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**STATE OF ILLINOIS**  
**Pollution Control Board**

**Respondent.**

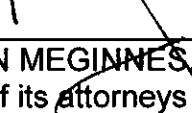
(Pollution Control Facility Siting Appeal)

3. In its Response, the County Board misrepresented the Record and the law concerning Criterion v, as more fully set forth in the attached Reply.

4. PDC respectfully requests leave to file the attached Reply with the Pollution Control Board for consideration.

**WHEREFORE**, Petitioner, Peoria Disposal Company, prays that this Board grant PDC leave to file the attached Reply, instanter.

Respectfully submitted,  
PEORIA DISPOSAL COMPANY

BY:   
BRIAN MEGINNES  
One of its attorneys

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEORIA DISPOSAL COMPANY,	)	
	)	
Petitioner,	)	
	)	PCB 06-184
v.	)	
	)	(Pollution Control Facility Siting Appeal)
PEORIA COUNTY BOARD,	)	
	)	
Respondent.	)	

**REPLY TO RESPONSE TO MOTION FOR  
PARTIAL SUMMARY JUDGMENT (Criterion v)**

**NOW COMES** Petitioner, Peoria Disposal Company, (hereinafter "PDC") by its attorneys, Brian J. Meginnes and George Mueller, and as and for its Reply to the Response to Motion for Partial Summary Judgment and Memorandum of Facts and Law in Support of Response to Motion for Partial Summary Judgment (Criterion v) (together, the "Response"), and in support of its Motion for Partial Summary Judgment on siting criterion v, states as follows:

**INTRODUCTION**

PDC filed its Motion for Partial Summary Judgment on the "Fee Condition" (as defined therein), which was placed on approval of Criterion v (415 ILCS 5/39.2(a)(v)) of PDC's Application for siting approval on September 8, 2006.<sup>1</sup> On or about October 5,

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<sup>1</sup> Although no final written decision was made by the Peoria County Board within one hundred eighty (180) days from the date of the filing of PDC's Application for Siting Approval, as stated in the Motion for Summary Judgment on Criterion v, PDC acknowledges, for purposes of this Reply, that the County believes that it may have adopted certain findings of fact and special conditions with regard to Criterion v. In ¶10 of its Petition for Review before this Board, PDC has alleged that the purported finding of the Peoria County Board that PDC has only proven siting Criterion v if certain special conditions were imposed was against the manifest weight of the evidence and was not supported by the evidence. This Reply assumes, *arguendo*, that the County's incorrect belief that it imposed conditions on approval of Criterion v is accurate.

2006, the Peoria County Board (the "County Board") filed its Response to PDC's Motion. The County Board does not contest the procedural availability of partial summary judgment at this point in the appeal process. However, in its Response, the County Board misrepresented the Record and the law concerning Criterion v. For that reason, PDC submits this Reply to the Pollution Control Board.

### **ARGUMENT**

1. The County Board admits that it lacks the power to impose the Fee Condition.

PDC's primary argument in its Motion for Partial Summary Judgment is that the County Board simply lacks the power to impose fees during the siting process, except as expressly permitted by statute. In support of this argument, PDC quoted and cited Lake County v. Illinois Pollution Control Bd., 120 Ill.App.3d 89, 101 (2 Dist. 1983).

In its Response, the County Board does not contest (1) that the Fee Condition actually imposes a fee on PDC, or (2) that the County Board lacks the power to impose such a fee. The County Board does not contest that Lake County v. Illinois Pollution Control Bd. is good and controlling law. Instead, the County Board seeks to distinguish the Lake County v. Illinois Pollution Control Bd. case on the grounds that "it did not deal with special conditions voluntarily imposed by the applicant." (Response Memorandum, pg. 7). Respectfully, this distinction is irrelevant. (Moreover, as discussed below, the County Board does not dispute that PDC never itself proposed or agreed to a \$5.00 per ton additional fee).

Therefore, the County Board has admitted that under the law, the County Board lacked the power to impose the Fee Condition.

2. PDC did not waive its argument that the Fee Condition is illegal.

Given that the County Board admitted in its Response that, under the law, the County Board lacked the power to impose the Fee Condition, the County Board's only remaining legal argument is that PDC somehow waived its right to dispute the imposition of the Fee Condition on appeal to the Pollution Control Board. (See Argument Sections A and B of the Response Memorandum).

The only case cited by the County Board in support of its waiver argument is Fairview Area Citizens Taskforce v. Illinois Pollution Control Bd., 198 Ill.App.3d 541, 555 N.E.2d 1178, 144 Ill.Dec. 659 (3 Dist. 1990), *appeal denied*, 133 Ill.2d 554, 561 N.E.2d 689, 149 Ill.Dec. 319 (1990). In Fairview, the Illinois Appellate Court found that claims of bias and conflicts of interest on the part of county board members must be made at the hearing level, or such claims were waived: "In order for the question of bias to be reviewed on appeal, the issue must be raised prior to or during the local hearings. (*A.R.F. Landfill, Inc. v. Pollution Control Board* (1988), 174 Ill.App.3d 82, 123 Ill.Dec. 845, 528 N.E.2d 390.)" Id. at 545, 1180-81, 661-62. The Fairview case says nothing whatsoever regarding waiver of an objection to a special condition.

The County Board's assertion that PDC "waived" its right to object to the Fee Condition by failing to object to same during the hearing process is fundamentally flawed, as the Fee Condition was not actually imposed or ordered until the May 3, 2006 meeting.<sup>2</sup> An applicant has no obligation in the siting process to object to proposed or recommended special conditions prior to enactment of same. The "Fee Condition" did

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<sup>2</sup>See footnote 1, *supra*.

not exist until the May 3, 2006 meeting,<sup>3</sup> and therefore, could not be objected to until after May 3, 2006.

