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 03-191 (Enforcement – Land)
v.	)	
COMMUNITY LANDFILL CO., an Illinois Corporation, and the CITY OF MORRIS, an Illinois Municipal Corporation,	)	
Defendants.		

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on November 30, 2007, we electronically filed with the Clerk of the Illinois Pollution Control Board, the City's Post-Hearing Brief and Closing Argument in the above-referenced matter, a copy of which is attached hereto and hereby served upon you.

Dated: November 30, 2007

Respectfully submitted,

On behalf of the CITY OF MORRIS

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CITY'S POST-HEARING BRIEF AND CLOSING ARGUMENT

NOW COMES the Defendant, CITY OF MORRIS, an Illinois Municipal Corporation, by and through its attorneys, and pursuant to an order by Hearing Officer Bradley P. Halloran, for its Closing Argument and Post-Hearing Brief states as follows:

I. PROCEDURAL HISTORY

This action arises from a Complaint brought by the Attorney General alleging that the City of Morris ("City") and Community Landfill Company ("CLC") violated the Illinois financial assurance requirements with respect to the Morris Community Landfill facility (hereinafter "Landfill facility"). On February 16, 2006, the Pollution Control Board entered an interim Order which granted summary judgment in part for the State, and directed the parties to participate in a hearing to decide "the specific issue of remedy, including penalty, costs, and attorney fees, if appropriate." Board's Feb. 16, 2006 Order at p. 16. The Board ordered that evidence at that subsequent hearing was to be limited to that which is "relevant under Sections 33(c), 42(f) and 42(h) of the Act (415 ILCS 5/33(c), 42(f), (h) (2004)." *Id.* Hearings were accordingly conducted on September 11 and 12, 2007.

II. FACTUAL BACKGROUND

The issue, with respect to the City, is whether a remedy should be imposed against the City for its conduct relating to the violations alleged in the State's Complaint, and if so, what remedy is appropriate. By necessity, therefore, the Board must consider the reasonableness of the City's conduct under the circumstances.

Evidence at the hearing revealed that in 1982, the City transferred ownership and control of the Morris Community Landfill facility to CLC, and that the State approved the conveyance, transferring the State permit which authorized development, operation and control of the facility to CLC. Hearing Exh. 3(b); Tr. 9/12/07 at 101-102.

At all relevant times thereafter, the City believed, in good faith, that CLC, as the developer and operator of the facility, was the entity responsible for posting the financial assurance required by 35 Ill.Adm.Code 700. Tr. 9/12/07 at 101-102; City's Answer and Affirmative Defenses; City's Response to Complainant's Motion for Summary Judgment and Cross-Motion for Summary Judgment. CLC procured financial assurance by acquiring bonds from Frontier Insurance Company. These bonds were reviewed and accepted by the IEPA from 1996 to 2000. Hearing Officer's Exhibit A: Tr. in PCB 01-170 at 478-478, 481-484, 489-492. Frontier Insurance company at all relevant times was licensed by the Illinois Department of Insurance, however on or about June 1, 2000, Frontier Insurance was removed from the Treasury Department's circular. *Id.* Even the State's own witness has acknowledged it was reasonable for the City to believe the bonds were effective through 2006. Tr. 9/11/07 at 171-172.

A disagreement developed among personnel at IEPA concerning the interpretation of 35 Ill.Adm.Code 811.712(b), and whether that regulation mandated that sureties who are licensed by the Illinois Department of Insurance must also be listed on the Treasury Department's

circular. Tr. 9/11/07 at 130-131; 134-137. IEPA subsequently took the position that the bonds which had been issued by Frontier Insurance, a surety licensed by the Illinois Department of Insurance, were non-compliant because Frontier was not listed on the Treasury Department circular. *See generally*, State's Complaint. The State thereafter filed a Complaint alleging that CLC and the City were in violation of the law due to the "non-compliant" Frontier bonds. *Id.*

Evidence at the September 2007 hearings in this matter established that the City has, for years, allowed the facility to send its leachate to the public water treatment facility free of charge. Tr. 9/12/07 at 97. The evidence also established that the City executed a bond in an amount designed to represent the estimated value of the leachate treatment, for which CLC's promised to pay the premiums. Tr. 9/12/07 at 177-179; 10/9/07 Affidavit of Mayor Kopczick; Exhibit E (Statement of Alderman John Swezy). However, based on CLC's status as the developer and operator of the facility, the City believed CLC was responsible for ensuring that all necessary financial assurance was provided to IEPA, and believed that the City's only responsibility was to continue to allow the facility to send its leachate to the public water treatment plant free of charge, which the City has done and continues to do. *See* City's Answer and Affirmative Defenses; City's Response to Complainant's Motion for Summary Judgment and Cross-Motion for Summary Judgment.

The City has, from the onset of this action, maintained that IEPA is misinterpreting the language of 35 Ill.Adm.Code 811.712(b), and also that IEPA is erroneously holding the City, which does not own or operate the Landfill facility, responsible for CLC's alleged non-compliance with the financial assurance regulations. It was not until June 1, 2006, when the PCB ruled on the City's Motion for Reconsideration, that the City was informed by the PCB that it would be considered to bear responsibility for providing financial assurances for CLC's

landfill facility.

III. ARGUMENT

The City's conduct has been both reasonable and responsible, inasmuch as the City reasonably believed that because CLC developed, operated and maintained the landfill pursuant to a permit issued by the State in 1982, it was CLC – not the City – that was responsible for providing the requisite financial assurance.

Moreover, the City's conduct has been based on its reasonable belief that the financial assurance bonds which were purchased by CLC complied with the requirements of 35 Ill.Adm.Code 712(b) because the issuer, Frontier, was licensed by the Illinois Department of Insurance, and therefore did not have to appear on the Treasury Department's circular, a belief shared by IEPA's own financial analyst, John Taylor, as confirmed in his testimony in PCB 01-170.[1] The City has accordingly pursued its legal right to have the IEPA's determination of non-compliance subjected to review. The City has accrued no cost-savings as a result of the alleged violation, and its conduct has not in any way interfered with public health, safety, or general welfare. As a result, the goals of the Act would not be furthered by imposition of a remedy against the City.

Moreover, since the PCB found that the City would be required to assure the performance of closure, post-closure care, the City voluntarily incurred substantial costs, including hiring environmental experts to evaluate the situation at the Landfill facility and determine all necessary closure, post-closure activities, and to revise the defective closure, post-closure plan previously submitted by CLC, as well as to create current, accurate cost estimates which were

[1] The transcripts in 01-170, including Taylor's testimony, were incorporated into the record of this proceedings without objection. Tr. 9/11/07 at 8-10; Hearing Officer Exhibit A.

submitted to IEPA approximately six months ago. Tr. 9/12/07 at 94, 111-113, 118; *see also* testimony of IEPA employee Christine Roque, Tr. 9/11/07 at 229, 231. It is the City's taxpayers who have been forced to shoulder these expenses, and it is those same taxpayers who will shoulder the burden if a remedy is imposed against the City by the Board, essentially standing in as the scapegoat for CLC.

