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, December 7, 2007, filed with the Office of the Clerk of the Illinois Pollution Control Board, by electronic filing, Complainant's Reply to City Post Hearing Brief and Closing Argument, a copy of which is attached and herewith served upon you.

Respectfully submitted,
PEOPLE OF THE STATE OF ILLINOIS
ex rel. LISA MADIGAN
Attorney General of the
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BY: _____

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REPLY TO CITY'S POST-HEARING BRIEF AND CLOSING ARGUMENT

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, and submits its Reply to the City of Morris' ("Morris") Post-Hearing Brief and Closing Argument ("Morris Brief").

I. INTRODUCTION

The Board has found the Respondents in violation. However, Morris continues to argue issues related to its underlying liability, and has presented no legally sufficient basis for denying the relief sought by the State. In addition, Morris relies heavily on incompetent testimony in its arguments, and attempts to trivialize ongoing noncompliance issues at the Morris Community Landfill ("Landfill"). Morris has not accepted its legal responsibility to address the deteriorating conditions, and the Board must now order such relief as to finally and completely bring the Landfill into compliance with the Act and financial assurance regulations.

II. INCOMPETENT TESTIMONY SHOULD NOT BE CONSIDERED BY THE BOARD

Throughout its Brief, Morris attempts to incorporate testimony which is not properly in evidence. These include the Affidavit of Morris Mayor Richard Kopczick, the Statement of Alderman John Swezy (Morris Brief, p. 3), and the 2001 testimony of John Taylor (Morris Brief, pp. 21-25). As the Board is well aware the statements of John Swezy and Mayor Richard Kopczick are not evidence, but public comment. John Swezy had previously been identified as a witness, but did not testify at hearing. His comments should not be considered competent evidence. Likewise, Mayor Richard Kopczick was not called as a witness, even though the hearing was held in the City of Morris. Despite being represented as 'affidavit', his comments also do not constitute competent evidence, and therefore should not be considered in the Board's consideration of the 33(c) and 42(h) factors[1].

Neither should the 2001 testimony of former Illinois EPA employee John Taylor be considered as evidence in *this* case. Although the Board is entitled to take notice of this prior testimony, it must also consider that Mr. Taylor's prior testimony regarding the Frontier Insurance Bonds was provided on behalf of Morris and Community Landfill Company ("CLC") in their unsuccessful 2001 permit appeal[2]. Following the Board's denial, the Appellate Court stated that his opinions were "...an error on the part of an employee of the Agency"[3].

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[1]Complainant has also moved to strike the affidavit on the basis that it does not constitute even appropriate public comment.

[2]PCB 01-170. See: Complainant's Exhibit 4.

[3]331 Ill. App. 3d 1056, 1062 (3d Dist. 2002), Complainant's Exhibit 5, p. 6.

III. MORRIS CONTINUES TO DENY LIABILITY

Despite the Board's finding that the City of Morris is in violation, and its confirmation on denial of reconsideration, Morris continues to argue that its failure to provide financial assurance (to the date of hearing) was reasonable, because "IEPA" has misinterpreted the financial assurance regulations (Morris Brief, pp. 3, 6, 8, 15, 17). Clearly, Morris is referring to the Board's February 16, 2006 decision, not Illinois EPA's position. From July 21, 2005, when Complainant filed its Motion for Summary Judgment, through June 1, 2006, when the Board denied the Motion to Reconsider, this issue was before the Board. However, liability was established on February 16, 2006, and Morris' continued denials are both out of place and irrelevant.

Incredibly, Morris also continues to argue that it is reasonable to believe that the Frontier Bonds are adequate financial assurance (Morris Motion, pp. 4, 16, 21-25). This issue was settled, once and for all, by the Appellate Court's affirmation of the Board's 2001 decision in PCB 01-170. From December, 2002 (when the Illinois Supreme Court denied the Respondents petition for review), there could be no reasonable doubt that the Frontier Bonds failed to meet the regulatory requirements. Moreover, despite arguing that they believed them compliant, the Respondents made no payment for Bond Premiums after 2001. Frontier Insurance Company was placed in rehabilitation in 2002.

