. at 6.

The Board states in the final opinion and order that the neighbors moved to the area after the landfill was already sited. Board Op. at 31. The record demonstrates that the former owner, Mr. Ralph Johnson, received permits from the Agency to develop and operate the site for solid waste disposal On August 6, 1973 and August 27, 1973, respectively. Parties Exh. 1. The facility, therefore, received siting in 1973 in accordance with the then-applicable law.

Mrs. Shourd's testimony indicates her family moved to the area after Mr. Johnson received siting for the landfill: "My family bought a house in the country, I believe it was in 1974, I think. In the fall of that year. And the next summer, it opened up as a landfill." Tr. at 328. The record also shows that shareholders Tom and Sue Roach moved to the area after the site opened as a landfill. Tr. at 340.

Nonetheless, the Board's final opinion and order makes it clear that regardless of the date that the Shourds, or other shareholders, moved to the area, priority of location was not an issue in the Board's remedy determination under the Section 33(c) factors. *See* 415 ILCS 5/33(c) (2002). If fact, the Board found that the Jersey Sanitation landfill would have been suitable to its location if not for its long history of noncompliance. Board Op. at 31. Therefore, the Board's decision did not hinge on who moved to the location first, but the fact that Jersey Sanitation operated out

of compliance for over a decade. The Board finds that Jersey Sanitation has not presented any new facts, evidence, or change in the law that would suggest the Board erred on this issue.

Date of Closure or Compliance. Second, Jersey Sanitation argues that the Board misstated the effective date of closure granted by the Agency. Jersey Sanitation refers to pages 1, 2, 5, and 7 of the Board opinion and order.

In response, the People contend that the Board's statements regarding the date of closure or compliance are correct. Resp. at 9. Further, the People state that because Jersey Sanitation was so non-specific in referring to instances where the Board allegedly erred, Jersey Sanitation's arguments on this issue should be rendered moot due to vagueness. *Id*.

First, the Board finds no reference to the date of closure on pages 1, 2, or 7. Second, the Board finds the date of September 30, 1994, provided on page 5 of the opinion and order, is supported by the record as the date of certified closure as indicated by a permit issued by the Agency on October 5, 1999. Board Op. at 5; *citing* Parties Exh. 42. The Board's findings regarding compliance are as stated in the opinion and order and Jersey Sanitation has provided no new facts or evidence disputing these findings. The Board finds that Jersey Sanitation has nothing new that would merit modification of the Board's findings regarding the dates of closure or compliance of the Jersey Sanitation landfill.

Composting and Open Burning. Third, Jersey Sanitation contends the Board erred in finding that Jersey Sanitation caused or allowed composting within the permitted boundaries of the landfill. Jersey Sanitation also states that Ms. Shourd testified that at the time, "composting was not even a regulated activity." Mot. at 4.

The People state that a review of the briefs proves that all grounds that the Board relied upon in the final opinion and order were raised in the People's briefs. Resp. at 10.

The People alleged in the second amended complaint that Agency inspection reports show Jersey Sanitation conducted unpermitted composting operations on August 30, 1990, January 23, 1991, and May 21, 1991. 2nd Am. Comp. at 18. The Board finds Jersey Sanitation's argument that composting was not an illegal activity at the time of the alleged violations incorrect. Section 21(d)(1), effective August 29, 1990, prohibited unpermitted waste disposal operations. 111½ Ill. Rev. Stat. 1021(d)(1) (1991).

After a review of the record, the Board concluded that the Agency inspector's testimony supported the People's allegation that Jersey Sanitation's composting activities constituted an unpermitted waste disposal operation. Board Op. at 25. The Board found Jersey Sanitation's composting activities violated Section 21(d)(1) of the Act. The Board finds that Jersey Sanitation has not raised any new evidence, change in the law, or error in the Board's application of the law that would merit modification of this finding, or reconsideration.

Groundwater Violations. The fourth "factual error" Jersey Sanitation raises is that the Board "found Respondent guilty of conduct that had never been charged by Complainant" with respect to alleged groundwater violations and "confused the Complainant's case against

Respondent." Mot. at 4. In support of this argument, Jersey Sanitation claims that its expert, Mr. Ken Liss, "testified without contradiction that no trends were developed, that no evidence existed to suggest the landfill was causing any exceedances [sic], and that the groundwater activities at the site were in full conformance with the permit, applicable regulations, and the statute." Mot. at 5.

