

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 COMMUNITY LANDFILL COMPANY, INC.,)
 an Illinois Corporation, and the CITY OF)
 MORRIS, an Illinois Municipal Corporation,)
)
 Respondents.)

PCB No. 03-191

CITY'S MOTION FOR LEAVE TO FILE A REPLY TO THE
STATE'S RESPONSE OPPOSING THE MOTION FOR LEAVE
TO FILE AMENDED AFFIRMATIVE DEFENSES

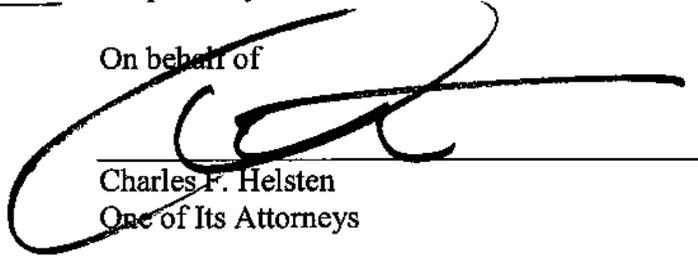
NOW COMES the Respondent, CITY OF MORRIS, by and through its attorneys, HINSHAW & CULBERTSON, LLP, and for its Motion for Leave to File a Reply to the State's response opposing the Motion for Leave to File Amended Affirmative Defenses, states as follows:

1. The City has filed a Motion for Leave to File Amended Affirmative Defenses in which it asserts several Affirmative Defenses which directly address the question of remedies under consideration in the upcoming hearing.
2. In response to the City's Motion, the State incorrectly asserts that the City's Amended Affirmative Defenses go to liability and not to the question of remedies. The City has prepared a Reply refuting the State's assertion, and requests leave to file a concise Reply clarifying application of the Affirmative Defenses to the upcoming proceedings.
3. The City is filing this Motion for Leave to File and the attached, concise Reply as expeditiously as possible, so as not to delay the Board's consideration of pending matters in this case.

Dated: 9/10/07

Respectfully submitted,

On behalf of



A large, stylized handwritten signature in black ink, appearing to read 'C. Helsten', is written over a horizontal line.

Charles F. Helsten
One of Its Attorneys

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an Illinois Municipal Corporation,)	
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CITY OF MORRIS'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE AMENDED AFFIRMATIVE DEFENSES

NOW COMES the Respondent, CITY OF MORRIS, by and through its attorneys, HINSHAW & CULBERTSON, LLP, and for its Reply in support of its Motion for Leave to File Amended Affirmative Defenses, states as follows:

1. The State has objected to the City's request for leave to file amended Affirmative Defenses on the basis that the amended defenses are inappropriate and/or irrelevant because "[t]he only remaining issue is for the Board to decide the appropriate relief for the violations." (State's Response in Opposition at ¶¶ 1, 3, 5).

2. Although the City respectfully disagrees with the Board's prior decision holding the City liable for violating the Act, the City nevertheless respects the Board's order, and, accordingly, directs the proffered Amended Affirmative Defenses not at liability, but, instead, at the factors listed in 415 ILCS 5/33(c), 42(f), and 42(h), which will be used to determine what remedy, if any, should be imposed against the City.

3. Some representative illustrations of the remedies and factors at issue in the upcoming hearing which are directly impacted by the Amended Affirmative Defenses are:

- a. Potential Remedy: Attorney's Fees - 415 ILCS 5/42(f) provides for a potential award of attorney's fees, which is prohibited as against the City by the Illinois Tort Immunity Act. *Yang v. City of Chicago*, 195 Ill.2d 96, 104 (2001).

- b. Potential Remedy: Punitive Damages –415 ILCS 5/42(h)(4) authorizes the levying of punitive penalties in order to “deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act.” The Illinois Tort Immunity Act prohibits the assessment of punitive damages against a municipality. 745 ILCS 10/2-102.
- c. Factor (h)(2): Attempts to Comply with the Act’s Requirements - 415 ILCS 5/42(h) provides that among the factors to be considered in awarding a remedy are “the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder.” *Id.* (emphasis added). The City has at all times acted on the good faith belief that it was not the party required under the Act to post financial assurance, thus the Amended Affirmative Defenses expressing the City’s position as to liability are entirely relevant to a consideration of this factor.

