BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on March 31, 2006, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, the City of Morris' Motion to Reconsider.

Dated March 31, 2006

Respectfully Submitted,

On behalf of the CITY OF MORRIS

By: Hinshaw & Culbertson LLP

Charles F. Helsten
One of Attorneys

HINSHAW & CULBERTSON LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

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MOTION TO RECONSIDER

NOW COMES the City of Morris, pursuant to Section 101.520 of the General Rules of the Illinois Pollution Control Board, and, in support thereof, states as follows.

1. That on or about February 27, 2006, the Respondent City of Morris received the February 16, 2006 Interim Opinion and Order of this Honorable Board, which addressed Cross Motions for Summary Judgment filed by the People of the State of Illinois (State). A true an accurate copy of the Order received by the City (bearing the date stamp upon which the document was physically received) is marked **Exhibit A** and attached hereto and incorporated herein by this reference.

2. That Interim Opinion and Order of this Honorable Board granted the State's Motion for Summary Judgment on the issue of the City's responsibility to provide closure/post closure financial assurance at the Morris Community Landfill, (located at 1501 Ashley Road, Morris, Grundy County, Illinois), and denied the City's Cross Motions for Summary Judgment pertaining to the same issue.

3. The City of Morris now respectfully moves this Honorable Board to reconsider its Interim Opinion and Order of February 16, 2006, wherein it granted the State's Motion for Summary Judgment and denied the City's Cross Motions for Summary Judgment on the issue of the liability and responsibility of the City to post financial assurance for waste disposal operations at the Morris Community Landfill and, in support thereof, states as follows:

4. In its February 16, 2006 Interim Order, the Board held that what in fact constitutes "conduct" is critical in determining whether the City of Morris actually "conducted" "waste disposal operations" at the Morris Community Landfill (thus making it liable for providing closure/post closure financial assurance for the facility in question).

5. In finding that the City "conducted" "waste disposal operations" at the facility in question, the Board noted that it had looked beyond the terms of the operating permits issued for the facility in question, to the "specific facts of the case as a whole".

6. In turn, this Honorable Board then found that the City of Morris had "financed the operation" of the facility in question, had litigated in conjunction with CLC, and (lastly) had "profited from and treated the leachate" from the facility in question. In addition, while expressly conceding that these operations alone may not constitute conducting a waste disposal operation, the Board also specifically found that Morris had "discretion regarding decisions of the site and took responsibility for some of the ancillary site operations such as treatment of leachate from the landfill". In turn, the Board found that the "grand sum" of these specific acts of conduct rose to the level of "operation" as anticipated by such and Section 811.700(f).

7. The Respondent City of Morris respectfully submits that the Board was in error in making such findings for the following reasons:

a. In arriving at its decision, this Honorable Board specifically found that the City of Morris did not actively conduct day-to-day (i.e., waste disposal) operations at the facility in question (see Interim Opinion and Order of the Board, page 14). As both Section 21(d)(2) of the Act and Section 811.700(f) specifically provide that only those persons who conduct waste disposal operations are liable for complying with the financial assurance requirements of that specific subpart, the Board was then in error in finding the City of Morris liable under this particular regulatory provision for the posting of closure/post closure financial assurance for the facility in question.

b. As indicated above, in making its ruling on the Cross Motions for Summary Judgment, the Board found that the City had "...financed the operation..." of the facility in question. Nowhere does the factual record made by the State in this matter establish that the City "financed" the operation of the landfill.

c. Further, assuming arguendo, and only for purposes of this Motion that the City had in some manner provided some level of financial support for the operation of the landfill, the providing of financial support does not, as a matter of law, constitute "conducting" of a "waste disposal operation" (i.e., that conduct which is specifically required by Illinois law to impose liability upon a person for providing closure/post closure financial assurance). If providing financing for landfill operations constituted "conducting a waste disposal operation, then any bank or other financial institution that extended credit to a landfill operation would, as a matter of law, be liable for that customer's closure/post closure financial obligations.