In response to Jersey Sanitation's claims that the Board fabricated the landfill's groundwater issues, the People comment "What an absurd claim!" Resp. at 4. The People state that the second amended complaint clearly sets out allegations of violations of groundwater standards. The People contend there is no arguing with the groundwater sampling results that are part of this record, and that they presented evidence at hearing regarding the necessary remedy for each and every groundwater allegation. Resp. at 11. The People state the undisputed sample results in this record show exceedences of Class II groundwater standards. Resp. at 11-12.

Further, the People state that contrary to Jersey Sanitation's claims, respondent's witness, Ken Liss, did not testify that "there was no evidence of trends." Resp. at 11. In fact, argue the People, Mr. Liss testified that given that a review of all of the groundwater sampling data indicates exceedences of the groundwater standards, a trend analysis is required under the terms of the current permit. *Id*.; citing Jan. 2004 Tr. at 40, 41. The People also contend that Mr. Rathsack, on behalf of Jersey Sanitation, stated that under the existing permit, if a trend was believed to be developing, a groundwater assessment was merited. Resp. at 11; citing Tr. at 398.

The Board notes that Jersey Sanitation's disagreement regarding the Board's finding of groundwater violations is with a Board legal conclusion and not with a factual finding. The People alleged groundwater violations in the second amended complaint, and the Board addressed each of the alleged violations, making findings based on the record. These findings are set forth in the final opinion and order and the Board finds here that Jersey Sanitation has raised no new evidence, change in the law, or error in the Board's application of the law that would merit modification of these findings or reconsideration.

Economic Benefit. Fifth, without citation of caselaw or Board precedent, Jersey Sanitation asserts the Board made a factual error because it "reached the confounding conclusion that Respondent reaped some economic benefit." According to Jersey Sanitation, the Board's economic benefit decision is unsupported by the facts and/or is "premised upon a gross misunderstanding of the law." Mot. at 6.

In response, the People again point out that Jersey Sanitation's argument has no merit because by failing to comply, the respondent avoided the costs of compliance. Resp. at 13.

The Board finds that Jersey Sanitation's argument is without merit. The Act is clear that delayed compliance with applicable rules and regulations constitutes "economic benefit." As stated in the Board's final opinion and order, Section 42(h) of the Act directs the Board, in

determining an appropriate civil penalty, to consider any economic benefits enjoyed by the respondent due to delay in compliance with requirements. 415 ILCS 5/42(h) (2002).[1]

The Board found that the People's estimate that Jersey Sanitation avoided $25,233.53 in costs by not meeting financial assurance requirements, and $9,000 by failing to perform a required groundwater assessment, were representative of the costs avoided by Jersey Sanitation. Board Op. at 34. This estimate does not include costs avoided by Jersey Sanitation for failing to properly monitor and control leachate (Board Op. at 14) and maintain adequate cover on the landfill (Board Op. at 15) during the years the landfill remained open, or take corrective action during post-closure care period (Board Op. at 25). Consequently, the Board's finding regarding the economic benefit of delayed compliance could have been much higher.

The record shows that the People's estimate of costs avoided by Jersey Sanitation's failure to meet financial assurance requirements was based on conservative interest rates. 2nd Am. Comp. at 113; Tr. at 71-79. The Fourth District Appellate Court has affirmed the Board's finding that the economic benefit of paying landfill fees late was the interest rate on money the respondent could have borrowed to timely pay the fees. *See* ESG Watts v. PCB, 282 Ill. App. 3d 43, 49-50, 668 N.E. 2d 1015, 1020 (4th Dist. 1996).

In summary, the Board's understanding of the law is based on the Act and Board precedent, and the Board's economic benefit determination is supported by the testimony and evidence in the record. The Board finds Jersey Sanitation's argument for modification of the Board's opinions and order on this issue without merit.

