

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: See Attached Service List
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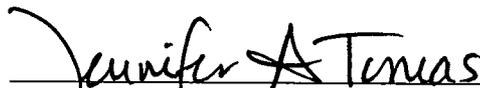
PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the following COMPLAINANT'S REPLY TO RESPONDENT COMMUNITY LANDFILL COMPANY, INC.'S CLOSING ARGUMENT AND POST-HEARING BRIEF, a copy of which is attached and hereby served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois

BY:



Jennifer A. Tomas
Christopher Grant
Assistant Attorneys General
Environmental Bureau
69 W. Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-0609
(312) 814-5388

DATE: December 10, 2007

THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST

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

Richard Porter
Charles F. Helsten
Hinshaw & Culbertson, LLP
100 Park Avenue
Rockford, Illinois 61105

Scott Belt
Scott Belt and Associate, PC
05 E. Main Street, Suite 206
Morris, Illinois 60450

Mark LaRose
Clarissa C. Grayson
LaRose & Bosco, Ltd.
200 N. LaSalle Street, Suite 2810
Chicago, Illinois 60610

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COMPLAINANT'S REPLY TO RESPONDENT COMMUNITY LANDFILL COMPANY, INC.'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 Reply to Community Landfill Company, Inc.'s Closing Argument and Post-Hearing Brief.

I. BACKGROUND

On September 11 and 12, 2007, the Board held hearing on the sole issue of remedy in this case. The Board had already found Respondents Community Landfill Company, Inc. ("CLC") and the City of Morris ("City") failed to provide financial assurance for closure and post-closure care of the Morris Community Landfill ("Landfill")¹. The Board directed the parties to hearing on the issue of remedy, including penalty, costs, and attorneys fees. The Board specifically requested that the parties only provide evidence relevant to Sections 33(c) and 42(h) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/33(c) and 42(h) (2004), and provide

¹ The Board's February 16, 2006 Order granting summary judgment, Complainant's Exhibit 2. The Board's June 1, 2006 Order upholding the February 16, 2006 Board Order after reconsideration, Complainant's Exhibit 3.

specific figures and justifications for penalty². On October 19, 2007, the Complainant filed its Closing Argument and Post-Hearing Brief. On November 30, 2007, CLC filed its Closing Argument and Post-Hearing Brief.

II. ARGUMENT

A. Analysis of the 33(c) Factors Finds that a Penalty is Warranted Against Respondent CLC

1. Respondent CLC's argument that the Landfill is not deteriorating belies the facts

Illinois Environmental Protection Agency ("Illinois EPA") inspector Mark Retzlaff testified at length on September 11, 2007 about the deteriorating conditions of the Landfill. These conditions include inadequate cover³, leachate seeps⁴, landfill gas escaping to the atmosphere⁵, and uncovered refuse⁶. The photographs included with Mr. Retzlaff's inspection reports⁷ detail some of deterioration that forms the basis for his "eyeball opinion that any waste is being or has been deposited outside the permitted area."⁸ In fact, the Landfill is not currently permitted to accept any waste at this time, so whether the waste observed by Mr. Retzlaff was in a permitted or non-permitted area is irrelevant.

Additionally, Respondent CLC argues that Mr. Retzlaff did not perform any tests at the Landfill or take any borings⁹. It is not the duty of an Illinois EPA inspector to prove that a Landfill is complying with the law; that is the obligation of the owner and operator of the Landfill, CLC and the City. In fact, Respondent CLC attempts to mislead the Board by quoting Illinois EPA's Accountant, Blake Harris, as to Landfill conditions. Respondent cites to Mr.

² Complainant's Exhibit 2, p. 18.

³ 9/11/07 Tr., p. 68-69.

⁴ 9/11/07 Tr., pp. 63, 64, 74.

⁵ 9/11/07 Tr., pp. 63, 68, 71.

⁶ 9/11/07 Tr., pp. 58, 60-67, 72-73.

⁷ Photographs included in People's Group Exhibit 1, Exhibits 7 and 8.

⁸ Respondent CLC's Closing Argument and Post-Hearing Brief, p. 8.

⁹ Respondent CLC's Closing Argument and Post-Hearing Brief, p. 8.