For these reasons, no remedy should be imposed against the City. However, if the Board feels compelled to impose a remedy against the City, and is determined that the City must act as the surrogate for CLC, the City posits that the only remedy against the City which should be considered is an order mandating that the City post a Local Government Guarantee pursuant to 35 Ill.Adm.Code 811.717, in an amount consistent with the current cost estimates, as prepared by Shaw Environmental and submitted to IEPA in July 2007.

A. NO REMEDY SHOULD BE IMPOSED AGAINST THE CITY

The Board's February 16, 2006 order directed the parties to engage in a hearing "on the specific issue of remedy, including penalty, costs, and attorney fees, *if appropriate*." Under the facts of this case, as established by the evidence adduced at the hearing, it is not appropriate to impose any remedy against the City.

When considering the question of remedy, "the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty." *People of the State of Illinois v. Gateway Bobcat of Herberer Equipment Co.*, PCB 08-029, 2007 WL 3153603, *2 (October 18, 2007). This Board opined in *Gateway Bobcat* that "the factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical

practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation." *Id.* The record in an enforcement case must thoroughly address the appropriate remedy, *if any*, for the alleged violations. *People of the State of Illinois v. City of Hometown*, PCB 08-027, 2007 WL 3027058, *2 (Oct. 4, 2007) (emphasis added).

The Supreme Court observed in *Southern Illinois Asphalt*, 60 Ill.2d 204, 208, 326 N.E.2d 406, 408 (1975), that the Board is required to consider "[a]ll facts and circumstances bearing upon the reasonableness of the conduct" when deciding whether a remedy should be imposed. *Southern Illinois Asphalt,* 60 Ill.2d at 208. The Court further observed in *Southern Illinois Asphalt* that it was inappropriate to impose a remedy against a respondent who, in good faith, placed its reliance on circumstances that suggested it was in compliance with the law. *Id.* at 211-212.

When considering the question of remedy, it is important to consider the identity of the respondent, remembering that where, as here, the respondent is a municipality, the burden will be borne by taxpayers. *City of Moline v. Pollution Control Bd.*, 133 Ill.App.3d 431, 434, 478 N.E.2d 906 (3rd Dist. 1985). Accordingly, assessment of a penalty against a municipality's taxpayers has been found to serve no useful purpose under the Act. *See id.*

Here, as discussed below, the facts and circumstances show that the City's conduct was reasonable, and was in large part dictated by the City's status as the Lessor of property on which CLC developed and operated a Landfill facility. Because the City did not own or operate the facility developed on its property, the City had a good faith basis for believing it was not required to post financial assurance for that facility. Moreover, the City had a good faith basis for believing that IEPA had misinterpreted 35 Ill.Adm.Code 712(b) in such a way as to erroneously conclude that the financial assurance bonds posted by CLC were non-compliant. In

fact, the City's reading of the regulation at issue was consistent with that of IEPA's own financial assurance analyst, John Taylor. Thus, it was reasonable for the City to believe it was in full compliance with the law. In addition, as explained below, the City's conduct caused no harm to public safety or to the environment.

Moreover, because the City of Morris is a municipality, it is the City's taxpayers who will shoulder the burden of any remedy imposed against the City, which will only add to the burden of expenses already incurred by taxpayers.

For these reasons, as explained more fully below, the Board should find that no remedy should be imposed against the City. If, however, the Board concludes that a remedy against the City is required, the City posits that the only appropriate remedy is an order directing the City to provide a Local Government Guarantee pursuant to 35 Ill.Adm.Code 811.717, utilizing the most recent closure, post-closure plan and cost estimates prepared by Shaw Environmental and submitted to IEPA on or about July 12, 2007.

B. THE STATUTORY FACTORS DO NOT SUPPORT IMPOSING A REMEDY AGAINST THE CITY

This Board has explained that the factors provided in Section 33(c) "bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability" as well as the "economic reasonableness of compliance" and whether the violation has been eliminated. *People of the State of Illinois v. City of Hometown*, 2007 WL 3027058, *2 (Oct. 4, 2007). The Board has further explained that in considering the Section 33(c) factors, the first question to be addressed is what, *if anything*, a respondent should be ordered to do to correct any on-going violation which may exist; the next question is whether to order the respondent to pay a civil penalty. *Id.*

Only after considering the Section 33(c) factors, and only if the Board decides it is appropriate to impose a penalty on the respondent, do the Section 42(h) factors come into play, since the factors in Section 42(h) are those which mitigate or aggravate the penalty amount. *Id.* Notably, Section 42(h)(3) provides that any economic benefit to the respondent from delayed compliance "*shall be determined by the lowest cost alternative for achieving compliance.*" 415 ILCS 5/42(h)(3) (emphasis added).

As discussed below, the relevant factors all point to the inappropriateness of imposing any remedy against the City.

The statutory criteria set forth in Section 33(c) are:

(i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;

(ii) the social and economic value of the pollution source;

(iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;

(iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions discharges or deposits resulting from such pollution source;

(v) any subsequent compliance.

i. The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people

Here, the City's conduct has not caused injury and has not interfered with the protection of health, welfare, and physical property. First, and foremost, the City is not the owner or operator of the facility, and does not conduct waste disposal operations at the facility. Pursuant to the Act, only entities that conduct disposal operations are required to comply with the

financial assurance requirements. 35 Ill.Adm.Code 811.700(f).

At the September 2007 hearing, the City introduced into evidence documents executed by the IEPA in 1982 which transferred the permit and therefore granted sole authority to develop and operate the facility to CLC. City's Group Exhibit 3; Tr. 9/12/07 at 101. The State therefore approved the complete transfer of all development and operating authority for the facility to CLC in 1982, and the State presented no evidence whatsoever at the hearing that since that time, the City has had any operational control over the facility.

To the contrary, the record establishes that CLC has had sole control of the facility since 1982, and therefore the City has not caused any injury to or interfered with the protection of the public health, safety, or welfare. Furthermore, since the PCB issued its interim order on June 1, 2006, suggesting that it might require the City to bear some responsibility for the facility, the City has undertaken all appropriate and available steps toward protecting public safety. The City's water treatment facility accepts the leachate generated at the landfill facility, and the City has retained Shaw Environmental to evaluate the Landfill facility and formulate a plan for taking all necessary action to ensure the protection of public health, safety and welfare in the aftermath of lapses by CLC, and there has been no evidence whatsoever of any injury to health, welfare, or property.

At the hearing, Devin Moose, director of the St. Charles office of Shaw Environmental and a registered professional engineer in Illinois and nine other states, testified that he and his firm were engaged by the City in 2004 to evaluate and address concerns about the Landfill facility. Tr. 9/12/07 at 67, 71. Moose testified that he has conducted a thorough investigation of the site, which has included obtaining and reviewing the entire IEPA file to assess CLC's operation of the facility, and a review of the results of prior monitoring at the site. Tr. 9/12/07 at

72-73. Moose testified that as a result of his assessment of the data, his firm formulated a list of recommendations, all of which were approved by the City. Tr. 9/12/07 at 73.