d. Moreover, the Board found that litigating certain contested matters "in conjunction with CLC" constituted "operation" of the facility in question so as to trigger responsibility for providing closure/post closure financial assurance. As more than amply and aptly demonstrated by the factual record herein, the City only chose to protect and defend itself against claims prompted by actions taken by the State and/or initiated from time-to-time over the past five years by the State. Defense of and/or protection of itself against such claims and assertions made by the State (or, for that matter, participation of any litigation concerning the closure/post closure status of this landfill) does not, as a matter of law, constitute conducting of a waste disposal operation.

e. In arriving at its finding that the City was liable for the posting of closure/post closure financial assurance for the facility in question, the Board also found that the City had "profited from and treated" leachate generated by the City of Morris landfill. Nowhere does the factual record made in this matter indicate that the City "profited" from its acceptance in treatment of the leachate in question, or do anything more than meet costs incurred in treatment of the leachate. Moreover, assuming arguendo and only for purposes of this Motion that the City did "profit" in some manner from the "treatment" of leachate, the garnering of some sort of economic and/or financial gain from the treatment of leachate from the facility does not, as a matter of law, constitute "operation" of a waste disposal site as contemplated by either Section 21(d)(2) of the Act or Section 811.700(f).

f. In addition, and while expressly conceding that each of the above-mentioned activities in and of themselves may not constitute "operation" of a waste disposal site, this Board also specifically found that Morris had "...discretion regarding decisions at

this site..." and "...took responsibility for some of the ancillary site operations such as treatment of leachate from the landfill...". Nowhere does the factual record made by the State in this matter establish that the City had "discretion regarding decisions at the site" or, moreover, if the City did arguably have discretion over various "decisions" at the site, or that these "decisions" were in anyway related to "operation" of the waste disposal site as that term is used in Section 811.700(f). Moreover, aside from its contractual commitment to accept leachate generated from the landfill for proper treatment and disposal, nowhere does the factual record made in this matter establish that the City took "responsibility" for any other "ancillary site operations". In fact, the express terms of the lease and operating agreement originally executed between the City and CLC (which is attached as **Exhibit B** to the City's Reply to the State's Response to the Cross Motion for Summary Judgment) place all decisions pertaining to operation of the facility squarely upon CLC. In addition, and assuming arguendo and only for purposes of this Motion that the City did in some manner take "responsibility" for some of the "ancillary" site operations (such as treatment of leachate from the landfill) such conduct does not, as a matter of law, rise to the level of "operation" of a waste disposal site as provided by Section 811.700(f). If in fact assuming responsibility for conducting of "ancillary site operations" (again, such as treatment of leachate from the landfill) constituted the level of "operation" of a landfill which would invoke responsibility for posting of closure/post closure financial assurance under Section 811.700(f), then any environmental service contractor or subcontractor that provided service to the site would be considered liable for posting of closure/post closure financial assurance. (As would any municipal POTW

that accepted leachate for treatment or, for that matter, provided any services [i.e., utilities] to a nearby landfill).

g. As none of these individual acts constitute "conducting a disposal operation" at a Municipal Solid Waste Landfill (MSWF), then, as a matter of fact and of law, the "grand sum" of these acts cannot constitute "operation" of a "waste disposal site" as found by this Board in its February 16, 2006 Interim Opinion and Order, and the City's Motion should be granted, or, at a minimum, the State's Motion should be denied.

WHEREFORE, and for the reasons set forth above, the City of Morris respectfully requests that this Honorable Board reconsider its February 16, 2006 Interim Opinion and Order, reverse its rulings on the Cross Motions for Summary Judgment, and accordingly deny the State's Motion for Summary Judgement against the City of Morris, and grant the City of Morris' Cross Motion for Summary Judgment against the State of Illinois, and for such other and further relief as this Honorable Board deems appropriate.

