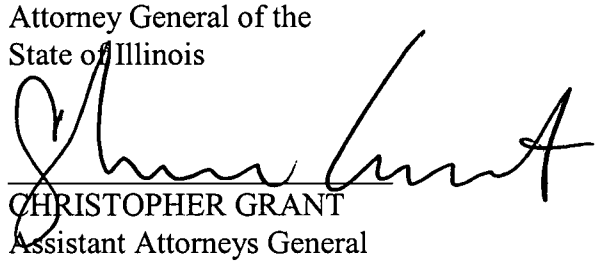
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
vs.	)	PCB No. 03-191
	)	(Enforcement-Land)
COMMUNITY LANDFILL COMPANY, INC., an Illinois corporation, and the CITY OF MORRIS, an Illinois municipal corporation,	)	
	)	
Respondents.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that we have today, October 19, 2007, filed with the Office of the Clerk of the Illinois Pollution Control Board, by electronic filing, Complainant's Closing Argument and Post-Hearing Brief, and Complainant's Appeal of Hearing Officer ruling, copies of which are attached and herewith served upon you.

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

BY: 

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COMPLAINANT'S APPEAL OF HEARING OFFICER RULING

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, and requests that the Board reverse an evidentiary ruling made by the Hearing Officer at hearing on September 11, 2007, and incorporate the excluded testimony of witness Brian White into the record. In support thereof, Complainant states, as follows:

I. EVIDENTIARY RULING

In its case in chief, Complainant called Illinois EPA Bureau of Land Compliance Unit Manager Brian White as one of its witness. On objection, the Hearing Officer excluded Mr. White's testimony regarding an offer made by Frontier Insurance Company in Rehabilitation ("Frontier") in response to the State's surety bond claim. Specifically, the Hearing Officer excluded testimony that Frontier had offered to settle the State's $17.4 MM claim for $400,000. The Bonds were issued to ensure closure and post-closure costs for the Morris Community Landfill, and were the subject of a permit appeal hearing between the Parties in 2001. *See: Complainant's Exhibit 4.*

Mr. White testified that Illinois EPA had made a claim on the Bonds, which have a face

value of approximately $17.4 million dollars[1]. He was then asked how much Frontier had offered to pay on the Bonds. The following exchange is in the record:

> Q. Has Frontier offered to pay on a claim, to your knowledge?
>
> A. Yes, they made an offer.
>
> Q. Okay. Do you know how much that offer was for?[2]

At this point, Counsel for the City of Morris objected, and, after discussion, the Hearing Officer ruled as follows:

> HEARING OFFICER HALLORAN: Excuse me, Mr. Grant. I kind of do find it somewhat relevant. But the problem is that this settlement is still up in the air and it's heavy in conjecture and there's nothing that I don't think from what I've heard so far is substantive. So I'm going to sustain Mr. Porter's objection. However, I will let it in as an offer of proof, if you so choose, and the Board can consider it in their own way.
>
> MR. GRANT: Yes. We'd like to continue on as an offer of proof.
>
> HEARING OFFICER HALLORAN: Okay. Let me know when the offer of proof is finished. Thank you.
>
> MS. TOMAS: Do you know if Frontier will be paying on those claims?
>
> THE WITNESS: I don't know if Frontier will be paying on those claims, no.
>
> MS. TOMAS: To your knowledge, have they made an offer to pay on those claims?

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[1] 9/11/07 Tr., p.179. Note: The transcripts for each day of hearing begin with 'page 1'. Citations to the transcript will therefore be made date specific.

[2] 9/11/07 Tr., p.184

THE WITNESS: Yes.

MS. TOMAS: And what was that amount?

THE WITNESS: 400,000.

MS. TOMAS: That's the end of the offer of proof.

HEARING OFFICER HALLORAN: Thank you.[3]

II. TESTIMONY REGARDING FRONTIER'S OFFER IS ADMISSIBLE

Clearly, in excluding this evidence, the Hearing Officer misinterpreted the general rule that offers of settlement are inadmissible. Specifically, this Rule applies only where the evidence is used to prove liability. See: *Stathis v. Gelderman, Inc.* 295 Ill. App. 3d 844, 861 (1st Dist. 1998). If the evidence is entered to prove an issue other than liability, its admission rests within the discretion of the court. *Id*[4].

The State does not offer Frontier's response to the State's surety bond claim to prove liability, which was established through summary judgment. And since Frontier Insurance Company in Rehabilitation is not a party to this matter, the information could not possibly be used to establish liability against Frontier[5]. Rather, the State offers this evidence to show the

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[3]9/11/07 Tr., pp. 187-188

[4]Some Illinois cases, and Federal Rule of Evidence 408, also call for exclusion where the evidence is used to establish the *amount* of the claim. Mr. White's uncontested testimony and Complainant's Exhibit 9 have already established the State's bond claim at $17,427,366.00. Testimony regarding Frontier's offer is therefore not intended as proof of the amount of the State's claim against it.

[5]As of the date of hearing, the State's bond claim was *not* the subject of a lawsuit filed by the State of Illinois, but rather was being processed according to the State of New York's insurance company rehabilitation procedures. Thus the excluded statement was not an offer to settle ongoing litigation, but rather Frontier's response to a claim on its surety bonds. Counsel for Frontier Insurance Company in Rehabilitation was consulted prior to hearing in this case, and had no objection to the State's use of its $400,000.00 offer as evidence.

woefully inadequate amount of funds available for closure and post-closure care of the Landfill.

The evidence in question goes directly to several relevant factors, including the degree of injury and interference with the general welfare [415 ILCS 5/33(c)(i)], and the gravity of the violation [415 ILCS 5/42(h)(1)]. At hearing, Illinois EPA inspector Mark Retzlaff testified that in August, 2007 he observed leachate seeps, gas odors, cover erosion[6], uncovered refuse[7], and other problems. The Landfill is clearly deteriorating. Permit Engineer Christine Roque testified that closure was due for Parcel B[8]. The fact that only $400,000 is available to satisfy closure and post closure obligations of $17.4 MM indicates a serious and grave injury to the general welfare. *See: People v. ESG Watts Inc.* (*Sangamon Valley*), PCB 96-237 (February 19, 1998) 1998 WL 83678, at 5 (failure to provide sufficient financial assurance is a substantial interference with public welfare).

Excluding Brian White's testimony on the Frontier's offer, which indicates the amount of funds available for closure and post closure, would result in the Board being misinformed on a key issue. After more than four years of litigation and the expenditure of significant resources, the Board is entitled to consider all of the relevant facts.

For the reasons stated herein, the Board should reverse the Hearing Officer's ruling, admit the evidence contained in the State's offer of proof into the record, and give due consideration to all relevant facts presented at hearing.

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[6]9/11/07 Tr., p. 68

[7]9/11/07 Tr., p.65

[8]9/11/07 Tr., p. 219

RESPECTFULLY SUBMITTED,

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

BY: _____

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COMPLAINANT'S CLOSING ARGUMENT AND POST-HEARING BRIEF

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and pursuant to Hearing Officer Bradley P. Halloran's October 5, 2007 Hearing Order, presents its Closing Argument and Post-Hearing Brief[1].

