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 April 28, 2006, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, Motion for Leave to File Reply to Complainant's Response to City of Morris' Motion to Reconsideration.

Dated: April 28, 2006

Respectfully Submitted,

On behalf of the CITY OF MORRIS

By: Hinshaw & Culbertson LLP

Charles F. Helsten
Hms.
Charles F. Helsten
One of Attorneys

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

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 April 28, 2006, she served a copy of the foregoing upon:

Mr. Brad Halloran
Hearing Officer
Pollution Control Board
100 W. Randolph, Suite 2001
Chicago, IL 60601

Mark A. LaRose,
LaRose & Bosco
200 N. LaSalle Street, #2810
Chicago, IL 60601

Christopher Grant
Assistant Attorneys General
Environmental Bureau
188 W. Randolph St., 20th Floor
Chicago, IL 60601

By depositing a copy thereof, 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.

Charles F. Helsten
Hinshaw

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

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION FOR LEAVE TO FILE REPLY TO COMPLAINANT'S RESPONSE TO CITY OF MORRIS' MOTION FOR RECONSIDERATION

NOW COMES the City of Morris, by and through undersigned counsel, and moves the Board for leave to file the attached Reply in support of its Motion to Reconsider in this proceeding instanter, and in support thereof states as follows:

1. The Complainant herein has previously filed its Response to the City's Motion for Reconsideration. A copy of that Response was physically received by counsel for the City on April 17, 2006. (Further, a copy of the receipt stamp indicating when such document was received is attached hereto and marked as Exhibit A and incorporated herein by this reference.)

2. In support of this Motion, the City asserts that the Complainant has filed a response opposing the Motion to Reconsider which does not accurately reflect the state of the facts or law involved in this case, and the City believes the attached Reply will enable the Board to make a more informed decision.

WHEREFORE, the City of Morris respectfully moves the Board for entry of an Order authorizing the filing of the attached Reply instanter in support of its Motion for Reconsideration.

Dated: April 28, 2006

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
Rockford, IL 61105-1389
815-490-4900

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT CITY OF MORRIS' REPLY BRIEF IN SUPPORT OF ITS MOTION TO RECONSIDER

In paragraph after paragraph of its Response to the City of Morris' Motion to Reconsider ("Response Brief"), the State misstates the applicable legal standards and blurs the relevant facts involved in this case.

The State leads off its Response with the observation that the City has not offered new evidence or alleged a change in the pertinent regulations. (Resp., ¶ 1) This assertion is correct, but totally irrelevant. The City's Motion is based on errors of law. The very authorities that the State cites provide that errors of law are one of the permissible bases for a Motion for Reconsideration. (*See Id.*) Thus, the parties actually agree that reconsideration is proper here if the Board misapplied the law as the City asserts.

The lynchpin of the State's argument that no legal errors were made is the assertion that Section 21(d)(2) must be interpreted "liberally." (Resp. ¶ 3, *citing State Oil Company v. People*, 352 Ill. App. 3d 813, 820, 822 NE2d 876, 882 (2nd Dist. 2004)) However, again, the State's reliance is grossly misplaced. In the *State Oil* case, the court was required to determine if a statute was to be retroactively applied where the statute was silent on the matter. Because of the

Legislature's failure to address the retroactivity issue, the Court was required out of necessity to consider policy concerns such as that favoring liberal interpretation of the Act. (*Id.*)

The case at bar is totally different than *State Oil*. By is plain terms, Section 21(d)(2) of the Act only applies to those persons who "conduct" a waste-disposal operation. "Conduct" is not an ambiguous term. It is defined in Black's Law Dictionary as "to manage; direct; lead; have direction; carry on; regulate; do business." *Black's Law Dictionary*, 295 (6th Ed. 1990). As an unambiguous term, the Court must interpret "conduct" consistent with its plain and ordinary meaning. *King v. First Capital Financial Services,* 211 Ill. 2d 1, 821 N.E. 2d 1155, 1169 (2005). "Liberal" interpretation is neither necessary nor proper in the present case. The only question is whether the actions of the City constituted "conduct" of a waste disposal operation, as "conduct" is commonly understood.

Because the straightforward reality is that the City did not conduct the operations at the landfill, the State tries to establish "conduct" using every conceivable argument. Its first argument is that the City is liable for "conduct" of a waste disposal site by virtue of its ownership of the land on which the Landfill is located. (Resp., ¶¶ 2-4) The State is clearly wrong on this point. If the Legislature intended to impose liability on passive owners for closure/post-closure financial assurances, it could have simply said so. Instead, it made no mention of ownership, and limited liability expressly to those who "conduct" waste disposal operations. Indeed, this Board has previously determined 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*, 1999 WL 304583.

