BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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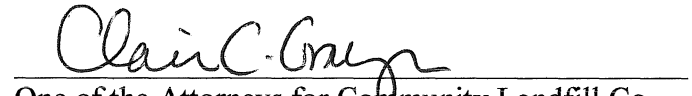
PLEASE TAKE NOTICE that on **November 30, 2007**, the undersigned caused to be filed electronically before The Illinois Pollution Control Board **RESPONDENT COMMUNITY LANDFILL COMPANY, INC.'S CLOSING ARGUMENT AND POST-HEARING BRIEF** with the Clerk of the Illinois Pollution Control Board, 100 W. Randolph Street, Suite 11-500, Chicago, Illinois 60601, a copy of which is attached and hereby served upon you.



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RESPONDENT COMMUNITY LANDFILL COMPANY, INC.'S CLOSING ARGUMENT AND POST-HEARING BRIEF

Respondent, COMMUNITY LANDFILL COMPANY, INC., by and through its attorneys Clarissa C. Grayson and Mark A. LaRose of LaRose & Bosco, Ltd., and pursuant to Hearing Officer Bradley P. Halloran's October 5, 2007 Hearing Order, hereby submits its Closing Argument and Post-Hearing Brief.

RESPONDENT COMMUNITY LANDFILL CO., INC.'S CLOSING ARGUMENT
Hearing – September 10-12, 2007

First and foremost, this is a hearing about the reasonableness of the conduct of the respondents, Community Landfill Co., Inc. and the City of Morris in the context of events that lead to the present hearing. The Board ordered the present hearing in order for the parties to present evidence concerning the 33(c), 42(f) and 42(h) factors. The State has dropped its request for attorneys fees and costs so the evidence presented herein will focus on the 33(c) and 42(h) factors.

In regard to the 33(c) factors, there has not been any testimony that there is any interference with the protection of the health or general welfare of the public. There has been testimony that CLC

never intended to run or operate the landfill without financial assurance. There has been testimony that landfills have social and economic value which gives them a positive function in society. There has been testimony that the location of the landfill is proper, since it is away from residential areas. There has been extensive testimony that closure and post-closure activities are occurring at the landfill, and, finally, there has been testimony that CLC is doing what it can given its very limited financial resources, through no fault of its own. All of these factors weigh against the assessment of a penalty against the Respondents.

In regard to the 42(h) factors, most critically, the Board must take a long hard look at the evidence of due diligence on the part of CLC in attempting to provide financial assurance. All that CLC did was to follow the directions of the Agency. When all three bonds were issued, Frontier was licensed by the Illinois Dept. of Insurance and was on the U.S. Dept. of Treasury's 570 list of approved sureties. The situation that CLC is in today is a direct result of the Agency's conduct in approving the Frontier bonds in August 2000, at the same time knowing that Frontier had been removed from the Treasury 570 list on June 1, 2000.

Former Agency Bureau of Land Permit Manager Joyce Munie knew that if the bonds were not accepted, no additional financial assurance would be tendered by CLC and the Agency would be left with the then existing $1.4 million in financial assurance. However, the Agency, in the words of Joyce Munie, got CLC "on the hook for $17 million" in financial assurance. Then, the Agency pulled the rug out from under CLC by denying its supplemental permit application to receive approval for the construction of a separation layer and receive authorization for the acceptance of waste for disposal in a newly constructed area. This effectively shut down the landfill and eliminated its ability to remain economically viable. One of the grounds for denial was that the bonds were no

good because Frontier had been delisted – even though the Agency knew that at the time the significant modification permit was issued. Nonetheless, it was reasonable for CLC and the City to believe the bonds were still in force. Blake Harris testified that he understood that Section 811.712(b) of the regulations could be interpreted to require a bonding company to be licensed to transact business or be on the Treasury 570 list, even though the Agency ultimately determined that both factors were required. Harris testified that the bonds were valid through 2005 at a minimum. Blake Harris further agreed with Agency employee Beverly Anderson's position in January 2004 that Frontier was providing financial assurance. Surely, if the Agency thought that Frontier was providing financial assurance in January 2004, isn't it reasonable that CLC and the City would also think it was providing financial assurance?