I. INTRODUCTION

On September 11-12, 2007, the Board held hearing on the sole issue of remedy in this case. The Board had already found that Respondents COMMUNITY LANDFILL COMPANY, INC., and the CITY OF MORRIS failed to provide for financial assurance for closure and post-closure care of the Morris Community Landfill ("Landfill"), and as a result violated 35 Ill. Adm.

[1]The People's Closing Argument and Post Hearing Brief relies on prior rulings in this case, matters of which the Board is entitled to take notice, and on the record made during the September 11 and 12, 2007 hearing. The record includes the trial transcript, exhibits admitted into evidence, and evidence propounded on offer of proof, if the Board so rules. Because the transcript for each day of hearing begins with 'page 1', citations to the transcript are date specific.

Code 811.700(f) and 811.712(b). The Board also found that, by violating these regulations, the Respondents violated Section 21(d)(2) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/21(d)(2) (2004)[2]. The Board directed the parties to hearing on the issue of remedy, including penalty, costs, and attorney fees, and specifically requested that the parties only provide evidence relevant to Sections 33(c) and 42(h) of the Act, 415 ILCS 5/33(c) and 5/42(h) (2004), and provide specific figures and justifications for penalty[3].

The evidence shows that the Board must order the Respondents to provide financial assurance for closure and post-closure care of the Landfill, and take other remedial action. The evidence also proves that a substantial penalty is appropriate in this case.

II. HEARING WITNESSES, EXHIBITS, AND OFFER OF PROOF

A. State's Witnesses

1. Mark Retzlaff, Inspector, Illinois EPA Bureau of Land FOS, Des Plaines, Illinois.

2. Blake Harris, Accountant, Illinois EPA Bureau of Air (formerly Bureau of Land). Springfield, Illinois.

3. Brian White, Illinois EPA Bureau of Land Compliance Unit Manager, Springfield, Illinois.

4. Christine Roque, Permit Engineer, Illinois EPA Bureau of Land, Springfield, Illinois.

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[2]The Board's February 16, 2006 Order granting summary judgment is in the record as Complainant's Group Exhibit A, Exhibit 2 ("Complainant's Exhibit 2"). The Board's Order denying reconsideration is in the record as Complainant's Exhibit 3.

[3]February 16, 2006 Board Order, Complainant's Exhibit 2, p. 18

5. Robert Pruim, President of Community Landfill Company[4].

B. Exhibits & Stipulations

All Exhibits were entered into evidence by agreement of the parties. Complainant's Exhibits were entered as People's Group Exhibit A, Exhibits 1 through 14[5].

C. Incorporation of Prior Hearing Testimony

The Respondents requested incorporation of various materials from *Community Landfill Co. and City of Morris v. Illinois EPA*, PCB 01-170. Complainant understands that the Board has substantial discretion in reviewing prior proceedings, and therefore did not formally object to the Motion to Incorporate. However, Complainant does not believe that this prior hearing testimony is relevant to this hearing, as it has no bearing on the Section 33(c) or 42(h) factors. Moreover, the testimony sought to be included is almost seven years old, and was not used for any purpose at hearing. Complainant requests that the Board give no weight to this prior testimony.

D. Complainant's Offer of Proof

Along with this Post-Hearing Brief, Complainant has appealed an evidentiary ruling by the Hearing Officer. The excluded testimony relates to the estimated value of the State's right to recover under a claim on the Frontier Insurance bonds. If the Board grants Complainant's appeal, it should consider the evidence in its evaluation of the gravity of the violations.

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[4] In lieu of calling Mr. Robert Pruim as a witness in the State's case, the parties agreed to stipulate that Community Landfill Company's interrogatory responses would be admissible as Mr. Pruim's testimony. Robert Pruim had provided the verifications for these interrogatory responses. 9/11/07 Tr., p. 13

[5] 9/12/07 Tr., pp. 9-10

III. RELIEF SOUGHT BY COMPLAINANT

The Complainant seeks a final order from the Board containing both affirmative relief and a civil penalty.

A. Order for Financial Assurance:

The Complainant seeks an order requiring the Respondents to post financial assurance in the amount of $17,427,366.00, submit revised cost estimates, and update financial assurance in accordance with approved revised estimates.

B. Closure of Parcel B

The Board should order the Respondents to close Parcel B of the Landfill in accordance with 35 Ill. Adm. Code 811.110, and the provisions of Permit No. 2000-156-LFM[6].

C. Civil Penalty:

Complainant requests that the Board assess a civil penalty against the Respondents, jointly and severally, in the amount of $1,059,534.00, and an additional civil penalty against Respondent City of Morris in the amount of $399,967.40.

IV. ANALYSIS OF THE 33(c) FACTORS DEMONSTRATES THAT THE BOARD MUST ORDER THE RESPONDENTS TO PROVIDE COMPLIANT FINANCIAL ASSURANCE

In its June 1, 2006 Order affirming summary judgment on liability, the Board stated that it considers the Section 33(c) factors to determine what to order a respondent to do to correct an ongoing violation[7]. The record shows that the Respondents have failed to provide any financial assurance, and therefore continue to violate the Act and Board regulations. During the period of

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[6]Complainant's Exhibit 12, Permit No. 2.

[7]June 1, 2006 Board Order, Complainant's Exhibit 3, p. 5

violation of these regulations, they allowed the Landfill to fall into serious disrepair, and have failed to perform closure on Parcel B. The evidence shows that the Board must order specific affirmative relief, *i.e.* an order to obtain financial assurance, and closure of Parcel B, to protect the interests of Illinois taxpayers and to abate a serious threat to the environment. In support, each of the 33(c) factors is analyzed below.

1. 33(c)(i): *The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;*

a. The Evidence Demonstrates a Substantial Interference with Protection of the General Welfare

Illinois EPA Bureau of Land Compliance Unit manager Brian White testified regarding financial assurance requirements for landfills. He first noted that, pursuant to the regulations, the owner or the operator of a landfill must provide the required amount of closure/post closure financial assurance[8]. He also testified that if the operator did not post the required amount of financial assurance, the landfill owner was required to do so[9]. Mr. White testified that the only financial assurance that had been provided at the Landfill under the 811 regulations was the non-compliant Frontier Bonds[10]. Since the Bonds were issued in 2000, neither Respondent has provided Illinois EPA with any other financial assurance for the Morris Community Landfill conforming with the 811 regulations, nor have they notified Illinois EPA that they intend to do so[11].

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[8] 9/11/07 Tr., p. 178

[9] 9/11/07 Tr., p. 182

[10] 9/11/07 Tr., p. 183

[11] 9/11/07 Tr., p. 190

The evidence also shows that closure of Parcel B is approximately 11 years overdue. According to CLC's Response to the State's Interrogatory No. 20, entered as the testimony of Robert Pruim by stipulation of the Parties, the last receipt of waste in Parcel B was in 1996[12]. Pursuant to Board regulations, closure should have been completed within 210 days of the last receipt of waste[13]. However, closure of Parcel B still has not been performed[14].