Morris also argues that the Bonds were 'valid' through 2006, which is irrelevant. The State has never claimed that the Bonds were invalid, and in fact has made a claim on the Bonds[4].

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[4]Complainant has filed an appeal of the Hearing Officer order excluding evidence on the current value of its bond claim.

However, there can be no doubt that the Bonds have been noncompliant since 2000. The Respondents have been in violation since their receipt of Illinois EPA's Violation Notices on November 16, 2000[5].

III. MORRIS DENIAL OF OWNERSHIP

Morris now denies that it owns or controls the "landfill facility"(Morris Brief, pp. 6, 8, 11,13, 25, 29, 33,34). In doing so it misrepresents the legal effect of a 1982 transfer of the operating permit for the Landfill. Morris retained ownership of the Landfill, and continued to apply for an obtain Landfill permits in that capacity[6]. As owner it collected royalties, treated leachate, provided (noncompliant) financial assurance, and appealed permit denials to the Board and Appellate Court. As late as August 29, 2007, a sign at the Landfill entrance identified the City of Morris as owner of the Landfill[7].

There is no evidence that Morris ever took action under its lease with CLC to correct problems at the Landfill, and very little evidence that it took corrective action. It cannot now escape liability by claiming either a lack of ownership or control.

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[5]Morris' argument that the initial date of violation was June 1, 2006 would lead to an absurd result. The Board could not have affirmed a violation if none occurred prior to its denial of the Respondents Motions to Reconsider. Because 30 landfills were issued violation notices around the same time as Morris, and 28 replaced their Frontier Bonds with compliant financial assurance in response, Complainant takes the position that Morris' receipt of the violation notice is the first day of violation.

[6]As testified by Illinois EPA Permit Engineer Christine Roque, Morris has obtained more than 50 Bureau of Land permit as either "owner and operator" or "owner" of the Morris Community Landfill. 9/11/07 tr., pp. 214. Two of these Permits are in evidence as Exhibit 12, each showing Morris as the permitted owner of the Landfill.

[7]Complainant's Exhibit 8, p. 8, exposure 16.

IV. THE LANDFILL IS SERIOUSLY DETERIORATING

The City of Morris goes to great pains to trivialize the current problems at the Landfill, claiming that the Illinois EPA inspector's August 29, 2007 inspection "showed no new violations" (Morris Motion, p. 11). This statement mischaracterizes inspector Mark Retzlaff's testimony. As shown in the record, Mr. Retzlaff testified:

> *Q. So you chose not to make note of any new apparent violations?*
>
> *A. The violations, by simply having photographs and describing them, technically are there, I just am not engaging it into a new enforcement action*[8].

Complainant has described the Landfill conditions in its Post-Hearing Brief, and now requests that the Board examine the photographs taken at Mr. Retzlaff's two inspections. Exhibit 7, from his June 26, 2007 inspection, shows uncovered construction refuse dumped on a hillside, including plywood, drywall, strapping and cardboard (exposures 3-5). Mr. Retzlaff also found uncovered sewage sludge (exposure 6) and uncovered general refuse (exposures 7-8). Exhibit 8, from the August 29, 2007 inspection, includes pictures of erosion cuts (exposures 2-6), leachate seeps (exposures 11, 14, 17), and additional uncovered refuse (exposure 19). Using a toxic vapor analyzer, Mr. Retzlaff found ambient gas levels of 30 ppm at an erosion cut, and levels too high for the instrument to read next to a leachate wellhead[9]. Landfill gas odors were present. In his testimony, Morris expert Devin Moose stated that more than 50% of the Landfill's gas collection system was nonfunctional[10].

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[8] 9/11/07 Tr., p.88

[9] 9/11/07 Tr., pp. 71-72.