Deterrence. The sixth and final "factual error" that Jersey Sanitation raises is the Board's conclusions relating to the Section 42(h) deterrence factor in determining an appropriate civil penalty. Mot. at 6. According to Jersey Sanitation, all available resources the respondents had were devoted to improving the landfill's environmental condition; behavior that should be encouraged, not deterred. Mot. at 7.

The People respond by stating that the landfill is currently out of compliance, and has been for 15 years, and that this is not behavior to be encouraged by this respondent or any other person similarly subject to the Act. Resp. at 14. The People state that "[i]n fact, the Respondent is a poster child for deterrence." *Id.*

After a review of the record, the Board found that Jersey Sanitation had been given many opportunities to comply with the Act, Board regulations, and its permit, but did not comply. The Board's final opinion and order states: "Jersey Sanitation has owned the facility since 1989, and on only one occasion has the Agency inspected the site and found no violations. In fact, at recent inspections done on January 21 and February 17, 2004, Inspectors Johnson and King found

[1] Section 42(h) was substantially amended by P.A. 93-575, effective January 1, 2004. The amendments direct the Board to use the economic benefit from delayed compliance as the minimum penalty amount. Also stated in the Board's opinion and order, because hearings in this proceeding began before the effective date of P.A. 93-575, the Board did not apply the amendments in fashioning an appropriate penalty to impose on the respondent.

leachate present at the site and entering Sandy Creek." Even this enforcement proceeding, initiated by the People eight years ago, has not deterred Jersey Sanitation from causing actual harm to the environment.

Further, the applicable standard under the Section 33(c) factors is not only what amount will deter the *respondent*, but also similarly situated entities from violating the Act and Board regulations. Because the violations actually harmed the environment and were ongoing for many years, even after the facility closed in 1992, the Board determined that a $65,000 penalty was necessary to deter Jersey Sanitation and similarly situated entities.

Finally, Jersey Sanitation did not even raise an argument under the Section 33(c) or 42(h) factors, yet argues that no civil penalty is warranted. Subsequent to hearing, Jersey Sanitation conceded many of the violations alleged in the second amended complaint. The Board found the remaining violations in the final opinion and order. The Board does not understand how, at the conclusion of an eight-year enforcement proceeding, imposing no civil penalty could deter a respondent such as Jersey Sanitation, a facility that has been out of compliance for so many years, from harming human health or the environment in the future.

In conclusion, without providing any examples or citations, Jersey Sanitation contends that the "Board and the appellate court have rebuffed, several times, efforts by Complainant (including both the Attorney General's Office and the IEPA) to illegally impose upon Respondent obligations that are impermissible by statute, regulation or law." Mot. at 7. Jersey Sanitation urges the Board to reevaluate the facts and reconsider the final opinion and order. According to Jersey Sanitation, the Board need not impose a civil penalty in every case of violation, and should not impose one here. Mot. at 7; citing Southern Illinois Asphalt Co. v. PCB, 60 Ill. 2d 204, 208, 326 N.E.2d 406, 408 (1975).

The People conclude that Jersey Sanitation has offered no new evidence, or change in the law, that demonstrates any error in the Board's February 3, 2005 order, or would merit any change in the Board's decision. Resp. at 15.

The Board finds Jersey Sanitation's citation to Southern Illinois Asphalt unavailing. In that case, the court reversed the Board's imposition of a civil penalty finding that one respondent had acted in good faith and its failure to obtain a permit was inadvertent. The court found the other respondent involved was not dilatory or recalcitrant in its conduct. Southern Illinois Asphalt, 326 N.E. 2d at 410, 412. Here, the Board did not and cannot find that Jersey Sanitation acted in good faith or that its failure to comply was simply inadvertent. The Board finds its imposition of a civil penalty both necessary and proper, and declines to modify the penalty.

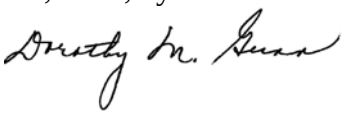
CONCLUSION

The Board grants Jersey Sanitation's motion, yet upon reconsideration, the Board finds no justification to modify its February 3, 2005 opinion and order. The Board, therefore, reaffirms its final opinion and order in its entirety.

IT IS SO ORDERED.

Section 41 (a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 16, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board