

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AUG 1 2003

STATE OF ILLINOIS
Pollution Control Board

PEOPLE OF THE STATE OF ILLINOIS,)

Complainant,)

vs.)

PCB No. 03-191
(Enforcement)

COMMUNITY LANDFILL COMPANY,)
INC., an Illinois corporation, and)
the CITY OF MORRIS, an Illinois)
municipal corporation,)

Respondents.)

NOTICE OF FILING

TO: Ms. Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, 11-500
Chicago, IL 60601

Mr. Christopher Grant
Assistant Attorney General
Environmental Bureau
188 W. Randolph, 20th Floor
Chicago, IL 60601

Mr. Brad Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that on August 1, 2003, the undersigned filed with the clerk of the Illinois Pollution Control Board an original and nine copies of RESPONDENT COMMUNITY LANDFILL COMPANY INC.'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES, a copy of which is attached and hereby served upon you.



One of the Attorneys for Community Landfill Co.

Mark A. LaRose
Clarissa C. Grayson
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THIS FILING IS SUBMITTED ON RECYCLED PAPER.

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**RESPONDENT COMMUNITY LANDFILL COMPANY INC.'S RESPONSE TO
COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES**

Respondent, Community Landfill Company, Inc., ("CLC" or "Respondent") by and through its attorneys LaRose & Bosco, Ltd., responds to the People of the State of Illinois' ("Complainant") Motion to Strike Affirmative Defenses, and moves the Board to deny Complainant's motion, and in support thereof, states as follows:

INTRODUCTION

On April 16, 2003, Complainant filed a complaint alleging that CLC and the City of Morris ("Respondents") operated a Municipal Solid Waste Landfill without having first provided appropriate financial assurance as required by the Illinois Environmental Protection Act ("the Act") and the Pollution Control Board ("Board"). On June 16, 2003, Respondent CLC filed its answer and affirmative defenses.¹ On July 16, 2003, Complainant filed its motion to strike CLC's first and

¹ On June 13, 2003, Respondent City of Morris filed its answer and affirmative defenses which did not contain any affirmative defenses.

argument's sake only that the elements of collateral estoppel have been met, the Complainant should not be allowed to use offensive collateral estoppel in this case. The cases cited by the People in support of their motion, Community Landfill Company et.al v. Illinois Environmental Protection Agency, PCB 01-170 (2001) and the subsequent decision by the Third District Appellate Court, Community Landfill Company et.al v. Pollution Control Board, 331 Ill.App.3d 1056 (3d Dist. 2002); appeal denied, 202 Ill.2d 600 (2002) were appeals of the Agency's denial of a permit, a civil proceeding. They were not part of an enforcement action brought by the People of the State of Illinois, a quasi-criminal proceeding.

Permitting is specifically governed by Section 39 of the Act, and enforcement is governed by Section 31 of the Act. The burdens of proof under each of those procedures are starkly different. In an enforcement case, the Agency or the complainant has the burden of proving that the respondent has violated or threatens to violate a provision of the Act, the regulations or a permit. 415 ILCS 5/31(e) (2001). In a permit appeal, the petitioner has the burden of proving that denial was inappropriate and that if the permit had been granted there would be no violation of the Act or the regulations. The Board recognized the illegality of this burden shifting in ESG Watts, Inc. v. IEPA (October 29, 1992) PCB 92-54 at 7. Prohibition against the Agency using permits to enforce has long been recognized by the Board and the Courts. Id.; EPA v. PCB, 252 Ill.App.3d 828, 624 N.E.2d 402, 403 (3d Dist. 1993). Most recently, the Board recognized and raised this prohibition *sua sponte* in CLC, et.al v. IEPA (April 5, 2001), PCB 01-48, 01-49, (consolidated) at 24-25.

In PCB-170, a civil matter, CLC appealed the Agency's denial of a supplemental permit for the Morris Community Landfill, based on the same Frontier bonds at issue in the present matter. Community Landfill Company et.al v. Illinois Environmental Protection Agency, PCB 01-170

248, 252 (1988) (holding that findings in a civil fraud action may not form the basis of collateral estoppel in a subsequent disciplinary proceeding).

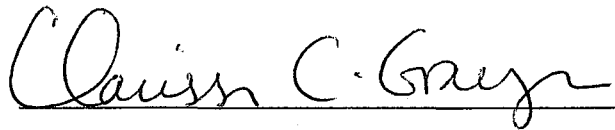
Furthermore, the court has cautioned against the use of offensive collateral estoppel. Van Milligan v. Bd. of Fire and Police Comm'rs of the Vill. of Glenview, et. al., 158 Ill.2d 85, 95, 630 N.E.2d 830, 835 (1994). Offensive collateral estoppel occurs when a plaintiff seeks to preclude a defendant from litigating an issue the defendant has previously litigated unsuccessfully in another action. Van Milligan, 158 Ill.2d at 95, 630 N.E.2d at 835. The Illinois Supreme Court has stated that such use of collateral estoppel must be done cautiously such that the defendant may fully and fairly litigate his case, even in cases where the threshold requirements for estoppel are otherwise satisfied. Id., 158 Ill.2d at 95, 630 N.E.2d at 835.

In the present case, the Complainant seeks to use offensive collateral estoppel to prevent the Respondent from making a defense that was raised in a prior civil proceeding. This argument, however, ignores both the court's cautioned use of offensive collateral estoppel and the fact that the Complainant's standard of proof for this disciplinary proceeding is a higher one than in the prior civil adjudication. Therefore, Respondent should not be precluded from asserting their first and second affirmative defenses in the present enforcement matter since the issues before the Board were previously adjudicated in a permit appeal, a civil proceeding with a lower burden of proof, not in an enforcement proceeding, a quasi-criminal proceeding with a higher burden of proof.

WHEREFORE, Respondent Community Landfill Company respectfully requests that the Board deny the Complainant's Motion to Strike Respondent's First and Second Affirmative Defenses.

CERTIFICATE OF SERVICE

I, Clarissa C. Grayson, an attorney hereby certify that I served RESPONDENT COMMUNITY LANDFILL COMPANY INC.'S RESPONSE TO COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES by placing copies of same in the United States Mail, first-class postage prepaid this 1st day of August 2003, addressed as follows:

A handwritten signature in cursive script, reading "Clarissa C. Grayson", written over a horizontal line.

One of the Attorneys for Community Landfill Co.

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