ILLINOIS POLLUTION CONTROL BOARD
November 5, 2009

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 03-191
	)	(Enforcement -Land)
COMMUNITY LANDFILL COMPANY, INC. and the CITY OF MORRIS,	)	
	)	
	)	
Respondents.	)	

ORDER OF THE BOARD (by S.D. Lin):

In its June 18, 2009 opinion and order, the Board assessed penalties against both respondents for violations of the Environmental Protection Act (Act), 415 ILCS 5/1 *et seq*. (2008) and the Board's rules requiring the posting of financial assurance for the proper closure and post-closure care of the Morris Community Landfill (Landfill). The action was brought by the People of the State of Illinois. Site permits for the Landfill, issued by the Illinois Environmental Protection Agency, list Community Landfill Company, Inc. (CLC) as the operator, and the City of Morris (City) as the owner. The Landfill is a special waste and municipal solid waste landfill located at 1501 Ashley Road, in Morris, Grundy County.

The Board ordered respondents CLC and the City, jointly and severally to

- post financial assurance in the amount of $17,427,366.00 using any combination of financial assurance mechanisms acceptable to the IEPA under the Board's rules;
- submit revised cost estimates, and update financial assurance in accordance with approved revised estimates; and
- cease and desist from accepting any additional waste at the site, and from committing any other violations of the Landfill's permits, the Act, and Board regulations.

The Board also assessed civil penalties, directing

- Respondent CLC to pay a civil penalty of $1,059,534.70 (calculated by the People as $1,486,106.70 with reference to the costs avoided for financial assurance premiums, less $426,572.00) in premiums paid).
- The City itself to pay a civil penalty amounting to the dumping royalties or tipping fees it received from 2001-2005, amounting to $388,967.40.

By order of September 17, 2009, the Board denied each of the respondents' timely-filed, separate motions for reconsideration. That order noted that the deadline date for respondents' compliance had been reset, due to the pendency of the motion for reconsideration, from the August 17, 2009 date set in the June 18, 2009 order, to November 16, 2009.

On October 13, 2009, the City filed a motion pursuant to Illinois Supreme Court Rule 335(g)[1] and the Board's procedural rule at 35 Ill. Adm. Code 101.906(c), requesting the Board to stay its order pending appeal (City Mot.). The People filed a response in opposition on October 20, 2009 (Comp. Resp. to City Mot.).

On October 20, 2009, the Board received service of the City's petition seeking review of the Board's orders in this action by the Illinois Appellate Court for the Third Judicial District: City of Morris v. Community Landfill Co., the People of the State of Illinois, the Illinois Pollution Control Board, and the State of Illinois, No. 3-09-0847 (Third Dist. filed Oct. 19, 2009). On October 26, 2009, CLC filed its own petition for review of the Board's order. Community Landfill Co. v. the Illinois Pollution Control Board, the People of the State of Illinois, City of Morris, and the State of Illinois, No. 3-09-0864 (Third Dist. filed Oct. 26, 2009).

On October 22, 2009, CLC filed a separate motion (CLC Mot.), pursuant to Illinois Supreme Court Rule 335(g) and the Board's procedural rule at 35 Ill. Adm. Code 101.906(c), requesting the Board to stay its order pending appeal. On October 26, 2009, the People filed a response in opposition (Comp. Resp. to City Mot.). On October 29, 2009, the City filed a reply to the People's response (City Reply), accompanied by a motion for leave to file. The Board grants the City's motion for leave to file a reply. The Board has considered all of the parties' filings.

In support of their motions, respondents use identical language to set forth the legal bases for their appeals:

> 1. Section 101.906(c) of the PCB General Rules provides that stays pending appeal are governed by Illinois Supreme Court Rule 335. Rule 335(g) states that a stay pending appeal shall ordinarily be sought in the first instance from the administrative agency.

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[1] Illinois Supreme Court Rule 335(g) provides in its entirety:

> Application for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency. A motion for stay may be made to the Appellate Court or to a judge thereof, but the motion shall show that application has been made to the agency and denied; with the reasons, if any, given by it for denial, or that the application to the agency for the relief sought was not practicable. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavit. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the Appellate Court. The court may condition relief under this rule upon the filing of a bond or other appropriate surety.

2. The Illinois Supreme Court has addressed factors that should be considered in ruling on a motion for stay pending appeal. *Stacke v. Bates*, 138 Ill.2d 295, 304-05, 562 N.E.2d 192, 196 (1990). One consideration is "whether a stay is necessary to secure the fruits of the appeal in the event that the movant is successful." *Stacke*, 138 Ill.2d at 305, 562 N.E.2d at 196. Other equitable factors should be balanced, and include whether the *status quo* should be preserved, the respective rights of the litigants, and whether hardship on other parties would be imposed. *Stacke*, 138 Ill.2d at 305-06, 309, 562 N.E.2d at 196, 198. Another consideration is whether there is a "substantial case on the merits" (not likelihood of success on the merits), but this should not be the sole factor." *Stacke*, 138 Ill.2d at 309, 562 N.E.2d at 198. Here, all factors favor a stay.