However, CLC was on the Agency's hook and was left with the responsibility of more than $17 million in financial assurance but it was without the permits required which would allow it to accept waste and generate sufficient income to even pay the premiums much less save any money for the future. If the Frontier bonds had not been approved by the Agency in August 2000, no additional financial assurance would have been tendered by CLC or the City and in that case, CLC would have been responsible for only one year's premium on $1.4 million, approximately $26,850. Instead, CLC was on the hook for more than $200,000 per year in premiums which totals more than $1 million over five years. CLC in fact made payments for the bond premiums in 2000 and 2001 totaling $426,572, plus approximately $200,000 in cash collateral for the bonds. CLC's payments of more than $600,000 show the extent of the due diligence and the good-faith conduct on the part of CLC following the Agency's bad-faith conduct in leading CLC where it is today.

Any allegations of so-called economic benefit to CLC are ludicrous. The State has tried to

argue that CLC has avoided making the payments it should have made on the Frontier bonds. The idea that CLC would make payments on bonds that the Agency had determined were no good – at least not good enough to allow issuance of a special permit so that the company could operate and make a profit – is also ludicrous. Too add insult to injury, the Agency has also refused to release the collateral that CLC posted in 2000. Blake Harris, who wrote the letter to Frontier on behalf of the Agency refusing to refund the collateral, is not even sure if there is regulation that allows the State to keep collateral for bonds that are determined to be non-compliant.

There has been no economic benefit to CLC in this entire situation. Without an operating permit to dispose of waste, CLC has no funds available to substitute the financial assurance. CLC has done what is can under the circumstances. It diligently paid the premiums on bonds for the entire duration of the permit appeal until there was no point in doing so any longer because the bonds were determined to be no good. What CLC can't do is have its collateral refunded because the Agency will not release it. What CLC is also unable to do is make any money to provide alternate financial assurance. The Agency has seen to that. While CLC acted in good faith in procuring the Frontier bonds with the express approval of the Agency, now it cannot even have its collateral released nor can it make any money, thanks to the Agency. CLC's conduct has been reasonable under the circumstances.

RESPONDENT COMMUNITY LANDFILL CO., INC.'S POST-HEARING BRIEF

I. INTRODUCTION

First and foremost, this is a hearing about the reasonableness of the conduct of the respondents, Community Landfill Co., Inc. (hereinafter referred to as "CLC") and the City of Morris (hereinafter referred to as "City") in the context of events that resulted in the landfill not having

financial assurance. The Board ordered the present hearing in order for the parties to present evidence concerning the 33(c), 42(f) and 42(h) factors. The People of the State of Illinois ("State") has dropped its request for attorneys fees and costs so the evidence presented herein will focus on the 33(c) and 42(h) factors.

When the Illinois Pollution Control Board granted summary judgment in favor of the State on February 16, 2006, it directed the parties to hearing on the issue of remedy, including penalty, costs, and attorney fees, **if appropriate.** (See People's Exh. 2, p. 16, emphasis added). The Board directed the parties to present evidence that is relevant under Sections 33(c), 42(f) and 42(h) of the Act and to provide specific figures and justifications for any proposed penalty. (Id.) On June 1, 2006, in clarifying its February 16, 2006 Order, the Board again ordered a hearing to analyze the 33(c) and 42(h) factors regarding an appropriate remedy, including civil penalty, **if any.** (See People's Exh. 3, p. 5, emphasis added). The Board stated that it would consider the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an **appropriate** remedy for the violation. (Id.).

The Board further stated that it would first consider the Section 33(c) factors in determining what to order the respondent to do to correct an ongoing violation, if any, and second, whether to order the respondent to pay a civil penalty. (Id.) The factors provided in Section 33(c) include 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.)

Continuing, the Board further stated that if, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, **only then** does the Board consider the

Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. (Id.) Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated. (Id.)