[10] 9/12/07 Tr., p. 105

Mr. Retzlaff also testified to unpermitted dumping of general refuse and construction debris in Parcel A[11] including dumping outside of the previously permitted area[12]. While the State does not seek a finding of violation of 415 ILCS 5/21(d)(1) (2006) in this case based on these facts, the evidence shows continued operation of the Landfill to and through August 29, 2007, as well as the slipshod manner is which waste is still being handled.

The present condition of the Landfill is abysmal, and without action by the Board, likely to worsen. CLC co-owner Edward Pruim testified that the company is essentially insolvent. The City of Morris has provided funds for "minor cover repair"[13], but otherwise (as shown by their brief) is attempting to avoid responsibility. Morris' own expert testified that the Landfill has "legally fallen into the category almost of an abandoned landfill, in my opinion"[14]. However, there is no financial assurance available for the State to take remedial action. The ongoing violations are hardly trivial.

V. FINANCIAL ASSURANCE MUST BE PROVIDED BASED ON AN ILLINOIS EPA-APPROVED COST ESTIMATE

In July, 2007, Morris submitted a revised cost estimate for closure and post closure care, in the amount of approximately $10.5 MM, and now argues that, in the event that the Board orders them to provide financial assurance, it should be in that amount. However, this is the first financial assurance permit modification submitted by the Respondents since 2000. Illinois EPA

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[11] 9/11/07 Tr., p. 58-59.

[12] 9/11/07 Tr., p. 91

[13] Testimony of Devin Moose, 9/12/07 Tr., p. 131

[14] 9/12/07 Tr., p. 125

must review this application in detail to determine whether the revised estimate conforms with the regulations. Therefore, the Board should order the Respondents to provide compliant financial assurance pursuant to the most recent approved cost estimate, i.e. $17,427,366.00 until such time (if ever) that Illinois EPA approves a new figure and grants a permit modification or the Board determines otherwise after a permit appeal. The Respondents, who have provided no financial assurance in any amount for years, must comply with Illinois EPA's standard permit review procedure before a new cost estimate can be accepted by the Board.

Moreover, a review of Morris' new cost estimate dictates prudence in this matter, as it conflicts with prior Board rulings. In PCB 01-48/01-49 (consolidated), the Respondents vigorously contested the requirement of guaranteeing third party performance of leachate treatment. However, after due consideration the Board found that this additional assurance, in the amount of $10,081,630.00, was required under the regulations[15].

In its revised estimate the City of Morris has almost entirely eliminated this cost. They have unilaterally reduced leachate treatment from the previously-required 100 years to 30 years. They have reduced the cost estimate for leachate treatment from more than ten million dollars to less than thirty-five thousand dollars[16]. In addition, their plan calls for closure over a period of 5-6 years[17], while Board regulations call for closure to be completed in less than one year. Because of these major deviations from the previously approved permit, the Board must allow the permit approval and/or appeal process to proceed according to Illinois EPA's standard

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[15]Complainant's Exhibit 6, p.28

[16]See: City Exhibits 1 & 2

[17]9/12/07 Tr., p. 90

procedure. The Board should not allow the Respondents to substitute a late-submitted permit application for full Agency review.

VI. ECONOMIC BENEFIT SHOULD BE BASED ON SURETY BOND COST

Complainant has requested that the Board recover all economic benefit derived by the Defendants from avoided surety bond premiums, and has conservatively estimated this benefit to be $1,056,534.00. However, the City of Morris claims that it could have provided a municipal government guarantee pursuant to 35 Ill. Adm. Code 811.717 at no cost, and therefore there is no economic benefit. The Board must reject this claim outright.

First, as admitted by City Auditor William Crawford, the City of Morris could never have provided the required amount of financial assurance by using Section 811.717[18]. In 2005, the City could have posted approximately $7 MM financial assurance, increasing to approximately $9 MM in 2007[19]. Throughout this period the required financial assurance was over $17 MM.

Moreover, the City of Morris *never* posted any amount, at any time. They did not post a guarantee after received Illinois EPA's violation notice, nor after losing in the Appellate Court in 2002, nor after the Board found them in violation in early 2006. Also, though the City of Morris claims that it could have been done at no cost, evidence in that regard is highly speculative.