Dated:_____

Respectfully Submitted,

On behalf of the CITY OF MORRIS, an Illinois Municipal Corporation

By: Hinshaw & Culbertson

HINSHAW AND CULBERTSON
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

Charles F. Helsten
One of Its Attorneys

AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on March 31, 2006, she caused to be served a copy of the foregoing upon:

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

Clarissa Grayson
LaRose & Bosco, Ltd.
200 N. LaSalle, Suite 2810
Chicago, IL 60601

(VIA HAND DELIVERY)
Ms. Dorothy Gunn, Clerk
Pollution Control Board
100 W. Randolph, Suite 11-500
Chicago, IL 60601

Bradley Halloran
Hearing Officer
Pollution Control Board
100 W. Randolph, Suite 11
Chicago, IL 60601

A copy of the same was enclosed in an envelope in the United States mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.

_____

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TO: All counsel of Record (see attached Service List)

Please take notice that on March 31, 2006, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, the City of Morris' Brief in Support of Motion to Reconsider.

Dated March 31, 2006

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On behalf of the CITY OF MORRIS

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BRIEF IN SUPPORT OF MOTION TO RECONSIDER

In its Interim Opinion and Order of February 16, 2006, this Board held that a "grand sum" of the City of Morris' separate instances of conduct rose to the level of "operation" of a waste disposal site as provided for in Section 811.700(f). However, any such construction of Section 811.700(f) must, of course, be consistent with Section 21(d)(2) of the Illinois Environmental Protection Act (the Act), the underlying statutory provision upon which Section 811.700(f) is premised.

As noted in the City's response to the State's Motion for Summary Judgment and Cross Motion for Summary Judgment, the plain language of Section 21(d)(2) of the Act only applies to those persons who "conduct a ... waste-disposal operation".

Again, as also noted in the City's Cross Motion for Summary Judgment, it is well settled that words in the statute must be given their plain and ordinary meaning. *King v. First Capital Financial Services,* 211 Ill. 2d 1, 821 N.E. 2d 1155, 1169 (2005). In *King* (828 N.E. 2d 1169, citing *In Re the Marriage of Beyer*, 324 Ill. App. 3d 305, 309-310, 753 N.E. 2d 1032 (201, the court held that "a court may not supply omissions, remedy defects, annex new provisions,

substitute different provisions, add exceptions, limitations or conditions or otherwise change the laws so as to depart from the plain meaning of the language employed in the statute".

Again, as also previously noted in the City's Cross Motion for Summary Judgment, according to Black's Law Dictionary, the plain and ordinary meaning of the word "conduct" is: "to manage; direct; lead; have direction; carry on; regulate; do business". Black's Law Dictionary, 295 (6th Ed. 1990).

In this case, there is no question that the acts of conduct enumerated by this Board at page 14 of its Interim Opinion and Order (upon which it found that Morris was "operating" a waste disposal site) clearly fall outside the plain and ordinary meaning of the term "conduct". In fact, not only does Mark Retzlaff, the IEPA Inspector assigned to this facility state under oath that it is CLC that "operates" the Morris County Landfill, and that CLC's employees manage the facility (see Complainant's Exhibit I, paras. 3 and 7), the Board itself concedes in its opinion that it does not appear that Morris actively conducts the day-to-day operations at the landfill. (See page 14 of Interim Opinion and Order).

As such, the Board's determination that the City of Morris "operates" a waste-disposal site cannot be premised upon the fact that Morris actually operates the day-to-day operations of the landfill or manages this site. If, then, the City is to be found to "operate" a waste disposal site (so as to invoke responsibility on its part to post closure/post closure financial assurance), this determination must be supported by those other acts and conduct enumerated by the Board at page 14 of its Opinion which supposedly rise to the level of "operating a waste disposal site" or "conducting a waste disposal operation".