Illinois EPA inspector Mark Retzlaff described the deteriorating condition of the Landfill. Inspections made in June and August, 2007 showed cover erosion in several locations[15], landfill gas escaping to the atmosphere[16], leachate escaping from the waste disposal area[17], and

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[12]Complainant's Exhibit 13, CLC Response to Second Set of Interrogatories, p. 2.

[13]35 Ill. Adm. Code 811.110 provides, in pertinent part, as follows:

e) The owner or operator of a MSWLF unit shall begin closure activities for each MSWLF unit no later than the date determined as follows:

1) 30 days after the date on which the MSWLF unit receives the final receipt of wastes;

* * *

f) The owner or operator of a MSWLF unit shall complete closure activities for each unit in accordance with closure plan no later than the dates determined as follows:

1) Within 180 days of beginning closure, as specified in subsection (e) of this Section.

[14]9/11/07 Tr., p. 219

[15]9/11/07 Tr., pp.68-69

[16]9/11/07 Tr., pp. 63,68,71

[17]9/11/07 Tr., pp. 63, 64, 74

uncovered refuse[18] [19]. He also found evidence of recent and ongoing waste disposal in Parcel A of the Landfill[20]. This parcel is not currently permitted for the receipt of waste.

Edward Pruim testified that Community Landfill Company had not paid premiums for financial assurance since 2001[21]. He also testified that they were now unable to pay the Company's outstanding obligations[22]. City of Morris consultant Devin Moose said that the City was funding some repair activities on a 'limited basis' but did not know how much money had been provided to Community Landfill Company[23]. He did not know if his client was willing to perform actual closure of Parcel B[24].

b. Discussion

The Board has found that financial assurance violations are the most insidious in character and result in a significant degree of interference with the protection of health, welfare and property. *People v. ESG Watts, Inc.* (Viola Landfill), PCB 96-233 (February 5, 1998).

The evidence proves that the Respondents' violations have created an extreme degree of interference with the protection of the general welfare. At the Landfill, the interference is no longer a theoretical or intangible threat. The existing condition of the Landfill shows that the

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[18]9/11/07 Tr., pp. 58, 60, 61, 62, 63, 64, 65, 66,67, 72, 73.

[19]See also, photographs included in People's Group Exhibit 1, Exhibits 7-8.

[20]9/11/07 Tr., pp. 60, 61, 65, 66, 67.

[21]9/12/07 Tr., p. 165

[22]9/12/07 Tr., p. 164

[23]9/12/07 Tr., pp. 134-135

[24]9/12/07 Tr., p. 148

unavailability of financial assurance has resulted in ongoing environmental harm.

The Respondents have allowed 11 years to pass without performing closure of Parcel B of the Landfill. The effects of their inaction are clear. As observed by Mark Retzlaff, the landfill's surface is eroding, exposing previously-disposed waste to the environment. Leachate is seeping from the Landfill surface. Landfill gas is escaping uncontrolled into the atmosphere. Respondent Community Landfill Company contends that it has insufficient funds for even basic maintenance, and 19 months after being found in violation, the City of Morris has still not provided any assurance that its own Landfill would be properly closed and maintained.

There can be no clearer illustration of the reason for requiring financial assurance than the existing condition of the Landfill. No compliant financial assurance in place since November 14, 2000, when Illinois EPA issued its violation notices to the Respondents[25]. The Respondents have neither taken action themselves, nor provided financial assurance which would allow the State to perform closure on Parcel B, or to correct the deteriorating conditions.

The evidence clearly shows a substantial and serious interference with the protection of the general welfare.

2. 33(c)(ii): *The social and economic value of the pollution source;*

a. <u>The Evidence Demonstrates that the Landfill has no Social or Economic Value</u>

The Landfill is divided into two parcels, designated 'A' and 'B'. Each is separately permitted[26]. Parcel B last received waste in 1996, and is overdue for closure[27]. No evidence was

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[25]Complainant's Exhibits 10 & 11

[26]See: Complainant's Exhibit 12.

[27]Complainant's Exhibit 13, CLC Response to Second Set of Interrogatories, p. 2.

presented at hearing regarding available space in Parcel A. However, event if Parcel 'A' has remaining capacity, it is not covered by an operating permit allowing the deposit of waste therein[28].

b. Discussion

The Landfill is not permitted to accept waste and has in fact become an environmental liability due to the neglect of the Respondents. The Landfill therefore does not have any social or economic value. See: *People v. ESG Watts, Inc. (Viola Landfill)*, PCB 96-233 (February 5, 1998, slip op. at 10).

3. 33(c)(iii): *The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;*

a. Evidence and Discussion

Illinois EPA Bureau of Land Engineer Christine Roque testified that, over the years the City of Morris had obtained approximately 50 to 55 permits for the Morris Community Landfill, and that Community Landfill Company had obtained approximately 50 permits[29]. Aside from the fact that Illinois EPA issued these permits for the Landfill, no other evidence was entered at hearing regarding suitability of the location of the Landfill. Complainant asserts that this factor is not significant in the Board's consideration of a remedy.

4. 33(c)(iv): *The technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source;*

a. The Evidence Shows that Compliance is Both Practical and Economically Reasonable

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[28]9/11/07 Tr., p. 225. See, also, Complainant's Exhibit 5.

[29]9/11/07 Tr., p. 214

Illinois EPA Accountant Blake Harris testified that he was involved with review and evaluation of the Landfill's Frontier Insurance Company Bonds in 2000, that the annual bond premium was shown on the face of each of the three bonds[30], and that premium amounted to two percent (2%) of the face value of the Frontier Bonds. Mr. Harris stated that around the time that the Respondents were issued violation notices, a total of thirty (30) landfills in Illinois were using Frontier Insurance Company surety bonds for financial assurance. All of these landfills were sent notices of violation[31]. These violation notices advised that the Bonds had become noncompliant, and requested that substitute financial assurance be provided. Of these thirty facilities, twenty eight subsequently replaced their Frontier Bonds with compliant financial assurance[32]. Of the two landfills that took no action one, Dowty, went out of business and is now on the State's list of abandoned Landfills[33]. The other is the Morris Community Landfill.

Mr. William Crawford, the auditor for the City of Morris, testified that the City of Morris is in a strong financial position[34]. He stated that the City's net assets had increased more than $4 MM between 2005 and 2006[35] to a total of $35 MM[36]. He had also calculated the City's ability to provide a local government guarantee pursuant to 35 Ill. Adm. Code Sections 811.716 and

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[30]9/11/07 Tr., p. 125.

[31]9/11/07 Tr., p. 126

[32]9/11/07 Tr., p. 129

[33]9/11/07 Tr., p. 129.