The State full well recognizes this problem, and attempts to deal with it by improperly citing decisions where owners were held responsible for a "pollution source." (*Id.*, ¶ 5, *citing*

Perkins v. Pollution Control Board, 187 Ill.App.3d 689 (3d Dist 1989)). But this case is not about the ability to control a "pollution source." The State is comparing apples and oranges.

Similarly, it is irrelevant that "owners" have responsibilities under Subtitle G of the Board regulations or Financial Assurance Regulations. (*Id.*, ¶ 6) In fact, this merely proves the City's point: The Legislature could have made "owners" liable under Section 21(d)(2). It did not.

The State's fallback position is that, even if passive ownership is not sufficient in itself to impose responsibility on the City, the City engaged in certain activities which collectively rose to the level of "conducting" a waste disposal facility. But in making this argument, the State again disregards the law. Conducting a waste disposal facility operation requires either "actual participation in operations" (*People v. Bishop*, 315 Ill.App.3d 976, 979, 735 N.E.2d 754, 757 (5th Dist. 2000)), or active supervision of those doing the waste disposal work. *Termaat v. City of Belvidere*, 1986 WL 27133. The City did neither. No employee of the City of Morris worked at the landfill, no employee of the City of Morris was observed spreading and compacting waste, no City employee has operated waste or earth moving equipment at the landfill, and the City has not conducted any waste disposal operations or other operations at the landfill. (*See* Affidavit of Mayor Dick Kopczick, attached as Exhibit A to the City's Response to Cross-Motion for Summary Judgment)

Totally lacking facts that are indicative of "conducting" waste disposal operations as that term is commonly understood, the State attempts to meet the Summary Judgment standard by focusing on facts that show, at most, only tangential and indirect involvement of the City. For example, the State cites the fact that the City signed permit applications. (*Id.*, ¶ 7) But merely having one's name on a permit does not establish that one is an operator. *Bishop*, 315 Ill.App.3d

at 979, 735 N.E.2d at 757 (5th Dist. 2000). Here, the City was legally required to sign permits because it owned the land. Accordingly, the presence of its name on the permits did not reflect involvement in the facility's operations.

So too, the fact that the City "jointly litigated against the State in Landfill matters" (*Id.*), is in no way indicative of the City's actual involvement in the day-to-day operation or management of the Landfill. Rather, the purpose of the litigation was to assert the validity of the current performance bonds, a wholly distinct and separate issue from that presently before the Board.

Also irrelevant is the State's assertion that the City treated leachate from the Landfill. (*Id.*, ¶ 8) If providing a service to a landfill constituted "conducting a waste disposal facility," dozens of other service providers could be held liable. By the same token, while it is true that the City financially accommodated CLC with respect to the surety bonds, that does not constitute operation of the waste facility. If it did, every lending institution that accommodates a customer would be liable for the consequence of every business act in which the company engaged.

The State also vaguely asserts that the City could be considered to be a partner or joint venturer with CLC. (*Id.*, ¶ 9 & n.2) But there is no partnership agreement, other document or any other evidence contained in the record in this matter that supports this claim. In fact, the 1982 Lease Agreement indicates exactly the contrary. Furthermore, this theory would require that one partner or joint venturer exercise control over the conduct of the other. (*See id.*) As discussed above, the City never exercised control over CLC's operations. Accordingly, it cannot (as a matter of law) be held liable as a partner or joint venturer.

The State's Response culminates with a pair of sweeping and highly prejudicial generalizations. Ignoring the evidence, the State alleges that the City had the "ability to regulate

landfill operations" (*Id.*, ¶ 9) and had "continuous involvement in waste-disposal related activities at the Site." (*Id.*, ¶¶ 10, 11) These allegations are totally unsubstantiated and misleading. It is ***the State's*** job to "regulate landfill operations," not the City's. The City was ***not*** continually involved in waste-disposal activities. The City did ***not*** have discretion and input into landfill operations. The fact that the State feels compelled to make these assertions, even though it cannot support them, speaks volumes.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in its initial Motion for Reconsideration and supporting Brief, Respondent the City of Morris respectfully requests that the Board grant its Motion for Reconsideration.

Dated: April 28, 2006

Respectfully Submitted,

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

By: Hinshaw & Culbertson

Charles F. Helsten

Charles F. Helsten
One of Its Attorneys

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