Finally, the County Board's theory that PDC "promised" to accept some version of the Fee Condition is a gross misstatement of the truth. In fact, it is patently obvious that PDC's representations and statements regarding the perpetual care fund were all contingent on approval of the Application for siting. The amount of the Fee Condition (\$5.00 per ton) was never suggested or approved by PDC. The figure literally came from a County Board member's imagination, without justification or explanation of any kind. (See Memorandum in Support of Motion for Partial Summary Judgment, Argument §D). Had the expansion of the landfill been approved pursuant to the Application, PDC might conceivably have been bound under a quasi-contract theory to accept some much lower version of the Fee Condition. However, the County Board's position that the County Board can (purportedly) deny the Application<sup>4</sup> and still impose a fee for a perpetual care fund is an attempt by the County Board to "have its cake and eat it too."

The County Board has admitted that under the law, the County Board lacked the power to impose the Fee Condition. Having denied the Application,<sup>5</sup> the County Board cannot claim waiver under any recognized legal or equitable theory in this case.

3. There are no material issues of fact regarding satisfaction of Criterion v.

The County Board failed to cite to a single piece of evidence contradicting PDC's proof on Criterion v, namely, PDC's proof that PDC's "plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other

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<sup>3</sup> See footnote 1, *supra*.

<sup>4</sup> See footnote 1, *supra*.

<sup>5</sup> See footnote 1, *supra*.

operational accidents.” (415 ILCS 5/39.2(a)(v)). In fact, the County Board failed to address its own purported finding of fact on this point: “There was no evidence presented which demonstrated Applicant’s [PDC’s] plans for fires, spills or accidents were insufficient....” (C13744; emphasis added).<sup>6</sup> The concerns raised by opponents of the Application regarding the purported need for a perpetual care fund are not the same as proof that PDC’s plan of operations was insufficient. No such evidence was offered into the Record, or cited by the County Board in its Response. Such concerns, if they even rise to the level of evidence which the County Board can properly consider, more appropriately relate to siting Criterion ii.

4. There is no relationship between Criterion v and the Fee Condition.

The only permissible inquiry under Criterion v is whether PDC’s “plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents.” (415 ILCS 5/39.2(a)(v); emphasis added).<sup>7</sup> The post-closure funding demanded by the County Board has nothing whatsoever to do with operations of the facility. By definition, at the point the post-closure fund would be implicated, no further operations would be occurring at the facility.

In addition, the County Board does not even attempt to argue that the actual calculation of the Fee Condition was not totally arbitrary. The County Board clearly had no basis in the Record for the calculation of the Fee Condition, and admitted as much

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<sup>6</sup> See footnote 1, *supra*.

<sup>7</sup> The County Board summarizes Criterion v as follows: “PDC was required to demonstrate to the County Board that it had plans for operating the facility to minimize the danger to surround [*sic*] area from fire, spills and other operational accidents so as to protect the public.” (Response Memorandum, pg. 13; emphasis added). The underlined portion of the quotation is not part of Criterion v, and is a misstatement of the requirements of Criterion v.

during the April 6, 2006 Board meeting. (See April 6, 2006 Tr. pg. 36, line 15 – pg. 37, line 10; C13419, Exhibit A to the Memorandum in Support of Motion for Summary Judgment).


There is no reasonable argument to be made that the Fee Condition relates to Criterion v or that the Fee Condition itself is based on the Record.

### **CONCLUSION**

For all the foregoing reasons, and the reasons recited in the Memorandum of Law in Support of PDC's Motion for Partial Summary Judgment, the County's decision to impose the Fee Condition on approval of Criterion v of PDC's application for siting approval should be overturned.

**WHEREFORE**, Petitioner, Peoria Disposal Company, prays that this Board issue a partial Summary Judgment as set forth hereinabove.

Respectfully submitted,  
PEORIA DISPOSAL COMPANY

BY:   
BRIAN MEGINNES,  
One of its attorneys

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STATE OF ILLINOIS       )  
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COUNTY OF PEORIA       )       SS

**AFFIDAVIT OF SERVICE & FILING**

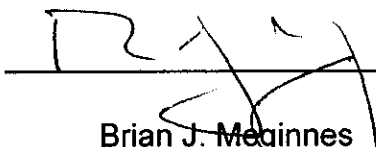
The undersigned being first duly sworn on oath, states that the foregoing MOTION FOR LEAVE TO FILE REPLY TO THE RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF FACTS AND LAW IN SUPPORT OF RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT (CRITERION V) was served upon the following persons as set forth below on the 12th day of October, 2006:

Illinois Pollution Control Board  
100 W. Randolph, Suite 11-500  
Chicago, Illinois 60601  
*via U.S. Mail from Peoria, IL*  
[ORIGINAL and FOUR (4) Copies]

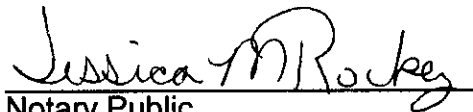
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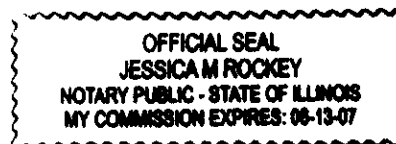
Mr. David A. Brown  
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\_\_\_\_\_  
Brian J. Meginnes  
(print name)

Subscribed and sworn to before me this 12th day of October, 2006.

  
\_\_\_\_\_  
Notary Public



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