II. WITNESSES AND EXHIBITS

A. Community Landfill Co., Inc. Witnesses

1. Edward Pruim
   Secretary/Treasurer of Community Landfill Co., Inc

B. Exhibits and Stipulations

All Exhibits were entered into evidence by agreement of the parties. Respondent CLC's Exhibits were entered as CLC's Exhibits 1-18. (9/12/07 Tr. pp. 11-12). [1]

CLC's Exhibit 1 is also marked as Hearing Officer Exhibit A which comprises various key materials from a previous Board proceeding, Community Landfill Co., Inc. and City of Morris v. the Illinois Environmental Protection Agency, PCB 01-170. The materials were admitted by the Hearing Officer upon CLC's Request to Incorporate Materials from Prior Proceeding, filed on September 6, 2007.[2] Contrary to the Complainant's position, this prior testimony and the related documents are relevant to the proceeding in order to show how and why the landfill is in the situation it is today. The testimony is particularly relevant as concerns the Frontier bonds, the subject matter that

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[1] References to the September 10-12, 2007 Hearing Transcript will be cited as: "(9/__/07, Tr. _". References to Exhibits from the Sept. 10-12, 2007 Hearing will be referenced by the party who offered the exhibit and the number and cited as the follow example indicatess: "(CLC Exh. 2)".

[2] Materials from an PCB-170 (October 15-17, 2001) were admitted by the Hearing Officer pursuant to CLC's Request to Incorporate Materials from Prior Proceeding. They were entered into the record as Hearing Officer Exhibit A. References to those materials will include the Hearing Officer Exhibit A designation, the date of the previous hearing, and the page number of the transcript or the exhibit number. They will be cited as: "(Hearing

underlies this entire proceeding. Further, contrary to the Complainant's view, these matters were addressed at hearing and will be more fully developed in CLC's post-hearing brief.

III. ARGUMENT

A. THE 33(c) FACTORS WEIGH AGAINST AN ORDER THAT RESPONDENT CLC PAY A CIVIL PENALTY.

The factors to be considered by the Board may include: (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; (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and (v) any subsequent compliance. As was shown at the hearing, and as will be shown in CLC's post-hearing brief, the landfill is not in the deteriorating that the State would have the Board believe; CLC is in the position it is in through no fault of its own; CLC made attempts at compliance; and, it is not economically reasonable or technically feasible for CLC to achieve full compliance.

In general, there is no dispute that CLC's location, in a rural area near other landfills, is a suitable location for the landfill. (9/11/07, Tr. 167). Similarly, there is no dispute that landfills have great social and economic value. (9/11/07, Tr. 167-168).

1. The landfill is not deteriorating as the State would have the Board believe.

The State argues that the landfill is deteriorating. (State Brief, pp. 7-8). However, Blake Harris testified that he is not aware of any environmental damage or damage to personal health, safety or welfare at the landfill caused by the lack of alleged posting of financial assurance. (9/11/07,

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Officer Exhibit A – (10/__/01 hearing, p. _.)"

Tr. 167). In addition, there was no evidence whatsoever presented beyond Retzlaff's eyeball opinion that any waste is being or has been deposited outside the permitted area. (9/11/07, Tr. 92). Additionally, Retzlaff testified that he did not perform any tests or borings to determine whether there was sufficient cover over the existing waste. (9/11/07, Tr. 93-94). He testified that any lack of adequate cover did not show up in the photographs because the weeds were so thick and that having weeds was better than just having blank soil which would allow for more erosion. (9/11/07, Tr. 97-98). He admitted that there is no regulation that prohibits weeds from being used as cover. (9/11/07, Tr. 101). He further admitted that there are times when it is necessary to uncover leachate wells. (9/11/07, Tr. 103). While Retzlaff testified that he used instruments to determine the composition of alleged odors, he was unable to fully describe the results as he does not know all of the technical aspects. (9/11/07, Tr. 68-69). He even testified that he could not be sure that all of the odors came from CLC and that it was possible that they came from the adjacent landfill site. (9/11/07, Tr. 85-86).