Moose found there were no significant impacts to groundwater causing any immediate threat to the public health, safety or welfare; he also found there was no significant presence of landfill gas at the site, or of significant gas migration. Tr. 9/12/07 at 74-75.

Moose and his firm also conducted an extensive review of the existing closure, post-closure plan, and concluded that the modeling used to create CLC's original plan was deeply flawed, possibly due to "inexperience on the part of the modeler." Tr. 9/12/07 at 87-88. Among other errors, Moose observed that "the modeler selected or assumed a Darcy velocity that is off by a factor of 40,000 compared to what I measured at the site." *Id.* As a result of that and similar errors, Moose opined that he didn't "have much faith in the model," which unnecessarily required leachate monitoring for 100 years, thereby artificially inflating the cost estimate by approximately $10,000,000. *Id.*, at 87-88, 78-79. As discussed in more detail below, Moose and his firm compiled a detailed closure/post-closure plan, and initially submitted the plan to IEPA in August 2005, which was later returned with comments. Tr. 9/12/07 at 111-112. Revisions were then made, and a revised, complete plan and cost estimates was submitted to IEPA in July 2007, reflecting closure costs of approximately $7.5 million. Tr. 9/12/07 at 94, 111-113, 118; *see also* testimony of IEPA employee Christine Roque, Tr. 9/11/07 at 229, 231.

Finally, the evidence adduced at the hearing clearly showed that if the City knew it would be considered responsible by the State for posting financial assurance, it could proffer its own assurances without any cost to the City. Tr. 9/12/07 at 36-37.

Accordingly, the evidence shows that the City's conduct with respect to the financial assurance has not caused any injury to the public health or welfare, or public property. Rather,

the City has voluntarily engaged in conduct designed to ensure the protection of the public health and welfare. The evidence concerning this factor, therefore, does not support imposition of a remedy against the City, and, in fact, militates strongly against any such action.

The State claims in its brief that the evidence showed a "deteriorating condition" at the Landfill, and "cover erosion in several locations", as well as "landfill gas escaping to the atmosphere, leachate escaping from the waste disposal area, and uncovered refuse." State's Brief at 5-6.

Setting aside the fact that the City has no control over the operation of the facility, the State's brief misstates the evidence by grossly exaggerating the testimony received at the hearing. When objections were raised concerning the testimony of Mark Retzlaff, whose testimony is cited as support for the State's assertions, Retzlaff admitted his inspections at the Landfill did not result in a finding of any violations at the site, and when he was asked to clarify what he believed needed to be done at the Landfill facility, Retzlaff merely opined, "get proper cover in place, prevent erosion, get the appropriate areas properly vegetated, keep the gas wells covered." Tr. 9/11/07 at 81.

Retzlaff went on to admit that his examination of the Landfill site on August 29, 2007 showed no new violations. Tr. 9/11/07 at 82. Retzlaff admitted that odors he smelled at the site might actually have been coming from a different landfill located nearby. Tr. 9/11/07 at 86.

The State asserts that Retzlaff "found evidence of recent and ongoing waste disposal in Parcel A ...This parcel is not currently permitted for the receipt of waste." State's brief at 7. However Retzlaff admitted at the hearing that it is, in fact, permissable for waste to be accepted at portions of Parcel A. Tr. 9/11/07 at 91, 96. He then claimed he believed CLC had deposited waste beyond the edge of the permitted area in Parcel A, but admitted he made no effort to

measure, or otherwise corroborate his "eyeball opinion" as to the location of waste with respect to the permitted area. Tr. 9/11/07 at 92, 112.

As to the question of erosion, Retzlaff admitted it is allowable for land to erode, and that with respect to the sufficiency of cover, he took no steps and conducted no measurements to determine whether the requisite amount of cover was in place over the waste. Tr. 9/11/07 at 93-94, 101. Of particular import was Retzlaff's admission that he had no information that the City in any way willfully or intentionally violated any regulation. Tr. 9/11/07 at 94-95.

With respect to his assertion that gas wells needed to be covered, Retzlaff admitted that it was a simple matter to cover the wells, which would involve merely picking up the lids and placing them on the wells. Tr. 9/11/07 at 102. He also admitted that there are times when it is necessary to uncover gas wells. Tr. 9/11/07 at 102. He further admitted that at times it is also necessary to uncover leachate wells. Tr. 9/11/07 at 103.

Retzlaff further admitted that since the summer of 2005, Shaw Environmental (the environmental engineering firm voluntarily hired by the City) has performed monthly sampling of gas probes and sampling of groundwater monitoring wells at the Landfill. Tr. 9/11/07 at 104-105. He admitted that since the fall of 2006 the gas flare has been in operation at the facility. *Id.* He admitted that since January of 2007, Shaw Environmental has conducted quarterly sampling of surface methane, and that since March of 2007, Shaw has been sampling the landfill gas extraction wells. *Id.* He also admitted that Shaw has conducted an evaluation of the leachate management system, the landfill's monitoring systems, and the landfill gas systems. Tr. 9/11/07 at 106-107. Retzlaff admitted that Shaw has also drafted and developed a revised closure plan and cost estimates. Tr. 9/11/07 at 107.

Retzlaff's actual testimony stands in stark contrast to the State's unsupported declaration

(which borders on active misrepresentation) that the alleged financial assurance violation "has resulted in ongoing environmental harm." State's Brief at p. 8. The State goes on to proffer a series of unsupported assertions about conditions at the Landfill on page 8 of its brief, including claims that "leachate is seeping from the Landfill surface" and "Landfill gas is escaping uncontrolled into the atmosphere." Furthermore, the State's reference to such allegations does not in any way prove that the City's purported failure to post financial assurance resulted in any injury to the public health or welfare. Ultimately, the State's assertions simply enjoy no substantive support in the record. Rather, testimony by Retzlaff, as cited above, coupled with the extensive testimony by environmental engineer Devin Moose concerning Shaw Environmental's ongoing efforts at the site, clearly refute the assertion that the alleged financial assurance violation caused any environmental harm, or that the City has failed to address "deteriorating conditions." On the contrary, the evidence showed that the City has taken action to address concerns at the site despite the fact that it does not control or operate the facility.

For the reasons set forth above, the evidence concerning this factor does not support imposing a remedy against the City.

(ii) The social and economic value of the pollution source

Mark Retzlaff of IEPA testified that a Landfill facility provides a benefit to the public. Tr. 9/11/07 at 96. He further agreed that Parcel A may continue to accept waste in the permitted area. *Id.* Notwithstanding this testimony by its own witness, the State's Post-hearing brief baldly asserts that the landfill has no social or economic value. The State similarly ignores Retzlaff's acknowledgement that the location of the Landfill facility is a good one. Tr. 9/11/07 at 95-96.

Accordingly, this factor does not support imposing a remedy against the City.