The regulations require that a municipal guarantee be listed on a City's financial statements[20]. Illinois EPA Compliance Manager Brian White thought such a listing could affect

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[18] 9/12/07 Transcript, p. 54.

[19] 9/12/07 Tr., pp. 48-49.

[20] 35 Ill. Adm. Code 811.716(b), incorporated by reference in 811.717.

a City's ability to borrow[21]. City Auditor William Crawford testified that while he didn't see economic benefit from not posting a guarantee, it was out of his area of expertise[22]. He did not know if such a guarantee would affect its bond rating[23]. Engineer and expert witness Devin Moose agreed with Morris counsel's statement that a there would be no cost[24]. However, there is no evidence that Mr. Moose was qualified to provide an opinion on local government finances, or the impact of listing a multi-million dollar contingent liability of a City's bond rating. He was simply agreeing with counsel on an area outside of his professional expertise.

In a case such as this, where there are multiple methods of compliance, the cost of the method actually chosen by the Respondent should be given great weight. The Board should presume that the Respondent evaluated the costs associated with each, and chose the most cost effective method. In this case, no other method besides surety bonds was ever used to provide financial assurance, and that known cost should be used in calculating the economic benefit gained from the violations.

VII. THE REMEDY SOUGHT BY THE STATE IS IN ACCORDANCE WITH THE PROVISIONS OF THE ACT

Morris complains that the relief sought by Complainant would fall upon local taxpayers. Understanding this, the State has been conservative in its calculation of penalty. It does not seek interest on avoided compliance costs, just recovery of the avoided expenditure. It has used

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[21] 9/12/07 Tr., pp. 192-193.

[22] 9/12/07 Tr., p. 37

[23] 9/12/07 Tr., p. 63-64.

[24] 9/12/07 Tr., p. 97

apparent below-market surety bond premiums from an insolvent company. Its calculations do not include the cost of providing standby collateral to support such Bonds. Additionally, recovery of royalty income is necessary for deterrence, as municipal entities should no more be able to profit from illegal activity than should a private company. In our case, Morris continued to allow dumping at a landfill with no operating permit (including dumping of its own waste), failed to provide funds for closure of Parcel B, and failed to provide assurance that the Landfill would in fact be closed. Closure is now 11 years past due.

First and foremost however, the Board must grant the affirmative relief sought by the State. The Board should find one thing missing from the City of Morris' argument: a commitment to come into compliance. The City argues that it is performing some closure and post closure care. However, according to their exptert, this consists of testing, evaluation, and "funding, to a certain degree, some minor cover repairs at the facility"[25]. As previously noted, less than 50% of the landfill's gas control system is functioning. Mr. Moose acknowledged that one gas probe had tested at 300% of the methane lower explosive limit. However, the only response action taken was that the City is "watching the gas probe information closely"[26]. This is not an appropriate response to learning of a defective landfill gas collection system, or the presence of potentially explosive levels of methane in gas probes. When asked directly whether (to his knowledge), the City of Morris was willing to perform closure on Parcel B, Mr. Moose answered that he did not know[27].

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[25]9/12/07 Tr., p. 131

[26]9/12/07 Tr., pp. 128-129

[27]9/12/07 Tr., p. 148

The City has now submitted a revised closure plan. However there is no commitment to implement that plan if approved by Illinois EPA. The City claims that it could put up at least a portion of the required financial assurance using a government guarantee. However, there is no indication that they actually will do so. The Board must order closure of Parcel B, and also order the Respondents to provide full financial assurance. It is time for the ongoing noncompliance at the Morris Community Landfill to come to an end.

VIII. 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 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 upgrade the financial assurance for closure and post closure, as required by 35 Ill. Adm. Code 811.701, within 60 days of issuance of an Illinois EPA- approved cost estimate.

3) 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.

4) 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,

5) 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

6) 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 7th day of December, 2007, the foregoing Complainant's Reply to City's Post-Hearing Brief and Closing Argument, 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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