Further, according to Retzlaff, there is in fact quite a bit of activity at the landfill which would contradict the State's position that it is deteriorating. He testified that the gas flare has been in operation since fall 2006. (9/11/07, Tr. 104). Monthly sampling of perimeter gas probes has occurred since summer 2005. (9/11/07, Tr. 104). Quarterly sampling of surface methane has occurred since January 2007. (9/11/07, Tr. 104) Groundwater monitoring wells have been sampled since 2005. (9/11/07, Tr. 104-105). Gas extraction wells have been sampled since March 2007. (9/11/07, Tr. 104-105). All monitoring systems were evaluated in summer 2005. (9/11/07, Tr. 106). The landfill gas system was evaluated in February 2006. (9/11/07, Tr. 106-107). Finally, Retzlaff knows that a revised closure plan and cost estimates have been developed and submittted to the

Agency. (9/11/07, Tr. 107).

All of the above described activity at the landfill along with Retzlaff's own testimony as to the current condition of the landfill makes it clear that conditions are not deteriorating as the State would have the Board believe. This factor should weigh in factor of the Respondents due to the ongoing activity.

2. CLC was Diligent in its Efforts to Comply with the Financial Assurance Requirements.

CLC was diligent in its efforts to comply with financial assurance requirements. As Edward Pruim testified, CLC never intended to operate the landfill without financial assurance. (9/12/07, Tr. 169).

CLC first proposed a significant modification permit to the IEPA in 1999 (9/12/07, Tr. 152). Prior to that application, the closure and post-closure bond was about $1.4 million. (9/12/07, Tr. 152). In that application, CLC proposed about $7 million in financial assurance. (9/12/07, Tr. 152). Additionally, the City of Morris had agreed to handle the collection and treatment of the groundwater, leachate and condensate from the landfill which would cost approximately $10 million. (9/12/07, Tr. 152). When CLC filed the sigmod in 1999, the IEPA rejected the $7 million proposal and requested a bond for the entire $17 million. (9/12/07, Tr. 155). CLC and the City reached an agreement whereby approximately $7 million in bonds would be funded by and in the name of CLC and approximately $10 million in bonds would be in the name of the City but would be funded by CLC. (9/12/07, Tr. 155-56). CLC and the City agreed that CLC would pay the annual premium on the City's bond for the 5-year period. (9/12/07, Tr. 156).

The approximate annual premiums for the $17 million worth of bonds was slightly more than

$200,000 per year. (9/12/07, Tr. 157). Frontier also required collateral in the amount of just under $200,000. (9/12/07, Tr. 157).

The IEPA reviewed drafts of the Frontier bonds before they were issued. (9/12/07, Tr. 158). The IEPA approved of the bonds before CLC committed to purchasing them. (9/12/07, Tr. 158). The concept was as follows: CLC would purchase the bonds and would give them to the IEPA in exchange for the sigmod permit. (9/12/07, Tr. 158). Specifically, from June to August 2000, a procedure was established between CLC's counsel, Mark LaRose, Agency financial assurance expert John Taylor, and Agency lawyer John Kim, whereby CLC would tender copies of the bonds that had been issued to petitioners by Frontier Insurance, Taylor would review the bonds to see if they were acceptable, and if acceptable, the parties would have a "closing" whereby CLC and the City would tender the original bonds and the Agency would tender the permits. (Hearing Officer Exh. A. (10/16/01 hearing, pp. 484-485 and Exhs. 64, 65 and 66)). When all three of the bonds were issued, Frontier was both licensed by the Illinois Department of Insurance and was on the U.S. Dept. of Treasury's Circular 570 List of approved sureties. (Hearing Officer Exh. A – (10/16/01 hearing, pp. 490-493 and Exhs. 15, 16 and 17)).