It is respectfully submitted that none of those tangential, indirect acts and conduct rise to the level of "operation" as contemplated by either Section 21(d)(2), or its enabling regulation (Section 811.700(f).

Again, the record made in this matter (which the Board must rely upon in arriving at its ruling on the Cross Motions for Summary Judgment) contains insufficient evidence to support granting of the State's Motion for Summary Judgment.

In the first instance, the extension of credit or otherwise "financing" a business operation does not rise to a creditor being deemed to have operated that business enterprise. Otherwise, any lending institution that extended credit to a business would be held liable for the consequences of the operation of that business. See generally *Board of Managers of Old Willow Falls Condominium Association v. Glenview State Bank*, 1989 WL 152836 (Ill.App. 1st Dist.) (A secured lender that extends credit in financing to a project is not deemed a "co-developer)"; *In re S.M. Acquisitions Co. v. Matrix IV, Inc.*, 332 B.R. 346 (2005). *In re Badger Freightways, Inc., v. Continental Illinois National Bank and Trust Company of Chicago*, 106 B.R. 971 (1989). (Banks are not generally considered fiduciaries of their borrowers so as to impose liability upon financial institution for acts of parties they have extended credit to, absent the lender becoming the ultra eagle of the customer in exercising pervasive control over the business operation of the same).

In addition, the election to become involved in litigation so as to protect oneself against the assertion of claims for the advancement of positions by a regulatory agency that would have a deleterious financial impact is in no way indicia of conducting a business operation (or, for that matter, a waste disposal operation). See generally *Travelers Casualty and Surety Company v. Interclaim (Bermuda) LTD.*, 304 F. Supp. 2d 1018 (N.D. Ill. 2004).

Likewise, the furnishing of services to a facility does not constitute "operation" of that facility. See *United States v. Consolidated Rail*, 729 F. Supp. 1461(D. Del. 1990). The providing of materials or services to a facility does not constitute operating or exercising control over that facility). Otherwise, if the contrary were the case, any municipality that provided utilities or other municipal services of any type, kind or sort to a business would be deemed to be responsible for that business's operations.

Lastly, as noted in the City's Motion to Reconsider, the record made in this matter is devoid of evidence of any "discretion" which the City of Morris had concerning material and/or critical site management decisions. More specifically, the City did not: 1) design or construct the facility, 2) had no authority to control or manage the day-to-day operations of the facility, 3) over and above having the authority to control or manage day-to-day operations of the facility, in fact exercised that control or actively participate in day-to-day operations and management of the facility, 4) place its own employees or personnel at the facility, 5) have the authority to approve capital expenditures and/or all other budgetary affairs of the entity managing the facility on a day-to-day basis, 6) have the authority to approve changes in the hiring and firing of personnel by the entity in charge of operating and managing the facility, 7) have the power to establish operational plans and procedures, and/or 8) mandate changes in the way the facility is being operated. In fact, a reading of the Lease and Operating Agreement by and between the City and CLC (which, again, was attached to the City's Reply to the Complaint's Response to the City's Cross Motion for Summary Judgment); demonstrates that all such matters were within the exclusive control of CLC. In fact, the terms and conditions of such Agreement conclusively establish that the City did not "operate" the landfill in question or otherwise conduct a waste-

disposal operation. (See generally *Nurad, Inc. v. Hooper & Son's, Inc.*) 91-1775 (4th Cir. May 29, 1992).

As noted above, then, none of the acts or instances of conduct noted by the Board in support of entry of Summary Judgment against the City constitute evidence of conducting a business operation, or, more specifically, conducting a waste-disposal operation. As such, if none of the individual parts satisfy the definition of conducting a waste-disposal operation, or operation of a waste-disposal facility, then, in turn, the "grand sum" of these non-actionable individual parts cannot collectively rise to the level of operation anticipated in Section 21(d)(2) of the Act or Section 811.700(f) (in many respects like a mathematical equation, where each separate, non-actionable element represents a zero value, the sum of those elements cannot total anything more than a zero).