(iii) The suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved

As noted above, the only testimony at the hearing concerning the location of the Landfill facility, which was given by the State's own witness, established that the Landfill is suitably sited. 9/11/07 at 95-96. Moreover, the instant action does not involve any allegation that the source is unsuitable. Finally, the State's brief posits that this factor is irrelevant, therefore, factor 33(c)(iii) does not support imposing a remedy against the City.

(iv) The technical practicability and economic reasonableness of reducing or eliminating the emissions discharges or deposits resulting from such pollution source

As with factor (iii), this factor is irrelevant in the instant action, which does not involve "emissions discharges or deposits," but instead concerns financial assurance bonds purchased for the site. Thus, this factor does not support imposing a remedy against the City.

The State spends five pages addressing what it purports to be evidence concerning factor 33(c)(iv), but given the fact that the alleged violations in this case do not involve "emissions, discharges or deposits of pollutants," the "technical practicability and economic reasonableness of reducing or eliminating discharges" is not relevant. This factor, therefore, plays no role in the determination of the appropriateness of imposing a remedy against the City.

(v) Any subsequent compliance

Despite CLC's financial problems and abrogation of its responsibilities, the City has continued to treat the leachate sent by the landfill to the public water treatment facility, and has retained environmental experts to monitor the facility and to create a detailed closure, post-closure plan. Moreover, Section 811.717 provides that a municipality may guarantee that it will, itself, perform the closure and post-closure care, rather than hiring the work out to others. Tr. 9/12/07 at 35. In this case, that is exactly what has happened so far.

In its brief, the State asserts that the Respondents "did nothing" after the Board found a violation of the financial assurance regulations. State's Brief at 15. As noted above, the City is not the entity which should be held responsible for providing financial assurance, and IEPA has misinterpreted the financial assurance regulations by finding that the Frontier bonds are non-compliant. As a result, rather than doing "nothing," the City has moved forward in challenging the misinterpretation, exhausting its administrative remedies and awaiting the Board's determination as to the City's obligations, while at the same time taking action at the site to protect public health and safety. The City's pursuit of a legal challenge to erroneous interpretations of the law should not be viewed as providing support for imposing a remedy against the City, the cost of which would be borne by local taxpayers.

Moreover, it should be noted that the State conveniently lumps the conduct of CLC and the City together, completely ignoring the City's voluntary hiring of Shaw Environmental to thoroughly investigate and evaluate the Landfill facility, and to prepare a detailed closure, post-closure plan, as well as cost estimates. The State's bald assertion that the City has done "nothing" ignores the overwhelming evidence to the contrary.

Because the City has behaved reasonably and responsibly, and has been proactive in responding to the situation, and has actually been performing closure, post-closure activities consistent with Section 811.717 (even though the City does not conduct the waste operation), the City has clearly been complying subsequent to the PCB's orders of February and June 2006, and thus this factor favors the City.

Summary – Section 33(c) Factors

The Section 33(c) factors, which are the basis for determining whether the imposition of a remedy is appropriate, do not support the imposition of a remedy against the City, especially

where, as here, the cost of any remedy imposed by the Board will be borne by the taxpayers of a municipality whose population is less than 15,000 persons.[2]

The State's summary of the 33(c) factors asserts that imposition of a penalty is necessary to deter future violations, recover the economic benefit Respondents allegedly obtained through noncompliance, and "reflect the duration and gravity of the violations." State's Brief at 15. This represents a conflation (and, in fact, intentional blurring) of the 33(c) factors and the 42(h) factors, whereby the State improperly tries to use 42(h)(1), 42(h)(3), and 42(h)(5) to justify the imposition of a remedy, rather than using these factors as the legislature intended they be used: to determine the *amount* of any penalty to be imposed ***after*** a determination is made based on the 33(c) factors. Although the State's attempt to use a mix-and-match approach in applying regulations is not surprising, it is improper, and should therefore be rejected by the Board.

Despite the City's unshakeable belief that it is not the entity responsible for providing financial assurance for the closure, post-closure care of CLC's facility, and its equally unshakeable belief that IEPA has erroneously concluded that the Frontier bonds are non-compliant, the City has nevertheless incurred substantial expense in hiring a highly reputable environmental engineering firm to address conditions at the Landfill facility. Because the City has acted reasonably, has taken all appropriate steps to protect public health and safety, has continued to accept leachate from the facility for treatment, and has established that it has the ability to perform closure, post-closure care, and because the cost of any remedy will fall squarely on a small city's taxpayers, imposition of a remedy against the City is inappropriate under the facts of this case.

If, however, notwithstanding all of the evidence to the contrary, the Board determines

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[2] The 2005 U.S. Census estimates the population of Morris at 12,939.

that a remedy should be imposed against the City, and that imposition of a civil penalty is justified, the evidence concerning the 42(h) factors overwhelming favors the City.

C. IF THE PCB IMPOSES A REMEDY, IT SHOULD REQUIRE ONLY THE POSTING OF A SECTION 811.717 LOCAL GOVERNMENT GUARANTEE

If, notwithstanding the fact that the City does not control the Landfill facility, the Board is determined to impose a remedy against the City, the only remedy which should be considered is the posting of a Local Government Guarantee of performance.

At the hearing, testimony by an independent auditor, William Crawford, showed that the City is in a strong financial position, and has a liquidity ratio of 2.295, which exceeds the .05 ratio required to meet the first part of the financial test set forth in Section 811.716. Tr. 9/12/07 at 24-25. Crawford also testified that the City also meets the second part of the financial test under Section 811.716: the annual debt service ratio. Tr. 9/12/07 at 26-27. As a result, Crawford found that the City presently meets the two ratios necessary for the financial assurance test under Section 811.716. Tr. 9/12/07 at 28.

Crawford testified that using the self worth test, the City is eligible to guarantee $9.1 million at the present time, which exceeds the current cost estimates for closure provided by Shaw Environmental ($7,347,572). Tr. 9/12/07 at 30. The City also has approximately $2.7 million in its Sanitary Landfill Contingency Fund, Solid Waste Tax Fund, and Garbage Fund. Tr. 9/12/07 31-32. Crawford testified that the regulations permit the City to perform the work itself, rather than incurring third-party costs, and he also noted that the costs of post-closure care occur over a matter of years, not immediately. Tr. 9/12/07 at 35. Thus, the current estimated post-closure cost of $2.7 million would be incurred over time, not instantaneously. Tr. 9/12/07 at 31, 35.

The evidence therefore clearly demonstrates that if, despite evidence that the City

exercises no control over the Landfill facility, the Board nevertheless concludes that the City should be responsible for closure, post-closure care, the City can perform the necessary activities and post financial assurances of its performance pursuant to Section 811.716 in an amount consistent with the most recent cost estimates.[3]

The State argues that the City and CLC should be jointly and severally required to "post financial assurance in the amount of $17,427,366.00, to submit revised cost estimates, and to update financial assurance in accordance with approved revised estimates." State's Brief at 4.