On August 4, 2000 these bonds were accepted by the Agency pursuant to the recommendation of its own financial assurance expert John Taylor who wrote on August 3, 2000: "Community Landfill has tendered three acceptable bonds totaling $17,427,366. The bonds appear to comply with the relevant regulations in all respects. John P. Taylor." (Hearing Officer Exh. A – (10/16/01 hearing, p. 499 and Exh. 1 (p.214))). Christine Roque testified that the permit was granted in August 2000 because CLC posted adequate financial assurance. (9/11/07, Tr. 238). Taylor testified that he recommended the bonds be accepted in August 2000 because they complied

with even the most stringent interpretation of the regulations. (Hearing Officer Exh. A – (10/16/01 hearing, pp. 490-491)). CLC did not know at the time the bonds were issued that Frontier was going to be removed from the Treasury Circular list the next day. (9/12/07, Tr. 170). When the bonds were approved on August 4, 2000, John Taylor, John Kim and then-Bureau of Land Permit Manager Joyce Munie all knew that Frontier had been removed from the Dept. of Treasury 570 list on June 1, 2000. (Hearing Officer Exh. A – (10/16/01 Hearing, pp. 490-492)).

John Taylor testified that Joyce Munie was aware that if the bonds were not accepted, no additional financial assurance would be tendered and the Agency would be left with only $1.4 million in financial assurance covering the entire site. (Hearing Officer Exh. A – (10/16/01 Hearing, pp. 496-497)). John Taylor further testified that Joyce Munie directed him to "find a way to accept the bonds and put the operators on the hook for $17 million" in financial assurance. (Hearing Officer Exh. A – (10/16/01 Hearing, pp. 497-498)). However, as Edward Pruim testified, if the IEPA had rejected the bonds when it knew that Frontier had been de-listed, CLC would have closed the landfill pursuant to the permit requirements with the $1.4 million bond. (9/12/07, Tr. 159). John Taylor testified that they all understood that if the bonds were found to be unacceptable, no permit would issue and no additional financial assurance would be tendered. (Hearing Officer Exh. A – (10/16/01 Hearing, pp. 496-497). Instead, when the IEPA approved the bonds, CLC put up the collateral and purchased the bonds for the first year premium of $208,730. (9/12/07, Tr. 159; CLC Exh.2 (No. 5(4)) and Exh. 18).

CLC then field a supplemental permit application to receive approval for the construction of a separation layer and to receive authorization for the acceptance of waste for discposal in a newly constructed area. It then spent the next year building and developing the new cell. (9/12/07, Tr.

160). In spite of the absence of any law, rule or regulation, Agency employee Blake Harris recommended on May 9, 2001 that the Frontier bonds be denied because Frontier was no longer on the 570 list. (Hearing Officer Exh. A – (10/16/01 hearing, p. 343). Harris testified that he made this determination without even looking at the bonds or determining their effective dates. (Hearing Officer Exh. A – (10/16/01 hearing, pp. 352-353). Harris' recommendation was accepted without question by Permit Manager Joyce Munie. (Hearing Officer Exh. A – (10/15/01 hearing, p. 224)). O the contrary, John Taylor's opinion was that the bonds still conformed with the most stringent reading of the Act and the regulations as of May 2001 since: (1) they were issued when Frontier was listed on the 570 list; and (2) there is no provision of the Act, rules or regulations that requires or even allows the Agency to deny permits based on a subsequent removal from the 570 list. (Hearing Officer Exh. A – (10/16/01 hearing, pp. 501-503). CLC was then informed by the IEPA that the very same Frontier bonds that had been previously approved were no good. (9/12/07, Tr. 160). The Agency denied the permit on that basis even though it knew that Frontier had been de-listed at the time it pre-approved the bonds in August 2000. (9/12/07, Tr. 160). The permit denial was subsequently upheld by the Pollution Control Board and the Illinois Appellate Court. (9/12/07, Tr. 161).

It is uncontradicted that if the Frontier bonds had not been approved in August 2000, no additional financial assurance would have been tendered by CLC or the City. (Hearing Officer Exh. A – (10/16/01, p. 484-485)). In that case, CLC would have been responsible for one year's premium on only $1.4 million or approximately $26,850. (Hearing Officer Exh. A – (10/16/01, pp. 678-679)). Instead, thanks to Joyce Munie's directive that Taylor "find a way to accept the bonds" and the agency's acceptance of the bonds, CLC and the City tendered an additional $15.6 million in financial

assurance bonds, with a five-year commitment to pay annual premiums totaling more than $200,000. (Hearing Officer Exh. A – (10/16/01, pp. 497-498)).

