ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, Plaintiff, v. COMMUNITY LANDFILL CO., an Illinois Corporation, and the CITY OF MORRIS, an Illinois Municipal Corporation, Defendants.	)	PCB 03-191 (Enforcement – Land)

NOTICE OF FILING

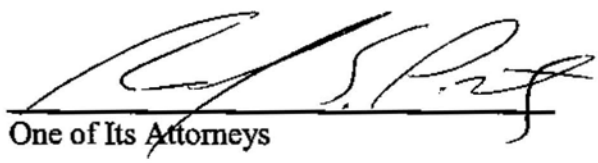
TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on November 2, 2007, we electronically filed with the Clerk of the Illinois Pollution Control Board, City's Response to the State's Appeal of the Hearing Officer's Ruling, a copy of which is attached hereto and hereby served upon you.

Dated: November 2, 2007

Respectfully submitted,

On behalf of the CITY OF MORRIS



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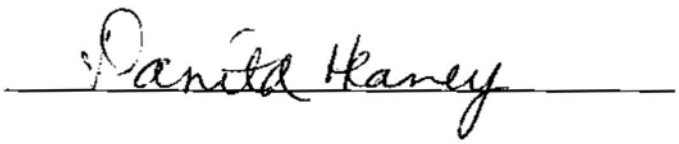
AFFIDAVIT OF SERVICE

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 November 2, 2007, she caused to be served a copy of the foregoing upon:

Mr. Christopher Grant Assistant Attorney General Environmental Bureau 69 W. Washington St., Suite 1800 Chicago, IL 60602	Mark LaRose Clarissa Grayson LaRose & Bosco, Ltd. 200 N. LaSalle, Suite 2810 Chicago, IL 60601
Mr. John T. Therriault, Assistant Clerk Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601 **(via electronic filing)**	Bradley Halloran Hearing Officer Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601
Mr. Scott Belt Scott M. Belt & Associates, P.C. 105 East Main Street Suite 206 Morris, IL 60450	Jennifer A. Tomas Assistant Attorney General Environmental Bureau 69 W. Washington Street, Suite 1800 Chicago, IL 60602

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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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois,	)	
Plaintiff,	)	PCB No. 03-191 (Enforcement-Land)
v.	)	
COMMUNITY LANDFILL CO., an Illinois Corporation, and the CITY OF MORRIS, an Illinois Municipal Corporation,	)	
Defendants.	)	

CITY'S RESPONSE TO THE STATE'S APPEAL OF THE HEARING OFFICER'S RULING

NOW COMES the Defendant, CITY OF MORRIS, an Illinois Municipal Corporation, by and through its attorneys, and in opposition to the State's Appeal of the Hearing Officer's Ruling states as follows:

BACKGROUND

The underlying proceeding at issue is an enforcement action involving allegations that the City of Morris ("the City") and its co-defendant, Community Landfill Company, Inc. ("CLC") violated Section 5/21(d)(2) of the Illinois Environmental Protection Act, and Sections 811.700(f) and 811.712 of the Board's Financial Assurance Regulations, for which hearings were held on September 10, 11, and 12, 2007. The hearings were held for the purpose of determining what penalty, if any, should be assessed against the City and CLC.

On September 11, 2007, the Hearing Officer sustained an objection by the City to evidence concerning a settlement offer which was allegedly made by Frontier Insurance Company in connection with a surety bond claim which the State has brought against Frontier.

After the hearing, when the State filed its Closing Argument and Post-Hearing Brief on October 19, 2007, the State also filed an objection to the above-referenced evidentiary ruling by the Hearing Officer. The State's objection was titled "Appeal of Hearing Officer's Ruling."

The State's objection to the hearing officer's ruling was untimely, inasmuch as it was filed well after the Board's fourteen day rule for filing such objections. *See* 35 Ill.Adm.Code 101.502(b). In addition, the evidentiary ruling to which the State objects was proper, inasmuch as it excluded evidence concerning settlement negotiations, which also constituted hearsay, and which was irrelevant to the hearing which was limited solely to the issue of the proper remedy. As a result, the Board should strike and/or deny the State's objection to the Hearing Officer's ruling.

ARGUMENT

1. The State's "Appeal" of the Hearing Officer's Ruling is Untimely

The ruling by the Hearing Officer now being challenged by the State occurred on September 11, 2007. It involved the Hearing Officer's decision to sustain an objection to the introduction of evidence concerning alleged settlement negotiations between the State and Frontier Insurance Company in Rehabilitation. (Tr. 9/11/07 p. 179).

The Board's Procedural Rules provide that:

> An objection to a hearing officer ruling made at hearing...*will be deemed waived if not filed within 14 days* after the Board receives the hearing transcript.

35 Ill.Adm.Code 101.502(b) (emphasis added)

The transcript of the hearing was filed with the Board on September 24, 2007. Twenty-five (25) days later, on October 19, 2007, the State filed its objection to the Hearing Officer's ruling. Inasmuch as the State's objection was not timely filed, the State's objection is deemed

waived. The State's "Appeal" should therefore be stricken, or in the alternative, should be denied by the Board.

2. The Hearing Officer Correctly Ruled that the Proffered Testimony was Inadmissible Because it Concerns Settlement Negotiations

Even if the State's objection was not untimely, the Hearing Officer's ruling was correct. The evidence which the Hearing Officer held inadmissible was testimony about settlement negotiations undertaken between IEPA and Frontier, within the context of the IEPA's claim on financial assurance bonds that were issued by Frontier.