[34]9/12/07 Tr., p. 54

[35]9/12/07 Tr., p. 57

[36]9/12/07 Tr., p. 56

811.717. He estimated that the City could provide a maximum guarantee of $9.1 MM[37] as of fiscal year 2007, up from $7.1 MM for fiscal year 2005[38]. During the period from 2000 through 2007, $9.1 MM was the highest amount available[39]. Community Landfill Company Treasurer Edward Pruim testified that Company funds are very limited and no funds are now available for financial assurance[40]. He stated that they would be unable to arrange for even $7 MM of the approximately $17.4 MM of financial assurance required[41].

b. Discussion

Compliance was Technically Feasible and Economically Reasonable

The financial assurance required for the Morris Community Landfill is approximately $17.4 Million. Based on William Crawford's testimony, the City of Morris could not have posted a local government guarantee for this amount at any time from 2000 to the present. However, there is every indication that the City of Morris could have provided surety bonds during that period. At a premium of two percent of face value, surety bonds would have cost the City of Morris, or Morris and Community Landfill Company together, approximately $348,000.00. The City of Morris had sufficient financial resources to comply with the Act and Board regulations throughout the noncompliance period. Providing financial assurance was therefore technically feasible for the City of Morris.

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[37] 9/12/07 Tr., p. 29

[38] 9/12/07 Tr., p. 40

[39] 9/12/07 Tr., p. 53

[40] 9/12/07 Tr., p. 164

[41] 9/12/07 Tr., p. 167

Community Landfill Company claims that it was unable to arrange for substitute financial assurance once the Frontier Bonds were deemed invalid, and now has no funds available. However, by the year 2000 Community Landfill Company had conducted waste disposal operations at the Landfill for almost 20 years. Permit No. 2000-156-LFM, which both Respondents had sought, was issued for development and *closure* of Parcel B[42]. By the time the Respondents investigated replacing the deficient Frontier Bonds, closure of Parcel B of the Landfill was already several years overdue. It is unsurprising that prospective financial assurance providers would have required the Respondents to post a substantial amount of collateral[43]. That problem could have been avoided if the Respondents had simply performed closure of Parcel B when it was due.

Obviously, the Landfill had to be properly closed at some point. The Respondents simply failed to retain sufficient capital from their Landfill operations to assure the Landfill's ultimate closure. Their failure to properly conserve resources for the inevitable closure of the Landfill should not be considered a defense, and the Board should find that compliance was feasible.

Meeting the financial assurance requirements was also economically reasonable. The regulations place all of the cost of closure and post closure care on those with a direct financial stake in the landfill. Requiring such assurance from owners and operators is inherently reasonable. Illinois taxpayers should never have to assume a risk that they must fund closure and maintenance of a Landfill that they neither owned nor operated. The regulations put the

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[42]Complainant's Exhibit 12, Permit 2, p. 2

[43]See: 9/12/07 Tr., p. 162

Respondents on notice that they would be required to ensure the cost of closure, and to guarantee that future maintenance issues would be addressed. Earnings from Landfill operations should have been retained for this purpose.

The Respondents knew the amount of required financial assurance because it was based on their own cost estimate. To obtain the Significant Modification Permits, they provided three surety bonds in the amount of $17,427,366.00[44]. The City of Morris provided $10,081,630.00, more than half. As testified to by Illinois EPA Permit Engineer Christine Roque, financial assurance amounts may be reduced by seeking and obtaining a permit modification from Illinois EPA[45]. However, the Respondents did not seek a permit modification until July 2007, more than seven years after they applied for the Significant Modification Permit using the $17.4 MM cost estimate[46] [47].

The City of Morris alone has more than sufficient assets to fund a compliant surety bond. Based on the facts in this case, compliance with the financial assurance provisions of the Act and regulations is economically reasonable.

The evidence shows that it is both technically feasible and economically reasonable to require the Respondents to obtain financial assurance. Therefore, the Respondents must be required to provide financial assurance in the amount of $17,427,366.00 immediately, provide annual revisions of the closure/post-closure costs, and update the amount of financial assurance

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[44]Complainant's Exhibit 9.

[45]9/11/07 Tr., p. 216

[46]9/11/07 Tr., p. 217

[47]The July 7, 2007 application is currently under review with Illinois EPA.

in conformance with the most recently approved Illinois EPA permit or permit modification.

5. 33(c)(v): *Any subsequent compliance.*

a. The Evidence Shows Continued Noncompliance

Illinois EPA Bureau of Land Compliance Unit Manager Brian White testified that the only financial assurance provided under the 2000 Significant Modification Permit was the non-compliant Frontier Insurance Company Bonds[48]. Since that time, neither the City of Morris nor Community Landfill Company has submitted information to Illinois EPA sufficient to demonstrate compliance with any of the methods for providing financial assurance authorized under 35 Ill. Adm. Code 811.700, including information to support a local government guarantee[49]. Illinois EPA Permit Engineer Christine Roque testified that, although required by the Respondents' Significant Modification Permits and the regulations, neither Respondent had submitted annual updates of the cost estimates for closure/post-closure of the Landfill[50]. Between 2000 and July 2007, neither Respondent sought a permit modification to reduce the financial assurance amount[51].

Edward Pruim, treasurer of Community Landfill Company, testified that the last payment was made on the Frontier Bonds in 2001.

b. Discussion

Neither Respondent has provided compliant financial assurance since receipt of Illinois

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[48]9/11/07 Tr., p. 182

[49]9/11/07 Tr., p. 190

[50]9/11/07 Tr., p. 217

[51]Id.

EPA's violation notice on November 16, 2000[52]. They made the last payment for financial assurance of any kind in 2001. Even after the Board found the Respondents in violation of the financial assurance regulations, the Respondents did nothing to comply.

Summary of 33(c) Factors

The evidence shows that an order for affirmative relief is necessary to achieve compliance with the financial assurance regulations pertaining to landfills. Affirmative relief, in the form of an order to obtain financial assurance, is also necessary for protection of the general welfare, now threatened by deteriorating landfill conditions, lack of proper maintenance, and failure to perform closure on Parcel B.

The evidence shows that the Landfill has no further social benefit, and that it is both technically feasible and economically reasonable to achieve full compliance.

Finally, the evidence shows that the Respondents have done nothing to come into compliance for the past 7 years. A penalty is both appropriate and necessary to deter further violations, recover the economic benefit of the Respondents' continued noncompliance, and to reflect the duration and gravity of the violations.

V. AFTER CONSIDERATION OF THE 42(h) FACTORS, THE BOARD SHOULD ASSESS A SIGNIFICANT CIVIL PENALTY AGAINST THE RESPONDENTS TO RECOVER THE ECONOMIC BENEFIT OF NONCOMPLIANCE AND TO DETER FUTURE VIOLATIONS.

A. Statutory Maximum Civil Penalty

The Board has determined that the Respondents have violated Section 21(d)(2) of the Act, 415 ILCS 5/21(d)(2) (2004), and 35 Ill. Adm. Code Sections 811.700(f) and 811.712(b).

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[52]Complainant's Exhibits 10-11.

Because the regulatory violations automatically constitute violations of the Act, Complainant understands the Board to have found at least two (2) individual violations. Pursuant to 415 ILCS 5/42(a) (2006), any person who violates any provision of the Act or any regulation adopted by the Board is subject to a penalty of up to $50,000.00 per violation and up to $10,000.00 for every day the violation continued.

Section 811.700(f) of the Board regulations, 35 Ill. Adm. Code 811.700(f), provides, as follows:

> f) On or after April 9, 1997, no person, other than the State of Illinois, its agencies and institutions, shall conduct any disposal operation at a MSWLF unit that requires a permit under subsection (d) of section 21.1 of the Act, unless that person complies with the financial assurance requirements of this Part.