The State's request for an order requiring the City to submit revised cost estimates is bizarre and particularly puzzling, inasmuch as testimony at the hearing established that the City has tendered multiple revised cost estimates in a process that began with an initial estimate submitted by Shaw Environmental in August 2005, which was reviewed by IEPA and returned to Shaw with comments. Tr. 118. Shaw then resubmitted a plan in November 2005. Tr. 9/12/07 at 118. As data continued to be collected, and revisions continued to be made in compliance with comments from IEPA, the cost estimates continued to evolve, and the most recent revised cost estimate and plan was submitted to IEPA in July of 2007; IEPA had still not responded as of the date of the hearing. Tr. 9/12/07 at 94, 111, 113. Thus, because the evidence is clear that the City, through Shaw Environmental, has already supplied detailed, revised closure plans and cost estimates to IEPA, this request should be rejected by the Board.

Moreover, testimony at the hearing established that the $17,427,366 figure demanded by the State is based on a faulty, outdated plan that was derived from defective modeling. Tr.

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[3] Notably, 35 Ill.Adm.Code 811.707 permits the use of a combination of multiple mechanisms for providing financial assurance, as long as the aggregate total of the mechanisms is equivalent to the cost for closure, post-closure care.

9/12/07 at 77-79; 84-88. Devin Moose, an environmental engineering expert with over twenty years of experience working with landfills, testified that the original, $17 million closure, post-closure plan for the site was not only defective, it held the potential to harm public safety by failing to address critical needs, focusing on tasks that would do nothing to protect the environment, and requiring activities that are actually unsafe, while at the same time representing an enormous waste of public funds. Tr. 9/12/07 at 98-100; 105; 108-109. The State offered no contrary testimony. Thus, the State's proposal that the Board impose a remedy based on an illogical, improperly modeled plan, at a projected cost of over $17 million, that fails to address critical issues at the site, risks public safety, and wastes public funds should be rejected.

The City posits that if the Board concludes that the City, which does not control, maintain, or operate the facility, should nevertheless be held responsible for guaranteeing closure, post-closure care, the Board should adopt the well-reasoned, expert estimates and plan submitted by Shaw Environmental, and order that the City provide a Local Government Guarantee consistent with the Shaw Environmental plan and estimates, which total $10,061,619 for combined closure and post-closure care. Tr. 9/12/07 at 84.

D. NO PENALTY SHOULD BE LEVELED AGAINST THE CITY

Imposition of a penalty is not appropriate in every case where a violation of the Act or regulations is established. *City of Moline v. Pollution Control Bd.*, 133 Ill.App.3d 431, 433, 478 N.E.2d 906 (3rd Dist. 1985). Rather, the record must demonstrate there is an adequate rationale for imposition of a penalty, and any penalty imposed must be "commensurate with the seriousness of the infraction." *Trilla Steel Drum Corp. v. Pollution Control Board*, 180 Ill.App.3d 1010, 1013, 536 N.E.2d 788, 790 (1989).

Section 42(h) of the Act sets forth mitigation and aggravation factors which should be

considered *if and only if* a penalty is deemed appropriate under the Section 33 factors. As explained above, the 33(c) factors all favor the City, and thus no penalty is warranted. Furthermore, the 42(h) factors all suggest that even if a penalty were appropriate, it should be mitigated. These Section 42(h) factors are:

1. the duration and gravity of the violation;

2. the presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

3. any economic benefits accrued by the violator because of delay in compliance with requirements;

4. the amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance with this Act by the violator and other persons similarly subject to the Act; and

5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator;

6. whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and

7. whether the respondent has agreed to undertake a "supplemental environmental project," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act.

Although the evidence does not support a finding that a civil penalty is appropriate in this case, even if the Board were to find that a civil penalty was appropriate, the Section 42(h) factors weigh strongly in the City's favor.

1. Duration and Gravity of the Violation

Duration: The earliest date that the Board might use in determining the duration of any

violation would be June 1, 2006, which was the date the City's Motion to Reconsider was denied. Furthermore, it will not be until after a decision in this case that a definitive determination will be made as to whether imposing a remedy against the City is appropriate. This is the first time that the Board has had an opportunity to receive evidence of the fact that the IEPA approved the complete transfer of all permitting and development authority for the facility solely to CLC. Therefore, if any violation is found, it cannot commence until the conclusion of this case and the "duration of the violation" factor therefore obviously favors the City.

Gravity: The City presently meets the financial test for a Local Government Guarantee, which requires merely the filing of the appropriate document(s) indicating the City will perform if CLC fails to meet its obligations. Indeed, the City is and has been performing, even without an order from the Board. The fact that to date, no written guarantee has been tendered has caused no injury to public health, safety, or welfare, nor has it damaged property. Instead, the evidence shows the City has acted responsibly to ensure the protection of public safety.

Moreover, the alleged underlying violations arise from the City's firm belief that the IEPA is misinterpreting the relevant regulations. The City's belief that the Frontier bonds comply with the regulations was shared by high-level employees at IEPA, including John Taylor, who, according to IEPA employee Blake Harris, believed that the Frontier bonds *did* comply with the relevant regulations. Tr. 9/11/07 at 134, 137, 169. Because of the material, internal conflict at IEPA over how the financial assurance regulation should be interpreted and applied, IEPA was forced to hold a meeting to try and decide which interpretation of the regulation to adopt. Tr. 9/11/08 at 154.

Testimony by John Taylor, a financial assurance analyst for the Bureau of Land, which

was given on October 16, 2001 in PCB 01-170,[4] revealed that Taylor reviewed thousands of financial assurance documents while working for the State. Tr. 10/16/01 in PCB 01-170, at 469. In fact, IEPA utilized Taylor as its own financial assurance expert in litigation concerning financial assurance. *Id.* at 469-470. Taylor was directly involved in the assessment of the financial assurance matters with respect to the Morris Community Landfill facility. *Id.* at 473.

In his capacity as a financial assurance analyst at IEPA, Taylor concluded that the Frontier bonds were acceptable under the regulations, despite the fact that Frontier was de-listed from the Treasury circular. *Id.* at 489-490. Taylor explained that the regulation was ambiguous as to whether issuers, such as Frontier, who were licensed by the Illinois Department of Insurance, also had to appear on the Treasury Department list of approved sureties. *Id.* at 490-491. Taylor testified that after carefully reviewing the administrative record concerning the rulemaking concerning the regulation at issue, he concluded that the Frontier bonds complied with the law's requirements; he contemporaneously made notes on the administrative record and his notes were produced at the hearing in PCB 01-170. *Id.* at 499. Taylor believed that the correct reading of Section 811.712(b) is that it does not require that sureties licensed by the State of Illinois be on the Treasury Department's circular. *Id.* at 515. Accordingly, he testified that he believed the Frontier bonds were compliant. *Id.* at 517-518.