3. Here, a stay is necessary to secure the fruits of the appeal in the event that the movant is successful" and to preserve the status quo. *See* City Mot. at 1-2, and CLC Mot. at 1-2.

Each motion then argues facts specific to each respondent's situation, which they argue support their stay requests. *See* City Mot. at 2-10, CLC Mot. at 2-6, and City Reply at 1-8.

In the response to the City's motion (Resp. City Mot. at 1-2), the People noted the Board's reluctance to grant stays when harm is threatened to the public, citing People v. John Prior, PCB 02-177 (Sept. 16, 2004). The People also asserted that the Board has generally denied stays when the matter is before the appellate court, citing Community Landfill and the City of Morris, PCB 01-48 and PCB 01-49 (cons.) (Aug. 9, 2001). The People acknowledge that the Board has in some instances granted stays of monetary penalties, citing IEPA v. No. Ill. Serv. Co., AC 05-40 (Apr. 19, 2007). But, the People also observe that in various cases the People had not opposed the stay. See IEPA v. Pielet Bros., PCB 80-185 (Feb. 4, 1982), People v. John Prior, supra, and People v. Blue Ridge Constr. Co., PCB 02-115 (Dec. 17, 2004).

Moreover, the People suggested that the Board should deny the stay on the grounds that the City had not filed an appeal bond in the amount of the civil penalty, or guaranteed that the landfill would be maintained and repaired during the pendency of the appeal. The People noted that the Board had no procedures for such bonds currently in place, but that the appellate court does, and that Board denial of an appeal would put the stay issue before the appellate court. Resp. City Mot. at 2-3. The People then argue that staying the order as to the City would threaten harm to the public. *Id.* at 3-4. The People urge the Board to deny the motion. *Id.* at 4-5.

In their response to CLC's motion, the People explain that they were not aware of the October 19, 2009 filing of the City's appeal. Comp. Resp. CLC Mot. at 1. The People again assert that the Board typically denies stays where cases are before the appellate court, citing Community Landfill and the City of Morris, PCB 01-48 and PCB 01-49, *supra*. *Id.* The People then assert that grant of the stay would threaten harm to the public, maintaining that CLC had repeated the City's arguments, so that the People repeated their arguments as well. *Id.* at 2. Additionally, the People remark that the only remedy against CLC is recoupment of the economic benefit it received during non-compliance. The People argue that since CLC has limited funds, to allow them to be expended during the course of any appeal could render any

judgment uncollectable, which would be unfair to the State. The People again urge the Board to deny the requested stay.

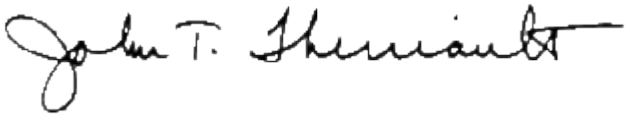
The City, in its reply, continues to disagree with various factual presentations by the City. City Reply at 1-8. The City also points out that, since the City is a municipality, the Board can grant a stay without requiring the City to post a bond. *Id.* at 8-9, citing Supreme Court Rule 305(i).

The Board denies in their entirety both respondents' motions for stay of the Board's June 18, 2009 order. Although the Appellate Court acquired jurisdiction of this case once a notice of appeal was filed with the court, the Board retains jurisdiction to determine "matters collateral or incidental to the judgment. . . . A stay of judgment is a matter that is collateral to the judgment because it neither affects nor alters the issues on appeal." Sears Holdings Corp. v. Maria Pappas, 391 Ill. App. 3d 147, 158-59, 908 N. E. 2d 556, 566-567 (1st Dist. 2009) (citations omitted). The Board declines to stay any part of its order as to either respondent for all of the reasons urged by the People. The Board acknowledges that the remedies the Board has imposed will be costly for each respondent. But, allowing maintenance of the *status quo* at the Morris Community Landfill could ultimately prove even more costly to the Landfill's neighbors as well as to the People of the State of Illinois.

The Board finds that respondents do not have "a substantial case on the merits" within the meaning of Stacke, *supra*. The Board agrees with the People that, if ever a case needed to have any stay conditioned on provision of adequate surety for ultimate performance, this is that case. If respondents continue to believe stays are warranted, respondents should apply for them to the appellate court.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 5, 2009, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Boar