The excluded evidence was testimony provided by Mr. Brian White, an IEPA official who stated that Frontier allegedly made an offer of settlement to IEPA to pay $400,000 in the State's claim under the financial assurance bonds. (State's brief at pp. 1-2) [1]. In Illinois, the general rule is that offers of settlement are not admissible into evidence. *Prewitt v. Hall*, 113 Ill.App.2d 198, 201, 252 N.E.2d 43, 44 (1st Dist. 1969); *Habitat Co. v. McClure*, 301 Ill.App.3d 425, 445, 703 N.E.2d 578, 592 (1st Dist. 1998). Moreover, settlement offers are strictly inadmissible if they are introduced to prove liability. *Stathis v. Geldermann, Inc.*, 295 Ill.App.3d 844, 861, 692 N.E.2d 798, 810 (1st Dist. 1998).

Here, the State argues that the excluded evidence was necessary to establish that the amount of financial assurance provided by the City and CLC was inadequate, and therefore violated Illinois law. (State's "Appeal" at 3-4). Clearly, then, the State sought to introduce the evidence to show that the Defendants allegedly failed to meet obligations imposed by the Act, and are accordingly liable for violating the statute. The hearing officer, therefore, correctly excluded the evidence of settlement negotiations.

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[1] Unfortunately, the State's brief does not include page numbers. Cites to the State's brief are therefore determined by counting from the first page of the State's "Appeal" brief, excluding the Notice of Filing and Certificate of Service pages.

3. The Proffered Evidence was Properly Excluded Because it was Hearsay

Even if the State's "Appeal" had not been untimely filed, and even if evidence of settlement negotiations was not inadmissible, the Hearing Officer correctly sustained the City's objection because the proffered testimony was hearsay. It is axiomatic that an out-of-court statement offered as proof of the matter asserted in court is hearsay and, therefore, inadmissible unless a recognized exception applies. *See, e.g., Hallowell v. University of Chicago Hosp.*, 334 Ill.App.3d 206, 211, 777 N.E.2d 435 (1st Dist. 2002).

In his testimony, Mr. White asserted that he had "*received information* that Frontier has offered to settle [the IEPA's bond claim against Frontier] for $400,000." (State's brief at p. 2; Tr. 9/11/07 at p. 184). The Hearing Officer initially sustained the City's objection that the testimony constituted hearsay. When the State then revised its question, asking Mr. White, "Do you know how much that [settlement] offer was for," the City reiterated its hearsay objection. The State responded that the question sought to elicit the witness's personal knowledge of the settlement offer. At that point the Hearing Officer agreed and overruled the hearsay objection. Without waiving its hearsay objection, the City argued that the evidence of settlement negotiations between the State and Frontier was also irrelevant and inadmissible in a hearing to determine what penalty, if any, should be assessed against the City. The Hearing Officer sustained the City's objection based on lack of relevance. (State's brief at p. 2).

The Proffered Evidence was Properly Excluded Because it was Irrelevant

Even if the State's Appeal had not been untimely, and if the proffered evidence concerning settlement negotiations was not inadmissible, and if the proffered evidence did not constitute hearsay, the Hearing Officer correctly excluded the evidence because it was irrelevant to the question at issue in the hearing: what penalty, if any, should be imposed against the City.

As the attorney for the State, Mr. Chris Grant, explained in his opening statement, "This hearing is set to provide evidence to the Board on the penalty factors from Section 33C and 42H of the Illinois Environmental Protection Act." (Tr. 9/11/07 at 18).

Despite the fact that the sole purpose of the hearing was to determine the appropriate remedy, if any, for the alleged violations, the State asserts that the excluded evidence was proffered for the purposes of showing that the amount of funds available for closure and post-closure care of the Landfill was inadequate. (State's brief at p. 3-4). On one hand the State acknowledges that the hearing was conducted "on the sole issue of remedy" and did not involve the question of liability. (State's Closing Argument and Post-Hearing Brief at p. 1). At the same time, however, the State argues in its objection to the Hearing Officer's ruling that the excluded evidence is necessary to prevent the Board from being "misinformed" as to whether the value of the financial assurance bonds was sufficient to comply with the statutory requirements. These assertions are utterly inconsistent.

There is no question but that the hearing was conducted solely to determine what, if any, remedy is appropriate. Because the evidence excluded by the Hearing Officer is clearly irrelevant to this question, the evidence would not assist the Board and was therefore properly excluded.

CONCLUSION

The State filed an untimely objection the Hearing Officer's ruling, and its objection is therefore deemed waived under the Board's rules. Even if the State's objection had been timely filed, however, the State's request that the Board overturn the Hearing Officer's evidentiary ruling should be denied inasmuch as the proffered evidence concerned inadmissible settlement negotiations, constituted hearsay, and was irrelevant to the question of what remedy, if any, is appropriate.

WHEREFORE, for the reasons set forth above, the Defendant, CITY OF MORRIS, a Municipal Corporation, respectfully requests that this Board deny the State's "Appeal of the Hearing Officer Ruling," and grant such other and further relief as the Board deems appropriate.

CITY OF MORRIS, Defendant

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