Taylor testified that at the time the bonds were purchased, Frontier was both licensed in Illinois and also appeared on the Treasury's list, although it was subsequently removed from the Treasury's list; he was not aware of any statute or regulation that authorized the IEPA to take action if a company which has issued financial assurance bonds is subsequently removed from

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[4] The transcripts from 01-170 were incorporated into the record without objection. Tr. 9/11/07 at 8-10; Hearing Officer Exhibit A.

the Treasury's list. *Id.* at 492-493. In the course of his work concerning financial assurance at the Landfill facility after Frontier was de-listed, Taylor contacted the Illinois Department of Insurance and was assured that the Frontier bonds were viable and would be honored if necessary. *Id.* at 495-496. Unfortunately, the IEPA ignored the plain language of the regulation which establishes that the Frontier bonds are sufficient because Frontier Insurance is licensed in Illinois.

In its brief, the State argues that Taylor's testimony in Case No. 01-170 is irrelevant, however the testimony, which shows that IEPA's own former financial assurance expert shared the City's interpretation of Section 811.712(b), and believed the Frontier bonds comply with the regulations, is highly relevant to a determination of the reasonableness of the City's conduct. It should be noted that testimony from Case No. 01-170 was incorporated into the record of these proceedings without objection, and was done so "in the interest of judicial economy, to save the time of having these people testify." Tr. 9/11/07 at 8-10. Thus, the testimony of Taylor concerning IEPA's acknowledgement that the regulation at issue was, in the very least, ambiguous, supports a finding that the City has acted reasonably, particularly since, pursuant to the Lease contract, CLC was solely responsible for posting financial assurance and paying for all closure, post-closure activities. The City's conduct simply reflects an intent to challenge and obtain clarification of the regulation and its obligations as the owner of the land beneath the facility, through the review process.

At the September 2007 hearings in this matter, IEPA accountant, Blake Harris, testified concerning Taylor's observations and opinions, explaining that Taylor told others at IEPA that the Frontier Bonds complied with the relevant regulations in all respects. Tr. 9/11/07 at 134. Harris explained that Taylor had concluded that three acceptable performance bonds totaling

$17,427,366 had been provided, and that "the bonds appear to comply with the relevant regulations in all respects." Tr. 9/11/07 at 137.

The regulation at issue, 35 Ill.Adm.Code 811.712(b), provides that:

> The surety company issuing the bond shall be licensed to transact the business of insurance by the Department of Insurance, pursuant to the Illinois Insurance Code [215 ILCS 5], or at a minimum the insurer must be licensed to transact the business of insurance or approved to provide insurance as an excess or surplus lines insurer by the insurance department in one or more states, and approved by the U.S. Department of the Treasury as an acceptable surety. Section 21.1(a.5) of the Act [415 ILCS 5/21.1(a.5)]
> (emphasis added)

Harris agreed that the Agency had to conduct an internal meeting to decide whether a surety company merely had to be licensed in Illinois, or also had to be on the Treasury department circular. Tr. 9/11/07 at 154. Unfortunately, the IEPA decided to ignore the fact that the regulation provided plainly that the surety company only needed to be licensed by the Department of Insurance, **or**, at a minimum, be licensed to transact the business of insurance and be on the Treasury circular.

When Harris was shown a January 27, 2004 letter from Beverly Anderson to Frontier Insurance, however, he agreed that the IEPA Bureau of Land had taken the position that at that time, Frontier Insurance was providing financial assurance for closure and post-closure costs. Tr. 9/11/07 at 170. Upon examining the Frontier bonds themselves, Harris agreed that they were facially valid through 2005 at a minimum. Tr. 9/11/07 at 158. He further admitted that there is a rule which provides that the bonds, which were valid through 2005, could be extended for twelve months if no alternative vehicle was employed. Tr. 9/11/07 at 171. **He accordingly agreed that it was reasonable for the City to believe financial assurance was still in place through the**

end of 2006. Tr. 9/11/07 at 171-172.

The interpretation of the regulation advocated by IEPA's own (former) financial assurance expert, Mr. Taylor, is the same as the City's interpretation: that Frontier's removal from the Treasury Department circular did not mean the Frontier bonds are non-compliant.

In furtherance of its efforts to obtain review of IEPA's interpretation of the law, the City has utilized the appropriate procedures to challenge the State's assertion that the Frontier bonds do not comply with the regulation, and also to obtain a review of the IEPA's position that the City should be held responsible for CLC's failure, if any, to provide acceptable financial assurance. Because it was pursued in good faith, the City's effort to secure review of a legal interpretation should be considered a mitigating factor. *See Park Crematory, Inc. v. Pollution Control Bd.*, 264 Ill.App.3d 498, 506, 637 N.E.2d 520, 525 (1st Dist. 1994); *Harris-Hub Co. v. Pollution Control Bd.*, 50 Ill.App.3d 608, 612, 365 N.E.2d 1071, 1074 (1st Dist. 1977) (holding that good faith is a factor to be considered in mitigation).

In summary, the gravity of the City's alleged violation is minimal, inasmuch as it arises from a question of statutory construction which has plagued even the Agency itself. Furthermore, the alleged violation has resulted in no environmental harm since the City has continued to move forward in addressing issues concerning the facility, despite the fact that the City has had no control over the facility since 1982 when the State authorized transfer of all operational control and permits to CLC.

The State argues that the gravity of the violation is "high," and suggest it is concerned about the potential for landfill abandonment. The State's melodramatic portrayal of a non-existent environmental disaster at the Morris Community Landfill, and its inference that the Landfill may soon be abandoned by the City, stands in sharp contrast with the realities of the

situation. The truth is, imposing a penalty on the taxpayers of the City would have the effect of actually weakening the City's ability to continue its efforts to address the situation at the site. Such an outcome would not further the goals of the Environmental Protection Act.

2. Presence or absence of due diligence on the part of the violator in attempting to comply with the requirements of this Act and regulations thereunder or to secure relief therefrom

The financial assurance requirements are designed to ensure that sufficient resources are available to ensure funding for closure, post-closure activities. Notwithstanding the alleged lack of financial assurance, the City has continued to provide treatment at its own wastewater treatment facility for the leachate generated at the facility. Moreover, the first steps of closure have been occurring thanks to the voluntary efforts of the City. It has hired Shaw Environmental to analyze the conditions at the site, to assess existing data and monitoring reports, and to develop an updated closure, post-closure plan and cost estimates, demonstrating the City's determination to ensure that public health and safety are protected.

In addressing this factor in its brief, the State claims that "the Respondents did not submit a permit application requesting a reduction of financial assurance until July 2007." (State's Brief at 21). This assertion runs counter to the unrefuted evidence that as early August 2005, Shaw Environmental had submitted an initial, revised cost estimate to IEPA, which was reviewed and returned to Shaw with comments. Tr. 9/12/07 at 118. Shaw then resubmitted a plan in November 2005. *Id.* In a series of revisions designed to address IEPA comments, Shaw has continued to re-submit revised estimates, most recently in July 2007. Tr. 9/12/07 at 111. Thus, the State's claim that the City has done "nothing" and has failed to submit revised cost estimates is patently false.