The evidence shows that from at least November 16, 2000, when both Respondents received the violation notices from Illinois EPA[53], until at least September 11, 2007, the first day of hearing, the Respondents failed to have any compliant financial assurance whatsoever. The Board should take notice that this constitutes a period of violation of 35 Ill. Adm. Code 811.700(f) for 2,490 days.

The maximum penalty may be calculated as follows:

	$ 50,000.00 for violation
2,490 days times $10,000.00 =	$24,900,000.00 for days of violation
Total:	$24,950,000.00

Section 811.712(b) of the Board regulations, 35 Ill. Adm. Code 811.712(b), provides, in pertinent part, as follows:

> b) The surety company issuing the bond shall be licensed to transact the

[53]Complainant's Exhibits 11-12

> business of insurance by the department of insurance, pursuant to the Illinois Insurance Code, or at a minimum the insurer must be licensed to transact the business of insurance or approved to provide insurance as an excess of surplus lines insurer by the insurance department of one or more states, and approved by the U.S. Department of the Treasury as an acceptable surety.

The evidence shows that on November 16, 2000 the Respondents were advised that the Frontier Insurance Company surety bonds did not meet the requirements of the regulations, and needed to be replaced with compliant financial assurance[54]. The Frontier Bonds expired by their own terms on June 1, 2005[55]. The Board should take notice that failing to replace the Frontier Bonds with an approved surety during the period constitutes a violation of 35 Ill. Adm. Code 811.712 for 1,658 days.

The maximum penalty may be calculated as follows:

	$ 50,000.00 for violation
1,658 days times $10,000.00 =	$16,580,000.00 for days of violation
Total:	$16,630,000.00
maximum for 811.700(f)	$24,950,000.00
Total both violations	$41,580,000.00

Complainant therefore asserts that the maximum civil penalty for the violations found by the Board is **$41,580,000.00.**

B. 42(h) CIVIL PENALTY FACTORS

In determining the appropriate civil penalty, the Board may consider the factors set forth in Section 42(h) of the Act, 415 ILCS 5/42(h) (2006). Complainant's analysis of the evidence is provided as follows.

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[54]Id.

[55]Complainant Exhibit 9.

1. 42(h)(1): *The duration and gravity of the violation;*

a. <u>The Evidence Proves Violation for 2,490 Days, with a High Degree of Gravity</u>

Illinois EPA issued violation notices to the Respondents on November 14, 2000, which were received on November 16, 2000[56]. The violation notices advised the Respondents that the Frontier Bonds were no longer compliant financial assurance, and contained the following statement:

> SUGGESTED RESOLUTIONS
>
> Immediately, provide adequate financial assurance in an amount that equals or exceeds the current closure/post closure cost estimate.

As of September 11, 2007, the Respondents still had not provided any compliant financial assurance for closure and post-closure care of the Landfill. This represents a noncompliance period of 2,490 days.

In 2001, the Respondents challenged the Agency's finding that the Frontier Bonds were non-compliant through permit appeal. The Board upheld the Agency's decision on December 6, 2001[57]. The Appellate Court affirmed the Board's decision on May 15, 2002 and issued its final opinion on July 17, 2002[58]. In <u>this</u> case, the Board issued its decision on summary judgment on February 16, 2006, and denied reconsideration on June 1, 2006[59]. Throughout this period, and to the date of hearing, the Respondents failed to obtain and provide compliant financial assurance,

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[56]Complainant's Exhibits 10-11.

[57]Complainant's Exhibit 4

[58]Complainant's Exhibit 5.

[59]Complainant's Exhibits 2 & 3.

despite every opportunity to do so.

Evidence on the gravity of the violation is substantially the same as the evidence presented by for Factor 33(c)(1), which Complainant incorporates herein.

b. Discussion

Complainant asserts that a conservative first date of violation is the date on which Illinois EPA notified the Respondents, through their receipt of violation notices, that they needed to replace the Frontier Bonds with compliant financial assurance. From that day forward, the Respondents knew that Illinois EPA, the Agency responsible for administration of landfill permitting, compliance and enforcement, had determined that no adequate financial assurance was in place.

The Respondents were not the only persons affected by the Agency's determination on the Frontier Bonds. Twenty-nine other landfills also were secured by Frontier Bonds, and were issued violation notices at approximately the same time as the Respondents[60]. Twenty-eight of these replaced the Frontier Bonds with compliant financial assurance. One went out of business[61]. The Respondents did nothing.

The Respondents have failed to demonstrate any good faith in attempting to resolve the violations. After they were denied an operating permit for lack of financial assurance, they appealed the Agency's finding to the Board and the Appellate Court. However, after losing in both forums the Respondents did....nothing. On February 16, 2006, the Board held them in violation for failure to have adequate financial assurance. However, even after the Board's

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[60]9/11/07 Tr., p. 126.

[61]9/11/07 Tr., p. 129.

decision was affirmed on Motion for Reconsideration, the Respondents did....nothing. To the date of hearing, a hearing delayed for more than 11 months at their request, the Respondents have failed to provide financial assurance in any amount to ensure closure and post-closure care of the Landfill. Complainant therefore urges the Board to find that the violations began, at a minimum, at the time that they, and all other landfills using Frontier Bonds, were formally notified of the violation.

The gravity of the violations is high. The Board has consistently found that violations of financial assurance regulations are extremely serious. See: *ESG Watts Inc. (Viola Landfill) v. Illinois EPA,* PCB 01-63 (April 4, 2002) ("*...financial assurance for closure/post closure of a landfill is essential to protect the State of Illinois from potential liability to care for landfills that may be abandoned*") (slip op. at 14); *People v. Wayne Berger*, PCB 94-373 (May 6, 1999) ("*...the* [financial assurance] *provisions are in place to ensure that other more threatening violations do not occur, and which provide a safety net to protect the environment if the operator cannot or will not meet his obligations under the law*") (slip op. at 20-21); *People v. ESG Watts, Inc. (Sangamon Valley Landfill)*, PCB 96-237 (February 19, 1998)1998 WL 83678 ("*...compliance with financial assurance requirements is necessary to assure that the State of Illinois will not have to pay for correcting environmental harm created by insolvent polluters.*") (slip op. at 5).

In this case, a number of problems need immediate attention at the Landfill, including the long-delayed closure of Parcel B, cover maintenance, correction of leachate seeps, uncovered refuse, etc. However, there is no financial assurance available for the State to address these problems. Complainant believes that this factor should be considered a significant aggravating

factor for calculation of civil penalty.