Harris' testimony that "he is not aware of any environmental damage or damage to personal health, safety or welfare at the landfill caused by the lack of alleged posting of financial assurance."¹⁰ As an accountant, Mr. Harris has neither been to the Landfill nor could speak to its current conditions. Mr. Retzlaff's testimony on September 11, 2007 and his inspection reports including photographs tell the story of the deteriorating conditions at the Landfill.

Respondent CLC cites several actions being taken at the Landfill that would supposedly contradict the State's position that the Landfill is deteriorating¹¹. Every single one of these actions were taken as a result of litigation by the Complainant or required to be accomplished pursuant to a permit, statute or regulation. Just because Respondent is complying with some its obligations under the law does not mean the Landfill is not deteriorating. These are obligations all landfills within Illinois are expected to comply with.

Finally, Respondent CLC refers to a revised closure plan and cost estimate submitted to the Illinois EPA prior to hearing¹². As it stood at the date of hearing, the Illinois EPA was reviewing this revised closure plan and cost estimate. Review is not acceptance and the submission will go through its regular channels for a determination.

2. Respondent CLC efforts to comply with the financial assurance requirements cannot be deemed diligent

On November 14, 2000, Violation Notices were sent from the Illinois EPA to Respondents CLC and the City, along with 29 other landfills that had Frontier bonds as financial assurance¹³. Of the 30 landfills that received the Violation Notice, 28 complied by obtaining alternate compliant financial assurance and one landfill was abandoned¹⁴. The Respondents,

¹⁰ Respondent CLC's Closing Argument and Post-Hearing Brief, p. 7.

¹¹ Respondent CLC's Closing Argument and Post-Hearing Brief, p. 8.

¹² Respondent CLC's Closing Argument and Post-Hearing Brief, pp. 8-9.

¹³ 9/11/07 Tr., pp. 126-127.

¹⁴ 9/11/07 Tr., pp. 129-130.

rather than supply alternative compliance financial assurance, chose to litigate before the Board the compliance of the Frontier bonds they had jointly purchased. The Board found the Frontier bonds were non-compliant financial assurance (PCB 01-170)¹⁵. Respondents appealed that order to the Third District Appellate Court and again were told that the Frontier bonds were non-compliant financial assurance¹⁶. Since at least July 17, 2002, when the Appellate Court denied rehearing, the issue of whether the Frontier bonds were acceptable financial assurance was determined once and for all.

Respondent CLC attempts in its Brief to re-argue the issue of the compliance of the Frontier bonds. Those issues have been previously decided by the Board and affirmed on appeal. Respondents did absolutely nothing after the Appellate decision to replace the Frontier bonds and to this day have not supplied alternative compliant financial assurance. Diligence would have been to provide alternative compliant financial assurance after the Violation Notice in November 2000, or at the very latest, after the Appellate Court denied rehearing in July 2002.

3. Respondent CLC's belief that Frontier was providing financial assurance contradicts prior Board rulings and the Third District Appellate opinion

Given that both the Board, in PCB 01-170, and the Third District Appellate Court have ruled that the Frontier bonds were non-compliant financial assurance, it defies logic that Respondent CLC could have believed Frontier was continuing to provide financial assurance for the Landfill. Respondent CLC states in its Brief that Blake Harris testified as to the validity of the Frontier bonds through at least 2005¹⁷. That is correct; the bonds were valid until 2005 with an automatic one year extension. But, bond validity and bond compliance are two separate analyses. It is indisputable that the Frontier bonds were not compliant financial assurance. To

¹⁵ Complainant's Exhibit 4.

¹⁶ Complainant's Exhibit 5.

¹⁷ Respondent CLC's Closing Argument and Post-Hearing Brief, p. 14.

argue anything different ignores the prior Board Order and Third District Appellate opinion.

B. The Purpose of Respondent CLC Providing Compliant Financial Assurance is to Avoid the Situation We Currently Have at the Landfill – Closure Being Due without Funding

The purpose of the Board ordering Respondent CLC to supply compliant financial assurance is to compel compliance with the laws and regulations relating to landfills in Illinois. The requirement for compliant financial assurance is not new and has been known to the Respondents since their purchase of the Frontier bonds. In fact, when the Frontier bonds were purchased in 1999, the closure of Parcel B was already 3 years overdue. Respondents should not be able to use their own delay tactics in obtaining compliant financial assurance to escape their obligations under the law.