Because the permit was denied, CLC was unable to accept waste, a situation which "would certainly eventually shut the facility down", in the words of CLC engineer Michael McDermont. (Hearing Officer Exh. A – (10/17/01 hearing, p. 685)). Nevertheless, during the permit appeal process, in good faith, CLC paid its 2nd year premium of $217,842. (9/12/07, Tr. 161; CLC Exh. No. 2(5)). By this time, therefore, CLC had paid more $600,000 in cash collateral and premiums while the IEPA was taking the position that the bonds were no good and CLC could not operate the landfill. (9/12/07, Tr. 162).

Again in good-faith, CLC investigated the possibility of obtaining substitute financial assurance. (9/12/07, Tr. 162). CLC asked the broker who had worked with it on the Frontier bonds to exhaust all available avenues of financial assurance that CLC could possible afford. (9/12/07, Tr. 162). Edward Pruim testified that he broker searched for other bonding companies but that due to the lapse in time, CLC was informed that the collateral required to obtain a $17 million bond would be 70-80% of the bond value. (9/12/07, Tr. 162). In other words, in order to obtain a $17 million bond, CLC would have had to post approximately $14-15 million in cash. (9/12/07, Tr. 162). Funds available to CLC were nothing like that. (9/12/07, Tr. 162). The company was not generating any income to be able to afford a bond for that amount. (9/12/07, Tr. 162). CLC was informed that the only way it could be done was through a bond for which CLC did not have collateral. (9/12/07, Tr. 163).

The foregoing describes the events which have lead to the present situation. Clearly, CLC was diligent in its efforts to obtain financial assurance. It was not simply trying to avoid its

obligation, as the State would have the Board believe. CLC would have preferred having the ability to provide financial assurance as it would have mean that it was a functioning, viable landfill with the necessary permits to accept waste and generate income. Instead, it was left with no means to do so, thanks to the actions of the State.

The State's argument that "the Respondents simply failed to retain sufficient capital from landfill operations to assure the landfill's ultimate closure" is without merit. (State Brief, p. 12). Obviously, CLC put up the money to provide for just that through the Frontier bonds. It is through the State's conduct of approving the bonds, then disapproving the bonds and refusing to provide the operating permit that would allow it to generate revenue that CLC does not have sufficient funds. This is what should be obvious to the Board.

3. CLC and the City Were Reasonable in Their Belief that Frontier was Providing Financial Assurance

Blake Harris testified the bonds were valid through 2005 at a minimum, and 2006 with an automatic one year extension. (9/11/07, Tr. 158). He further testified that he agreed with IEPA employee Beverly Anderson's position in January 2004 that Frontier was providing financial assurance. (9/11/07, Tr. 170-172; CLC Exh. 12). Surely, if the IEPA thought that Frontier was providing financial assurance in January 2004, it is more than reasonable that CLC and the City would think the same. The Board should reach the same conclusion reached by Beverly Anderson and Blake Harris: that Frontier was providing financial assurance.

B. ANY ORDER REQUIRING THE POSTING OF FINANCIAL ASSURANCE WOULD NOT BE APPROPRIATE AS IT WOULD SERVE NO PURPOSE

The State has now taken the position that the Board should "...order specific affirmative Relief, *i.e.*, an order to obtain financial assurance, and closure of Parcel B. (State Brief, p. 5). If a

bond was to be posted for the amount of closure and post-closure care based on the most recent approved cost estimates, a bond in the amount of more than $17 million dollars would be required. (9/12/07, Tr. 84). If closure is required by the Board, and an insurance company or the bonding agency understood that the bond would be called or the insurance company would be called upon to pay the cost immediately after issuance, it would affect the rate significantly. (9/12/07, Tr. 98-99). Devin Moose, the City of Morris' expert witness, testified that in his experience with financial assurance, which is considerable, he is unaware of any situation where someone had to purchase a bond that was going to be called immediately. (9/12/07, Tr. 99). Due to the risk-based nature, he cannot imagine anybody not requiring full collaterization of the bond if it is going to be called immediately. (9/12/07 Tr. 109).