2. **42(h)(2):** *The presence or absence of due diligence on the part of the respondent in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act.* [415 ILCS 5/42(h)(2)]

a. The Evidence Shows a Complete Absence of Due Diligence

The Respondents failed to submit required annual updated cost estimates of the amount required for closure/post-closure expenses of the Landfill[62]. After applying for and obtaining the Significant Modification Permits with financial assurance requirements totaling $17,426,366.00, they unsuccessfully challenged the amount of financial assurance before the Board[63]. However, there is no evidence that the Respondents ever sought regulatory relief following the Board's April 5, 2001 denial. The Respondents did not submit a permit application requesting a reduction of financial assurance until July, 2007[64]. Since the date that the Frontier Bonds were deemed non-compliant, the Respondents have posted no compliant financial assurance, of any kind or in any amount, for closure/post-closure of the Landfill[65].

b. Discussion

The Respondents have made no attempt to comply with the Act or Board financial assurance regulations. Although they received notice on November 16, 2000 that the Frontier Bonds were non-compliant, the Respondents took no action until a subsequent operating permit application was denied. Instead of obtaining compliant financial assurance at that point, they

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[62]9/11/07 Tr., p. 217

[63]Complainant's Exhibit 6.

[64]9/11/07 Tr., p. 217.

[65]9/11/07 Tr., p. 190

litigated the issue of the non-compliant Bonds through the Appellate Court. On December 5, 2002, when the Illinois Supreme Court denied their petition for appeal, there was no question that their financial assurance needed to be replaced.

Community Landfill Company showed no diligence thereafter. They stopped paying premiums on the existing financial assurance in 2001[66]. They did not perform closure on Parcel B, which would have reduced the amount of financial assurance required. However, they also did not cease their waste disposal activities. As shown by the testimony of Mark Retzlaff, inspections made in June and August, 2007 found evidence of recent dumping of general construction & demolition debris, including plywood, drywall, cardboard and wood, as well as sewage sludge from the City of Morris' sewage treatment plant[67].

The City of Morris has demonstrated a total lack of due diligence. Since losing the joint permit appeal in 2002, they have failed to provide financial assurance in any amount, failed to close Parcel B or direct its closure, and failed to take any significant action to correct the deteriorating conditions at the Landfill. Although the City of Morris claims that it *could have* provided a local government guarantee pursuant to 35 Ill. Adm. Code 811.717, they never did so. Though they possessed the apparent right to take legal action to compel Community Landfill Company's compliance with environmental laws and regulations[68], there is no evidence that they ever did anything besides jointly litigating with the Company against the State.

Neither Respondent has shown any diligence in attempting to resolve ongoing violations.

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[66]9/12/07 Tr., p. 165

[67]See: Complainant's Exhibits 7-8

[68]See: City Exhibit No. 7

Complainant believes that this Factor should be applied in aggravation of penalty.

3. 42(h)(3): *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.*

a. The Evidence Shows that the Respondents Obtained a Substantial Economic Benefit from the Violations

The Respondents benefitted from the violations in two ways. The Respondents jointly benefitted from the avoided cost of premiums on financial assurance bonds. Also, the City of Morris benefitted from dumping royalties received during the period when no financial assurance was in place. Complainant requests that the Board recover these economic benefits through civil penalty. For simplicity, and because of the substantial penalty Complainant is seeking from a municipal entity, Complainant is willing to waive recovery of interest between the date the benefit was received to the date of hearing.

A. Avoided Cost of Financial Assurance

a) Surety Bonds

Illinois EPA Accountant Blake Harris testified that the annual premium for the Frontier Bonds provided for the Morris Community Landfill was shown on the face of the three Bonds, and represented two percent (2%) of each Bonds' face value[69]. He also testified that, in the course of his work, he had reviewed bonds from other sureties and that these bonds also listed the annual premium on the face of the bond[70]. The three Frontier Bonds supplied by the

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[69] 9/11/07 Tr., p. 124.

[70] 9/11/07 Tr., p. 125.

Respondents to Illinois EPA[71] are: Bond No. 91507, with a penal sum (after rider and continuation certificate) of $1,439,720, listed premium $28,794.40; Bond No. 158465, penal sum $10,081,630, listed premium $201,633; and Bond No. 158466, penal sum (after rider) $5,906,016, with annual premium listed as $103,540[72]. Using the premiums listed on the Bonds, the annual cost of financial assurance would be $333,967.40.

In response to Complainant's interrogatory, entered by stipulation of the parties as the testimony of Community Landfill Company President Robert Pruim, Community Landfill Company paid a $208,730 premium for the three bonds in 2000, and $217,842 in 2001[73]. At hearing, Edward Pruim testified that annual premiums for the Frontier bonds was "slightly more than $200,000 per year"[74]. By arrangement with the City of Morris, Community Landfill Company was to pay the premiums[75]. He also stated that 2001 was the last year that premiums were paid[76].

b) Other Financial Assurance

The Respondents could only have achieved compliance using one of the mechanisms for financial assurance listed in 35 Ill. Adm. Code 811.706. Of the ten possible mechanisms, only

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[71]Complainant's Exhibit 9

[72]Complainant believes that the premium for Bond No. 158466 was understated, and that the a Continuation Certificate for this Bond would list a premium of $118,120, or 2% of the face amount shown on the rider.

[73]CLC Exhibit No. 2, Response to Interrogatories No. 5

[74]9/12/07 Tr., p. 157

[75]9/12/07 Tr., p. 156

[76]9/12/07 Tr., p. 165

evidence related to performance bonds (811.712), local government guarantee (811.717), and local government financial test (811.716) were discussed at hearing.

As previously noted, and as admitted by City Auditor William Crawford, the City could not, at any time from 2000 until the present, have posted a local government guarantee for $17,427,366.00, the amount of financial assurance required by the Significant Modification Permits[77]. In fiscal year 2005, the maximum amount that the City could have pledged was approximately $7 MM[78]. By fiscal year 2007, this had increased to a maximum potential guarantee of approximately $9 MM[79]. Regardless, the City of Morris did not post a local government guarantee in any amount from 2000 to the date of hearing.

B. Dumping Royalties Paid to the City of Morris

During the period that the Respondents were in noncompliance with the financial assurance regulations, active dumping continued at the Landfill, and Community Landfill Company paid dumping-related royalties and taxes to the City of Morris. Community Landfill Company's interrogatory response in this regard, admitted by stipulation of the parties as the testimony of Robert Pruim, shows that royalties of $399,308.98 were paid to the City of Morris by Community Landfill Company, just for the years 2001 through 2005[80].

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[77]9/12/07 Tr., p. 53-54

[78]9/12/07 Tr., p. 40

[79]9/12/07 Tr., p. 29

[80]Complainant's Exhibit 13, Response to Second Set of Interrogatories, Response No. 23. Complainant has excluded the year 2000 from its calculations because the noncompliance period did not begin until November, 2000, and monthly information was not available. Taxes are not included in this amount.

b. Discussion

The appropriate measure of the economic benefit derived from avoided financial assurance costs is the avoided premiums for performance bonds. No other financial assurance mechanism was ever used by either Community Landfill Company or the City of Morris.

Ordinarily, the proper method for calculating avoided financial assurance costs would be the cost of *compliant* financial assurance. Because the Respondents never provided any, evidence on this cost is not available. However, Complainant requests that the Board consider the premium cost of the Frontier Bonds as avoided costs. Even though the Bonds were non-compliant, and therefore not an acceptable 'lowest cost alternative', their cost provides the Board with a *very conservative* estimate of the avoided economic benefit.