The State further asserts, on page 22 of its Brief, that the City has "demonstrated a total

lack of due diligence" by failing "to close Parcel B or direct its closure" and by failing "to take any significant action to correct deteriorating conditions at the Landfill." This assertion fails to take into account the fact that CLC remains the Lessee under an existing Lease, thus the City cannot, on its own initiative, charge in and close Parcel B at CLC's facility, nor can it dictate how CLC will conduct its operation of the facility. Moreover, the State's claim that the City has failed to take any action to correct deteriorating conditions at the Landfill is directly refuted by the unrebutted testimony of Devin Moose, and by the work already performed by Shaw Environmental with respect to the site.

The City has persevered under very trying circumstances, and has done everything within its power as Lessor to address conditions at its Lessee's Landfill facility. The State's assertion that factor 42(h)(2) should weigh in aggravation of any penalty to be imposed is not supported by the evidence, and should be rejected by the Board.

3. Economic benefits accrued by the violator because of delay in compliance

As discussed above, testimony by Mr. Crawford, an independent auditor, revealed that the City presently meets the necessary financial tests under Section 811.716 to utilize the municipal guarantee provisions of the law. Tr. 9/12/07 at 28. Testimony at the hearing further confirmed that the City would incur no cost in providing a Local Government Guarantee, thus the City accrued no economic benefit whatsoever by hesitating to proffer a formal, written guarantee, pending the Board's decision in this matter. (Tr. 9/12/07 at 36-37). This factor, therefore, weighs heavily in the City's favor as the City has enjoyed no economic benefit from any delay in providing its own guarantee.

Although the State argues that the City benefited economically from a delay in financial assurance compliance by receiving dumping royalties (State's brief at 23), any royalties received

for waste dumped at the site are unrelated to a delay in proffering a formal municipal guarantee.

Section 42(h)(3) expressly provides that any economic benefit to the respondent from delayed compliance "*shall be determined by the lowest cost alternative for achieving compliance.*" 415 ILCS 5/42(h)(3) (emphasis added). If the City had reason to believe that it was responsible for posting financial assurance for the facility controlled by CLC, it could provide a Local Government Guarantee which would have cost nothing.

The State's assertion that there should have been no dumping at the Landfill, and that any royalties received by the City between 2001 and 2005 were for illegal activity, is belied (and, in fact, directly controverted) by the testimony of IEPA employee Mark Retzlaff, who testified that it was permissible to continue dumping waste in the designated area of Parcel A. Tr. 9/11/07 at 91, 96. (It should be noted that there is absolutely no evidence to suggest that the City was itself involved in dumping waste at the facility.) Furthermore, it makes no sense that the City would pay more penalty than CLC because the City accepted royalties, when the operator clearly benefited more from the direct revenues it received from the acceptance of waste.

In addition, the State admits that the City's agreement with CLC was that CLC would pay the cost of premiums for any and all financial assurance bonds (State's Brief at 27). If the City had been required to post financial assurance, it would have done so by a municipal guarantee at no cost, and the fact that CLC was providing financial assurance by acquiring bonds was of no economic benefit to the City, as only CLC was responsible for such premiums. Therefore the City has derived no economic benefit from CLC's failure to post financial assurance bonds acceptable to IEPA.

The State bases its request for a $1,059,534 penalty upon a purported failure to have financial assurances in place since November 16, 2000. However, the State's own witness,

Blake Harris, admitted that the bonds on their face were valid through 2005, and by rule, valid through 2006. Tr. 9/11/07 158, 171. Therefore, even using the State's per day proposed penalty of $596.83 for January 1, 2007 through the September 11, 2007 hearing date, the total penalty would be $151,594.82. The State also indicated that a credit should be allowed for the cost of the premiums paid in the amount of $426,572. Thus, even using the State's own analysis, no penalty should be assessed. Moreover, it should be remembered that the Act provides that any economic benefit to the respondent from delayed compliance "*shall be determined by the lowest cost alternative for achieving compliance.*" 415 ILCS 5/42(h)(3) (emphasis added). In this case, the City, as a unit of local government, was authorized to provide a Local Government Guarantee and therefore the lowest cost alternative for achieving compliance would have been the posting of its own guarantee of performance, which would have entailed no cost at all.

Because CLC, not the City, has developed and operated the facility, its taxpayers should not be forced to stand in for CLC and assume responsibilities that rightfully fall on CLC as developer and operator. However, the City is nevertheless presently able to provide a Local Government Guarantee if is ordered to do so by the Board, and evidence at the hearing established that the City has adequate resources to guarantee its performance of closure, post-closure activities, consistent with the most recent closure, post-closure plan and cost estimates submitted to IEPA by Shaw Environmental.

In summation, the evidence shows that the State's claim that the City benefited financially "from its violations" is patently false and completely unsubstantiated. Contrary to the State's assertion that the City must be prevented from reaping "a financial windfall," the City has derived absolutely no financial benefit from the situation involving CLC's allegedly non-compliant financial assurance bonds. In point of fact, the City and its taxpayers have incurred

substantial costs as a result of CLC's situation. Thus, the claim that the City has obtained ill-gotten gains is misguided at best. There are no "windfall profits" to be disgorged from the City, and the Board should accordingly find that the City reaped no economic benefit from the alleged financial assurance violations.

4. Amount of monetary penalty which will serve to deter further violations by the violator and to otherwise aid in enhancing voluntary compliance

As a threshold matter, any monetary penalty imposed against the City will serve only to further burden local taxpayers, who have already suffered mightily due to CLC's financial problems, and will not facilitate the closure of the facility.

The State argues that a penalty in the amount of $1,059,534.70 should be assessed jointly and severally against the City and CLC because the regulations provide that an "owner *or* operator" shall maintain financial assurance. State's Brief at 27 (emphasis added). Apparently, in the State's view, the term "or" is the equivalent to the term "and," since the State interprets a provision requiring that an owner *or* operator maintain the requisite assurance to mean that "*both* parties are expressly required to provide financial assurance." (emphasis added)

The State further asserts that the City and CLC jointly posted the Frontier Bonds "with the City providing more than half of the required amount." State's Brief at 28. This assertion is directly contradicted by the evidence adduced at the hearing. Edward Pruim, the Secretary Treasurer of CLC, testified at the hearing that CLC agreed to pay *all* premiums for all of the bonds, and that the only thing the City was responsible for was the continued acceptance of leachate from the landfill at the city's public water treatment facility without charge, which was estimated to have a value of about $10 million. Tr. 9/12/07 at 156-157; 177. Thus, the $10 million bond, *whose premium was paid by CLC*, was designed to represent the value of the leachate treatment services provided by the City.

The State posits that "the factor of deterrence is closely linked to the factor of economic benefit." State's brief at 30. As noted above, the City has derived no economic benefit from the current situation, and has instead been forced to incur substantial expenses. The State argues that the Board should take this opportunity to make an example out of the City, so as to discourage other municipalities from "standing by" and allowing "their" landfills to deteriorate. Here, however, the City, which does not own or operate CLC's facility, has done its best to address a bad situation, and has incurred substantial costs in attempting to remedy the ills resulting from CLC's problems.