Moreover, the City of Morris can find no legal authority for the proposition that these individual, non-operative factors in total would be deemed to constitute conducting a business operation or operation of a facility. The City would submit no law exists on this point because no reviewing tribunal has ever found that the combination of such singular, non-operative, non-actionable events of conduct could constitute active control of a waste disposal facility.

As initially stated by the City in its Cross Motion for Summary Judgment, the Complainant's assertion that the City of Morris is required to comply with Section 21(d)(2) of the Act and Section 811.700(f) of the Code merely because it is the owner of the property on which the landfill is located and engages in some singular, non-operative acts which are tangentially related to the landfill parcel would require a wholesale rewriting of these sections. In effect, this finding would require the word "conduct" contained in these sections to be replaced with the word "own or be connected with in some manner or form".

Again, clearly it was not the intention of the Legislature for either Section 21(d)(2) of the Act (or its enabling regulations) to apply to entities that are not engaged in active, day-to-day operations of a landfill or in active management of the landfill.

Again, in keeping with the Act's own definition of operator (which make clear that it is operators who conduct waste disposal operations), this Board has previously held that where there is an active operator at the site, it is only the operator, and not the owner who is liable for failure to provide the required financial assurance. See *People v. Wayne Burger and Burger Waste Management*, PCB 94 373 May 6, 1999 (1999 WL 304583). In addition, even as noted by this Honorable Board in its Interim Opinion and Order, in *TerMaat v. Anderson, et al*, PCB 85 129 (Oct. 23, 1986), this tribunal previously found that where an on-site contractor had little or no discretion over performance of day-to-day operations and active management of the site, it was those persons who exercised authority and control over day-to-day operations that would be deemed responsible for posting closure/post closure financial assurance. Accordingly, just as the on-site operator in *TerMaat* (who had no significant control over day-to-day operations and active management of the site) was found not to be liable for posting of financial assurance, the City of Morris (which, by this Honorable Board's own Interim Opinion and Order has been recognized as not having control over day-to-day operations and management of the facility) should (consistent with the *TerMaat* decision) be found to not be responsible for posting of closure/post closure financial assurance.

As the Board as aptly noted in its Interim Opinion and Order decision, "The Board should only grant summary judgment when the Moveant's right to relief is clear and free from doubt". *Dodw*, 181 Ill. 2d 483, 693 N.E. 2d 370, citing *Putrill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E. 2d 867, 871 (1986). Although the City contends that its right to relief is "clear and free" from

doubt, the converse is not true with respect to the State's case. Again, the State has presented precious little (if any) competent evidence under the controlling law in this case to support its Motion for Summary Judgment. As such, in the alternative, if this Board does not grant the City's Motion for Summary Judgment, it should in any event reverse its granting of the State's Motion for Summary Judgment, and set order evidentiary hearing on the issue of liability.

Dated:_____

Respectfully Submitted,

On behalf of the CITY OF MORRIS, an Illinois Municipal Corporation

By: Hinshaw & Culbertson

_____

Charles F. Helsten
One of Its Attorneys

HINSHAW AND CULBERTSON
100 Park Avenue
P.O. Box 1389
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815-490-4900

AFFIDAVIT OF SERVICE

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Mr. Christopher Grant
Assistant Attorney General
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188 W. Randolph St., 20th Fl.
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Clarissa Grayson
LaRose & Bosco, Ltd.
200 N. LaSalle, Suite 2810
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(VIA HAND DELIVERY)
Ms. Dorothy Gunn, Clerk
Pollution Control Board
100 W. Randolph, Suite 11-500
Chicago, IL 60601

Bradley Halloran
Hearing Officer
Pollution Control Board
100 W. Randolph, Suite 11
Chicago, IL 60601

A copy of the same was enclosed in an envelope in the United States mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.

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