There is conflicting evidence regarding the actual cost of the Frontier Bonds. As Blake Harris testified, the annual premium is listed on the face of these instruments, and the premium for the Bonds totaled $333,967.40. However, payment of premiums on the Bonds was assigned between the Respondents by contract to be the responsibility of Community Landfill Company. Their interrogatory responses show that the annual payment in 2001 was $217,842.00. Edward Pruim also testified that premiums were "slightly more than $200,000.00".

An annual premium of $217,842.00 represents a cost per day of $596.83. The initial date of noncompliance is November 16, 2000. From November 16, 2000 until September 11, 2007 (the first day of hearing on remedy), the Respondents avoided expenditures for compliant financial assurance for 2,490 days. Multiplied times a cost per day of $596.83, this represents an economic benefit from avoided compliant financial assurance costs of $1,486,106.70.

If the Board chooses to recognize the Respondents' payments in 2000 and 2001 for the

non-compliant Frontier Bonds, it will credit the Respondents for payments of $426,572.00, resulting in an economic benefit from avoided financial assurance expenditures of $1,059,534.70.

The evidence also shows that the City of Morris received dumping royalties of $388, 967.40 for the period 2001-2005. The City of Morris was in violation of the financial assurance regulations throughout this period. Moreover, after denial of their operating permit application in 2001, there should have been no dumping of waste at the Landfill. However, as shown by the testimony of Mark Retzlaff, dumping of general construction debris and the City's sewage sludge continued through the summer of 2007. Complainant believes that dumping royalties received by the City of Morris during this period should be recovered as economic benefit.

Complainant believes that all economic benefit should be recovered in the form of a civil penalty. Complainant requests that the Board assess, as part of its overall civil penalty calculation, the sum of $1,059,534.70 against the Respondents jointly and severally, and an additional penalty of $388,967.40 against the City of Morris.

The sum of $1,059,534.70 must be recovered as avoided financial assurance costs, and should be joint and several, since both parties are expressly required to provide financial assurance. For example, 35 Ill. Adm. Code 811.700 provides, in pertinent part, as follows:

> *a) The owner or operator shall maintain financial assurance equal to or greater than the current cost estimate calculated pursuant to Section 811.704 at all times, except as otherwise provided by subsection (b).*
>
> *b)The owner or operator shall increase the total amount of financial assurance so as to equal the current cost estimate within 90 days after any of the following occurrences....*

As the Board found in summary judgment, the City of Morris and Community Landfill Company are each liable for failing to provide closure/post closure financial assurance. Also, in 2000 the City of Morris and Community Landfill Company jointly posted the Frontier Insurance Bonds, with the City providing more than half of the required amount. Once these bonds were found non-compliant, *neither party* replaced the bonds with compliant financial assurance. The fact that the Respondents' lease agreement allocated financial assurance payment responsibilities to Community Landfill Company does not eliminate the City's independent legal responsibility, imposed by the Act and Board regulations, to assure closure and post-closure care.

In addition, the Board should recover the City of Morris' 2001-2005 royalty income in the amount of $388,967.40. During this period, the City of Morris knew that there was no compliant financial assurance, and knew that operations at the Landfill were proceeding illegally. If the City had been acting in good faith, any revenue generated from Landfill operations would have been applied either to closure of Parcel B or to acquiring at least a portion of the required amount of financial assurance. However, despite the 2000 violation notice, the loss of its permit appeal before the Board and Appellate Court, and the Board's 2006 finding of violation in this case, the City has yet to provide one penny of compliant financial assurance for closure and post closure care of its Landfill. The City of Morris must not be allowed to benefit financially from its violations, and the Board should recover its Landfill royalty income through civil penalty.

Pursuant to 415 ILCS 4/42(h)(7) (2006), all economic benefit must be recovered unless it would work an arbitrary or unreasonable hardship. However, Complainant's request is entirely reasonable.

First, Complainant's calculation of the economic benefit to the Respondents is *extremely conservative*. It uses Community Landfill's testimony regarding premiums actually made, and not the premium shown on the face of the Bond, which was more than $100,000 higher on an annual basis. It has used the rates paid for non-compliant bonds. It also has not included the impact of posting a significant amount of bond collateral [81]. Complainant's calculations also adjust the penalty to credit a payment made for the Frontier Bonds in 2001, after the Respondents had been advised by Illinois EPA that the Bonds were not acceptable. Finally, the State is not requesting interest on unfunded financial assurance, which the Board routinely has assessed in civil penalty calculations.

The City of Morris has benefitted from its failure to fund closure post/closure financial assurance, and is in excellent financial condition. Revenues for the most recent fiscal year totaled over $21 MM[82]. Three City funds related to waste disposal contained over $2.7 MM[83]. The City had net assets of almost $35 MM as of April 30, 2006[84], an increase of almost $5 MM from the previous fiscal year[85]. The City recently acquired additional airport property at a cost of $2.2 MM, and planned additional capital expenditures of $24-27 MM, including $10-12 MM

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[81] According to the testimony of Edward Pruim, up to $15 MM of collateral would have been required for replacement surety bonds 9/12/07 Tr., p. 162

[82] 9/12/07 Tr., p. 29

[83] 9/12/07 Tr., pp 31-32.

[84] City Exhibit 6, p.18.

[85] 9/12/07 Tr., p. 57.

for a new city hall/police station[86].

However, even after being found in violation by the Board, the City took no action to arrange for financial assurance, although, based on the testimony of City Auditor William Crawford, they could have put up a local government guarantee of approximately $7 MM as of the end of fiscal 2005, and $9 MM as of the end of fiscal 2007. Clearly, they could have provided annual payments of between $217,000 and $333,000 to cover surety bond premiums for 100% of the required financial assurance. Recovery of the economic benefit from the City's noncompliance with the Act and Board financial assurance regulations is reasonable.

Community Landfill Company now claims poverty. As previously argued, this is largely its own doing. After almost 20 years of landfill operation, it failed to retain sufficient funds for closure of Parcel B or for long term care. Edward Pruim testified that it intended to use revenue from future operations to fund closure[87]. However, by the time that Community Landfill Company arranged for the Frontier Bonds, closure of Parcel B was 3-4 years overdue. During the period between 1996 and 2000, neither Community Landfill Company nor the City of Morris took any action to perform the overdue closure.

4. 42(h)(5): *The amount of monetary penalty which will serve 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;*

a. <u>Evidence and Discussion</u>

In this case, the factor of deterrence is closely linked to the factor of economic benefit. Municipalities which own landfills may contract with other entities for operation, receiving

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[86]9/12/07 Tr., pp. 32-33.

[87]9/12/07 Tr., p. 168

royalties and other benefits in return. However, they remain jointly liable under the pertinent land disposal regulations, and therefore have the responsibility to ensure that their contract partner operates the landfill in compliance with the law. In this case the Board must consider the deterrent affect on others. There are a number of municipally owned landfills in Illinois. These municipalities must not be allowed to stand by while their landfills deteriorate, nor must they be allowed, once dumping revenues have ceased, to shift long term maintenance responsibilities to the State. In our case, City of Morris has ignored its environmental responsibilities, while spending a significant amount of funds on other projects. Therefore the penalty assessed in this matter must make it clear to others that municipalities will not be treated differently from private owners when violations of the Act and Board regulations occur at their landfills. At a minimum, fees and royalty payments made to municipalities during periods of knowing violation must be recovered in penalty, so that there is no incentive for continued violations.