There are significant differences in opinion as to the appropriate closure and post-closure costs. (9/11/07, Tr. 233-34 and 9/12/07, Tr. 83-84). The recently submitted revised cost estimates are $10,061,619 which is more than $7 million less that the previous estimate. (Id.) The estimates have been submitted to Christine Roque but a response had not yet been made as of the date of hearing. (9/12/07, Tr. 94). It stands to reason therefore, that if the Board requires the full amount of the most recent cost estimate to be posted as financial assurance, the funds required to do so may well be in excess of what is actually required now as opposed to what may have been required more than seven years ago, based on the landfill continuing to accept waste. In Devin Moose's opinion, any money spent should be spent on the landfill itself. (9/12/07, Tr. 98). It is clear that ordering respondents to post financial assurance at this point would not be appropriate as it would be wasteful and not serve a purpose. As Devin Moose testified, regulations do not always fit squarely within the situation. (9/12/07, Tr. 125).

IV. THE BOARD SHOULD NOT ASSESS A CIVIL PENALTY AGAINST CLC BECAUSE CLC WAS DILIGENT IN ITS ATTEMPTS TO PROCURE FINANCIAL ASSURANCE, NOT HAVING FINANCIAL ASSURANCE HAS NOT RESULTED IN AN ECONOMIC BENEFIT AND A PENALTY WOULD RESULT IN AN UNREASONABLE HARDSHIP.

If the Frontier bonds had been found to have been compliant, CLC's operating permit for Cell A would have been issued and CLC would have gladly paid the premiums for financial assurance. However, CLC has been in a classic Catch-22 situation: without the operating permit it anticipated and for which it was obligated to procure financial assurance for over $17 million based on the cost estimate provided assuming it had an operating permit, it could not generate sufficient revenue to pay for any bond premiums. In reality, the fact that CLC does not have financial assurance has resulted in severe economic hardship which would be compounded by assessing a civil penalty. Nevertheless, CLC attempted in good faith to procure financial assurance despite the fact that it was unable to generate any income.

A. CLC Attempted in Good Faith to Provide Financial Assurance

As stated above, CLC attempted in good faith to provide financial assurance after the determination was made by the Agency that the Frontier bonds were not compliant. It never intended to operate the landfill without financial assurance. (9/12/07, Tr. 169). CLC investigated the possibility of obtaining substitute financial assurance. (9/12/07, Tr. 162). CLC asked the broker who had worked with it on the Frontier bonds to exhaust all available avenues of financial assurance that CLC could possible afford. (9/12/07, Tr. 162). Edward Pruim testified that the broker searched for other bonding companies but that due to the lapse in time, CLC was informed that the collateral required to obtain a $17 million bond would be 70-80% of the bond value. (9/12/07, Tr. 162). In other words, in order to obtain a $17 million bond, CLC would have had to post approximately $14-

15 million in cash. (9/12/07, Tr. 162). Funds available to CLC were nothing like that. (9/12/07, Tr. 162). CLC was informed that the only way it could be done was through a bond for which CLC did not have the collateral to secure. (9/12/07, Tr. 163).

Blake Harris testified the bonds were valid through 2005 at a minimum, and 2006 with an automatic one year extension. (9/11/07, Tr. 158). He further testified that he agreed with IEPA employee Beverly Anderson's position in January 2004 that Frontier was providing financial assurance. (9/11/07, Tr. 170-172; CLC Exh. 12). Surely, if the IEPA thought that Frontier was providing financial assurance in January 2004, it is more than reasonable that CLC and the City would think the same. The Board should reach the same conclusion reached by Beverly Anderson and Blake Harris: that Frontier was providing financial assurance.