The State goes on to assert that a substantial fine should be jointly and severally imposed against the City and CLC, notwithstanding the fact that "the Community Landfill Company can not afford to pay a significant penalty." State's Brief at 31. Apparently the State believes it is in the public interest to impose a harsh punishment on a small municipality (and therefore its taxpayers) for a private operator's failings. It is difficult to imagine how the State can on one hand argue that the City should assume responsibility for remedying the situation at the landfill, and on the other hand ask that the City be harshly punished with a devastating penalty, thereby diminishing the City's ability to continue working toward a resolution of problems at the site. The inequity of the State's position in this case is both apparent and astonishing.

Finally, as explained above, the evidence at trial established that the bonds were valid through 2006, and thus there is no basis to assess a daily penalty since the year 2000, as proposed by the State.

Accordingly, this factor does not constitute an aggravating factor, and instead mitigates against imposition of a civil penalty against the City.

5. The number, proximity in time, and gravity of previously adjudicated violations of this Act by the violator

Here, there are no additional adjudicated violations of the Act by the City, as the State acknowledged in its brief. Thus, this factor weighs in the City's favor.

6. Whether the respondent voluntarily self-disclosed the non-compliance

In this case, the Respondents were notified that the State had unilaterally concluded that according to its interpretation of Section 811.712(b), the Frontier bonds did not comply with the regulatory requirements. Therefore, the fact that the City did not "self-disclose" has no relevance to a determination of what penalty, if any, should be imposed against the City.[5]

7. Whether the respondent has agreed to undertake a "supplemental environmental project"

From the beginning, the City has reasonably believed that it was not the appropriate entity to bear responsibility for posting financial assurance, inasmuch as CLC is the permitted developer and operator of the Landfill facility. It has also been the City's position that IEPA is misinterpreting the financial assurance regulations in a way that erroneously finds the Frontier bonds to be non-compliant.

As a governmental body, the City has a duty to expend taxpayer resources in a fiscally responsible manner. Accordingly, it would be inappropriate for the City to voluntarily take on environmental projects at taxpayer expense in order to "settle" with the State, where the City believes the IEPA's actions result from a misinterpretation of the law. Nonetheless, the City has voluntarily hired Shaw Environmental to monitor the facility and determine the appropriate costs and tasks for closure, post-closure care at the facility and has allowed CLC to send its leachate to the City for treatment free of charge. Thus, this factor should not weigh against the City.

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[5] The State provided no argument concerning this factor.

E. ATTORNEYS FEES

Although the State initially sought attorney's fees, in its post-hearing brief the State waives recovery of fees and costs.

IV. CONCLUSION

In 1982, the City entered into a lease with CLC, wherein the City transferred operation and control of the Landfill facility to CLC. IEPA approved the transfer, and it accordingly transferred all authority for developing and operating the facility to CLC, as memorialized by the permit transfer executed by IEPA in July 1982, which was admitted into evidence at the hearing. From that time forward, CLC exercised exclusive control over the facility.

Evidence at the hearing established that pursuant to its Lease with the City, CLC agreed to assume all responsibility for providing financial assurance to the State, and also agreed to pay all premiums for any insurance or bonds. When IEPA reviewed CLC's proposal to post bonds issued by Frontier Insurance, it authorized the Frontier bonds, and CLC therefore contracted with Frontier for purchase of the bonds. Although a $10 million bond listed the City's name, the evidence clearly established that bond was intended by the parties to simply represent the value of the leachate treatment which was to be provided by the City, and further showed that all premiums for the bond were to be paid by CLC. Tr. 9/12/07 at 156, 177.

Later, although IEPA's own financial assurance expert concluded that the Frontier bonds were compliant, IEPA nevertheless issued an opinion to CLC stating that the Frontier bonds were non-compliant because Frontier was not listed on the Treasury Department circular.

Having invested $400,000 in bonds which IEPA had suddenly declared non-compliant, CLC found itself in financial trouble and ceased paying the premiums. The City thereafter came under attack by the State, accused of having violated the financial assurance regulations because

of CLC's failure to replace the allegedly non-compliant bonds.

The City, which is merely the Lessor of real estate upon which CLC developed and operated a Landfill facility pursuant to its 1982 permit from IEPA, has found itself in the untenable position of being unable to control operations at CLC's Landfill facility, and simultaneously held responsible both for the state of operations at the Landfill, and for CLC's failure to post financial assurance that is acceptable to IEPA.

If the PCB decides to impose a remedy against the City, despite the fact that the Frontier bonds are compliant, and despite the fact that the City does not control or conduct operations at the Landfill facility, any remedy against the City should not require the purchase of any financial bonds, as such would be a useless waste of resources that could be spent instead on closure of the landfill. Rather, if a remedy is to be imposed against the City, the City should be allowed to post its own Local Government Guarantee and actually perform. Furthermore, that guarantee should be in the amount of the present combined cost estimates submitted by Shaw Environmental ($10,061,619), inasmuch as the prior cost estimates which were submitted by CLC were based on erroneous modeling.

Meanwhile, the City has done, and will continue to do, whatever is necessary to safeguard the health and safety of its citizens and the environment.

Because the City can post a municipal guarantee, the Board should reject the State's request that the City and CLC be required to "jointly and severally" post financial assurance in the amount of $17 million; this request is particularly inappropriate, given that the State's proposed figure is predicated on an outdated and defective closure, post-closure plan submitted by CLC, which was shown at the hearing to be based on faulty modeling and to ignore important health and safety concerns. The closure, post-closure plan submitted by Shaw Environmental

totals $10 million (combined), and provides for much better environmental protection. The Board should therefore order that CLC post financial assurances of the new cost estimates and follow the Shaw plan.

The Board should further reject the request for imposition of a civil penalty against the City, since punishment is not only inappropriate in light of the City's conduct, it would punish local taxpayers and severely undermine the City's ability to engage in future remediation at the site. Notably, the State's argument for imposing a harsh penalty against the City is based on an alleged economic benefit supposedly derived from non-compliance, however the evidence at the hearing showed that the City derived no financial benefit from CLC's failure to post financial assurance, and derived no financial benefit from its own hesitance to bind taxpayers through issuance of a written guarantee prior to this Board's determination of responsibility for closure, post-closure care. Furthermore, the State's proposed penalty ignores the fact that its own witness admitted at hearing that the bonds were valid through 2006, and that testimony was never refuted.

Finally, the City observes that although the State's Post-hearing Brief requests that the City and CLC be ordered to provide updated cost estimates, those estimates were submitted to IEPA five months ago, therefore the request for updated estimates rings hollow.

In summary, although the State's brief tars the City and CLC with the same brush, the City requests that in considering whether a remedy is appropriate in this case, the Board consider the City's conduct separately from that of CLC, and that the Board not impute any of CLC's improprieties to the City.

WHEREFORE, for the reasons set forth above, the Defendant, CITY OF MORRIS respectfully requests that this Board deny the relief requested by the State.

CITY OF MORRIS, Defendant

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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 30, 2007, she caused to be served a copy of the foregoing by email upon:

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