4. As illustrated by the exemplars cited above, the amended Affirmative Defenses are directly relevant to the Board’s determination of the appropriate remedy to be imposed against the City, if any, at the upcoming hearing.

5. As this Board noted in *People v. Sheridan Sand and Gravel*, PCB 06-177 (January 26, 2007), it is the Board’s practice to allow amendments to pleadings filed with the Board, except in cases where it would prejudice a party. *See also: People v. The Highlands, L.L.C. and Murphy’s Farm, Inc.*, PCB 00-104 (May 6, 2004).

6. Moreover, the most important consideration in whether to allow a requested amendment is whether allowing the amendment furthers the ends of justice. *Savage v. Pho*, 312 Ill. App. 3d 553, 556-57 (5th Dist. 2000). Any doubts as to whether leave to file an amended pleading should be granted should be decided in favor of allowing the amendment. *Id.*

7. In enacting the Illinois Tort Immunity Act, the legislature expressly immunized units of local government with respect to punitive judgments and attorney’s fee awards, thereby protecting

taxpayers and government from judgments other than those designed to compensate an injured party for an actual injury. See e.g. *Yang v. City of Chicago*, 195 Ill.2d 96, 104 (2001). The Tort Immunity Act evidences the General Assembly's determination that such limitations on judgments against units of local government serve the ends of justice.

8. Finally, the State's assertion that it will be prejudiced and "punished" if the Board grants leave for the City to file its Amended Affirmative Defenses is completely and totally inconsistent with the State's simultaneous assertion that the proposed defenses are irrelevant to the issues under consideration at the upcoming hearing.

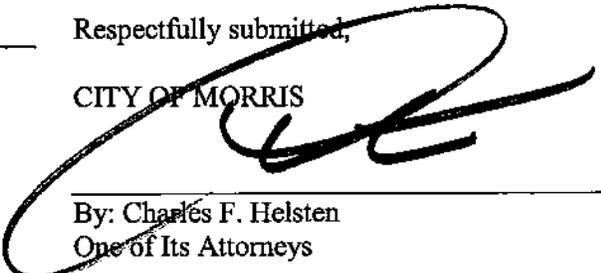
WHEREFORE, for the reasons set forth above, the City respectfully requests that the Board grant leave to the City to file its Amended Affirmative Defenses.

Dated:

9/10/07

Respectfully submitted,

CITY OF MORRIS


By: Charles F. Helsten
One of Its Attorneys

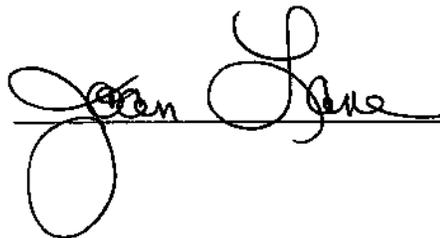
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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on September 10, 2007, she caused to be served a copy of the foregoing upon:

Mr. Christopher Grant Assistant Attorney General Environmental Bureau 69 W. Washington St., Suite 1800 Chicago, IL 60602	Mark LaRose Clarissa Grayson LaRose & Bosco, Ltd. 200 N. LaSalle, Suite 2810 Chicago, IL 60601
Mr. John T. Therriault, Assistant Clerk Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601 (via electronic filing)	Bradley Halloran Hearing Officer Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601
Mr. Scott Belt Scott M. Belt & Associates, P.C. 105 East Main Street Suite 206 Morris, IL 60450	Jennifer A. Tomas Assistant Attorney General Environmental Bureau 69 W. Washington Street, Suite 1800 Chicago, IL 60602

Via E-Mail.



A handwritten signature in black ink, appearing to read "Jennifer A. Tomas", is written over a horizontal line.

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