Even if Community Landfill Company can not afford to pay a significant penalty, the Board should recognize the deterrent value of such a penalty on other Landfill operators. See: *People v. ESG Watts, Inc. (Viola landfill)*, PCB 96-233 (February 5, 1998) (slip op. at 13).

Despite the Board's finding of violation in February, 2006, neither Respondent has arranged for any amount of closure/post-closure financial assurance at the Landfill nor have they notified Illinois EPA of their intention to do so[88]. Neither party has initiated closure of Parcel B, despite the fact that closure is 11 years past due.

Complainant will leave to the Board's discretion whether a multiple of economic benefit realized from the violations is appropriate for the purpose of deterrence. But the evidence

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[88]9/11/07 Tr., p. 190

suggests that such action be strongly considered.

5. 42(h)(5): *the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;*

a. Evidence and Discussion

Complainant notes that in the case PCB 97-193, the Board has granted partial summary judgment against Respondent Community Landfill Company. Also, in 1989, Community Landfill Company received an Administrative Citation in the case AC 89-6. The Administrative Citation related to uncovered waste from a previous operating day. A penalty of $500.00 was assessed.

Complainant is not aware of any previously adjudicated violations against the City of Morris.

6. 42(h)(6): *Whether the respondent voluntarily self disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency;*

a. Evidence and Discussion

The Respondents did not self-disclose the violations.

7. 42(h)(7): *Whether the respondent has agreed to undertake a 'supplemental environmental project'....*

a. Evidence and Discussion

No supplemental environmental project has been proposed by the Respondents.

VI. ATTORNEY FEES AND COSTS

In its Complaint and Motion for Summary Judgment, the State requested the award of attorney fees and costs. Pursuant to 415 ILCS 5/42(f) (2006), these are recoverable upon proof of a willful, knowing or repeated violation. Complainant believes that the Respondents

continued failure to correct the violations, particularly after the Board's grant of summary judgment, constitutes a willful and knowing violation.

However, as the evidence demonstrates, there is a dire need for affirmative relief in the form of a court enforceable final order directing the Respondents to provide compliant financial assurance. Complainant has also asked the Board to consider directing the Respondents to initiate closure of Parcel B.

The violations have now continued for seven years. In the interest of obtaining a final order without creating any additional delay related to the award of attorney fees and costs, the State waives recovery of costs and fees in this matter. Complainant requests that the Board take notice of this waiver in its evaluation of the reasonableness of Complainant's civil penalty recommendation.

VII. CLOSING ARGUMENT

On February 16, 2006, the Board found the Respondents in violation of 415 ILCS 5/21(d)(2), 35 Ill. Adm. Code 811.700(f), and 35 Ill. Adm. Code 712(b). The violations continued to the date of hearing, and neither Community Landfill Company nor the City of Morris has demonstrated good faith by attempting to come into compliance.

First, the Board must compel compliance with the regulations. In crafting its remedy, the Board must recognize the current threat posed by conditions at the Landfill and the Respondents' consistent failure to comply. The Board must also consider the effect of its decision on other landfill owners and operators. Resolution of this case must send a clear message to others that noncompliance with financial assurance requirements will not be tolerated, and that violations will be dealt with harshly. The Board has done so in the past, and it must do so again in this

case. The Board must ensure that the Respondents do not reap a financial windfall from the ongoing violations, and that any penalty fairly reflects the degree of interference with public welfare and the gravity of the noncompliance.

The Board has not hesitated to order corrective action in cases where landfill owners and operators have violated financial assurance provisions. In *People v. John Prior and Industrial Salvage, Inc.*, PCB 93-248 (July 7, 1995), the Board stated that an order to 'cease and desist' from violations required an order to come into compliance (*slip op.*, at 23). In that case, the Board specifically ordered the Respondents to perform closure of the Respondents' landfill in accordance with the Act, Board regulations, and existing permit conditions, and also ordered the Respondents to post financial assurance (slip op. at 24-25) . Similarly, in *People v. Wayne Berger and Wayne Berger Management*, PCB 94-373 (May 6, 1999), the Board ordered the Respondents to perform closure of the subject landfill, in addition to paying a civil penalty (slip op., at 22).

The Board should also order the Respondents to close Parcel B of the Landfill. Closure is seriously overdue, and existing conditions demonstrate that closure-related action needs to be taken. Once the Respondents perform closure, they will be able to significantly reduce the amount of financial assurance required.

In addition to a corrective remedy, the Board must assess a civil penalty that will aid in enforcement of the Act's provisions. In this case, the Respondents have delayed compliance for almost seven years. Even after the Board found them in violation, they took no action to achieve compliance. Throughout this 7 year period, conditions at the Landfill have seriously degraded. To aid in enforcement of the Act, the Board must assess a civil penalty sufficient to remove all

financial benefit derived by the Respondents, and in such amount that will deter future violations by the Respondents and others similarly situated.

Neither the Act nor Board regulations exempt municipalities from the civil penalty provisions, and the appalling lack of diligence on the part of the City of Morris argues against creating such an exemption in this case. All landfill owners, municipal and private, are required to comply with the Act and pertinent regulations. Municipalities must not come to believe that they will receive a 'pass' if they choose to ignore their requirements and divert funds from environmental compliance to other purposes.

IV. CONCLUSION

As remedy for the violations, the Complainant respectfully requests that the Board enter an order containing the following relief:

1) Requiring the Respondents, jointly and severally, to post financial assurance meeting the requirements of the 35 Ill. Adm. Code 811.700, and current Landfill Permits, in the amount of $17,427,366.00, within 30 days of the date of the Board's final order;

2) Requiring the Respondents, jointly and severally, to provide an updated cost estimate meeting the requirements of 35 Ill. Adm. Code 811.705 (d), within 60 days of the date of the Board's final order;

3) Requiring the Respondents, jointly and severally, to upgrade the financial assurance for closure and post closure, as required by 35 Ill. Adm. Code 811.701, within 60 days of providing an updated cost estimate.

4) Requiring the Respondents, jointly and severally, to initiate closure of Parcel B within 60 days of the date of the Board's final order, and to complete closure in accordance with 35 Ill. Adm. Code 811.110, and Permit No. 2000-LFM-156.

5) Assessing a civil penalty against the Respondents, jointly and severally, in the amount of $1,056,534.00, and an additional civil penalty against Respondent City of Morris in the amount of $399,967.40,

6) Ordering the Respondents to cease and desist from further violation of the Act and Board

regulations, including but not limited to violations of the financial assurance regulations; and

7) Ordering such other relief as the Board deems appropriate and just.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I, CHRISTOPHER GRANT, an attorney, do certify that I caused to be served this 19th day of October, 2007, the foregoing Complainant's Closing Argument and Post-Hearing Brief, Complainant's Appeal of Hearing Officer Ruling, and Notice of Filing, upon the persons listed below, 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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