C. A Civil Penalty is Warranted Against Respondents for Their Continued Failure to Comply with the Financial Assurance Requirements

Respondent CLC claims that it is in a Catch-22 situation where it did not receive the anticipated operating permit and thus has been unable to generate sufficient income to pay for any premium bonds¹⁸. The fact that CLC relied upon the granting of an operating permit in 2001, which was not granted, cannot excuse its obligations to comply with the law.

1. Respondent CLC's financial situation does not relieve it of its duty to comply with the laws and regulations requiring compliant financial assurance

The Landfill has been operated by CLC since at least 1982. From at least 1982 through at least 2005, the Landfill was operating and generating income for both CLC and the City. In fact, Mr. Retzlaff testified that waste continues to be accepted and dumped at the Landfill as of June and August 2007¹⁹. Edward Pruiem, CLC's President, testified that there is not the cash flow

¹⁸ Respondent CLC's Closing Argument and Post-Hearing Brief, p. 16.

¹⁹ 9/11/07 Tr., pp. 58-66.

that once was there, years ago²⁰. Respondent CLC's failure to retain sufficient funds to satisfy the long-term obligations of the Landfill does not excuse the imposition of a civil penalty.

Respondent CLC claims that it attempted in good faith to provide financial assurance after the Frontier bonds were determined to be non-compliant²¹. As detailed above, no alternate compliant financial assurance was provided after the issuance of the November 14, 2000 Violation Notice. No alternate compliant financial assurance was provided after the Appellate Court opinion in 2002. To this day, compliant financial assurance has not been tendered by either Respondent for the Landfill. Respondent CLC states that that it never intended to operate the landfill without financial assurance²², but that is exactly what it's done for over 7 years.

2. The Illinois EPA is entitled to the collateral and premiums held by Frontier until compliant financial assurance is in place

The Illinois EPA was listed as the obligee (i.e. beneficiary) of the Frontier bonds when they were purchased by CLC and the City²³. As such, the Illinois EPA has to give the surety an opportunity to perform closure or post-closure²⁴. However, if the surety does not perform closure or post-closure, the Illinois EPA is entitled to a penal sum²⁵. Frontier is currently in rehabilitation in New York and will not be performing closure and post-closure at the Landfill²⁶. In Complainant's offer of proof, it was shown that Frontier has been settling similar claims for significantly less than their original value²⁷.

The ability of Respondent CLC and the City to release the collateral and premiums being held by Frontier for the benefit of the Illinois EPA is wholly within their own ability. Once

²⁰ 9/12/07 Tr. p. 151.

²¹ Respondent CLC's Closing Argument and Post-Hearing Brief, p. 16.

²² Respondent CLC's Closing Argument and Post-Hearing Brief, p. 16.

²³ 9/11/07 Tr. p. 183.

²⁴ 9/11/07 Tr. p. 184.

²⁵ 9/11/07 Tr. p. 184.

²⁶ 9/11/07 Tr. p. 184.

²⁷ 9/11/07 Tr., pp. 187-188.

compliant financial assurance is posted for the Landfill in the amount of \$17.4 million, the Illinois EPA will release its claim on the Frontier bonds. The idea that the Illinois EPA is somehow withholding money that Respondent CLC is entitled to is ludicrous.

III. CONCLUSION

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 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,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN

Attorney General of the State of Illinois

BY:

A handwritten signature in black ink that reads "Jennifer A. Tomas". The signature is written in a cursive style and is positioned above a horizontal line.

JENNIFER A. TOMAS

CHRISTOPHER GRANT

Assistant Attorneys General

Environmental Bureau

69 W. Washington Street, Suite 1800

Chicago, Illinois 60602

(312) 814-0609

(312) 814-5388

CERTIFICATE OF SERVICE

I, JENNIFER A. TOMAS, an Assistant Attorney General, certify that I caused to be served by Electronic Filing and First Class United States Mail, the foregoing Notice of Filing and Complainant's Reply to Respondent Community Landfill Company, Inc.'s Closing Argument and Post-Hearing Brief, to the parties named on the attached service list, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601 on December 10, 2007.


JENNIFER A. TOMAS