B. The State Refuses to Release CLC's Collateral and Premiums from Frontier

The cash collateral posted by CLC was approximately $200,000. (9/12/07, Tr. 165-166). Because the collateral posted was invested by Frontier, CLC believes that the amount is now between $300,000 and $400,000. (9/12/07, Tr. 166). While Frontier has said that CLC is entitled to the return of the funds it is holding, the IEPA will not release them; therefore, CLC has not received any of the cash collateral back from Frontier. (9/12/07, Tr. 166). Blake Harris testified that he does not know if there are any regulations that allow the State to keep the collateral for bonds that are determined to be non-compliant. (9/11/07, Tr. 146).

In addition, Frontier has said that CLC is entitled to a refund of the premiums it has paid which were $208,730 (2000) and $217,842 (2001) for a total of $426,572. (CLC Exhibit No.2, Response to Interrogatories No. 5). Ed Pruim testified that Frontier would pay that back to CLC if the IEPA approved it. (9/12/07, Tr. 167). However, because the IEPA will not release the funds,

more than $600,000 cash out of CLC's pocket for the bonds is still being held by Frontier. (9/12/07, Tr. 166-167).

C. CLC Does Not Have the Means to Pay a Penalty

CLC does not have the means to pay a penalty. (9/12/07, Tr. 167-168). When it first applied for the sigmod in 1999, it intended to close the landfill in 4-5 years. (9/12/07, Tr. 168). However, its ability to generate adequate revenue to pay any bond premiums was terminated when the Frontier bonds were determined to be no good, and the operating permit was denied. CLC never intended to run or operate the landfill without proper financial assurance. (9/12/07, Tr. 169). Even the State's own witness, Mark Retzlaff, admitted that he "guesses" that CLC does not make any money and that its not being able to dispose of waste would "hamper the landfill's ability to make money." (9/11/07, Tr. 89).

Edward Pruim testified that there has been minimal income and revenue at the landfill through accepting contaminated soils but that it has been a struggle. (9/12/07, Tr. 162-63). While CLC had to let 7-8 employees go, it kept a general manager to oversee and maintain the landfill, as well as a part-time secretary, while it tried to resolve some of the issues. (9/12/07, Tr. 163). Edward Pruim further testified that at the present time, CLC has a lot of outstanding bills that cannot be paid. (9/12/07, Tr. 164). If CLC paid out what is currently in its checking account and had a zero balance, there would still be bills to pay. (9/12/07, Tr. 176). In sum, the company is in the red and has no money to pay a penalty of any sort. (9/12/07, Tr. 164). Ed Pruim testified that there are no funds available and no business; there is not the cash flow that once was there, years ago. (9/12/07, Tr. 151).

Based on the foregoing, Respondent Community Landfill Co., Inc. respectfully requests that the Board:

1. Find that CLC should not be penalized for doing in good faith what it was told to do by the Agency which was to commit to purchasing the Frontier bonds with the express approval of the Agency and commit to paying more than $200,000 in annual premiums and in echange, be able to accept waste and generate sufficient revenue to make the payments;

2. Find that CLC acted reasonably and diligently by purchasing the Frontier bonds and paying the premiums;

3. Find that CLC acted reasonably and diligently with its attempts to procure alternate financial assurance;

4. Find that CLC has not accrued any economic benefit and in fact has been economically harmed due to the State's conduct; and

5. Find that under the circumstances as set forth herein, any penalty assessed to CLC would be unfair and inappropriate.

Respectfully Submitted,

COMMUNITY LANDFILL CO., INC.

One of its Attorneys

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CERTIFICATE OF SERVICE

I, Clarissa C. Grayson, an attorney, hereby certify that I caused to be served a copy of the foregoing **RESPONDENT COMMUNITY LANDFILL COMPANY, INC.'S CLOSING ARGUMENT AND POST-HEARING BRIEF** by electronically filing and by placing the same in the United States Mail, first-class postage prepaid, this 30th day of November 2007, addressed as follows:

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