BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on July 22, 2009, the undersigned electronically filed the following documents:

(1) **CITY OF MORRIS' MOTION FOR RECONSIDERATION OF THE POLLUTION CONTROL BOARD'S ORDER OF JUNE 18, 2009**

and

(2) **CITY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR RECONSIDERATION WITH ATTACHED EXHIBITS**

with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601.

Dated: July 22, 2009

Respectfully submitted,

On behalf of the CITY OF MORRIS

/s/ Nicola Nelson
One of Its Attorneys

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BEFORE THE POLLUTION CONTROL BOARD

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

CITY OF MORRIS' MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE ORDER OF JUNE 18, 2009

NOW COMES the City of Morris, by and through its attorneys, and pursuant to Section 101.520 of the General Rules of the Illinois Pollution Control Board, moves the Pollution Control Board to reconsider its order of June 18, 2009. The City respectfully requests this Board to find that no penalty lies and that the City is not responsible to provide financial assurance for the reasons set forth herein.[1] Alternatively, the City respectfully requests this Board to not impose any penalty.

The Board's order held both the City and CLC must "submit revised cost estimates, and update financial assurance in accordance with approved revised estimates" (6/18/09 Order at 3). If this Board declines to reconsider its requirements regarding the posting of financial assurance, it is respectfully requested alternatively that the Board reconsider the amount and reduce the City's obligation to the amount of

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1 This Board is well-aware of the facts leading up to its decision and the City's position. The City has attempted to avoid repetition of the facts and proceedings except where relevant or raised at the 2007 hearing.

its original bond. Alternatively, the City seeks reconsideration of the timing of submitting financial assurance and cost estimates. This Board recognized that it had the authority to require revised cost estimates and to order that the financial assurance would be updated in accordance with those revised estimates (6/18/09 Order at 3). This Board's order requires the posting of financial assurance in an amount that was determined nine years ago. The uncontroverted evidence at the hearing is that the actual cost is estimated to be $7.0 million less than the last permitted amount. However, this Board has the authority to first require a determination of the updated cost estimates prior to the posting of financial assurance.

Thus, the City respectfully requests this Board to first require the submission of updated cost estimates within a time certain from the ruling on this motion,[2] that the Illinois Environmental Protection Agency (IEPA) be directed to review the updated cost estimates and determine the proper, updated amount within a certain time frame,[3] and that additional time then be authorized for the City to post financial assurance based on the approved revised cost estimates.

A revised timetable will allow the City's audit to be completed and for the City to complete its investigation on how much it can post in a government guarantee and seek other means to comply. A revised timetable will permit time for the IEPA to

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2 This Board provided for a 60-day deadline, but the June 18, 2009 order is automatically stayed upon the filing of this motion. 35 IllAdm.Code. §101.902.

3 The testimony established that revised cost estimates were provided twice to the IEPA (in 2005 and July 2007), but it has yet to act on them (*see infra*).

review the revised cost estimates. Meanwhile, it is respectfully requested that the State be ordered not to settle any claim with Frontier without the City's involvement and agreement.

I. This Board's Order Makes the City the Insurer for the Insolvent Surety and Landfill Company and Imposes a Crushing Burden on a City with Less than 9,000 Adults According to the Last Census.

This Board imposed a joint and several obligation on CLC (which claims insolvency) and the City to post a $17.4 million financial assurance and imposed a penalty on the City of about $400,000 (6/18/09 Order). It found that the purpose of the financial assurance regulations is to prevent a situation where "the State, at taxpayer expense, [must] clean up or even close a facility" (6/18/09 Order at 2 (quoting 2/16/07 Interim Order)).

However, the Board's Order imposes a multi-million dollar obligation – in the aftermath of an operator's insolvency and surety's receivership – on the few thousand taxpayers of a small town. The City's population at the last census was less than 12,000, and, of those individuals, only 8,620 citizens were 20 years or older. http://city.mornet.org/html/population_age.htm. This Board's Order overlooks the fact that its order would require 8,620 city taxpayers to pay the $17.4 million price for an insolvent corporation and surety, plus another $400,000 as a penalty.

Although it is not the City's fault that Frontier went into receivership, or that CLC has apparently been run into the ground, the City is now left holding the bag for the costs of a landfill it has not operated in the last 27 years. As the dissent noted, the

penalty under these circumstances is arbitrary, and imposes an unreasonable financial hardship (6/18/09 Order, dissent). 415 ILCS 5/42(h) (2006).

Because of the current status of CLC and Frontier, the Board's Order effectively requires the City to come up with 100% of the $17.4 million bond, notwithstanding the evidence that the City also continues to bear the cost of treating the landfill's leachate at its publicly owned treatment works (POTW), and also continues to incur the cost of payments to its environmental consultants, who were retained to protect the health and safety of City residents once it became clear that CLC had abdicated its responsibilities. This Board declined to order Parcel B closed, but ordered that no additional waste could be accepted (6/18/09 Order at 3, 44). Thus, the landfill will not generate income, but even if it did, payment to the City is limited by the terms of the lease. In light of the dire impact of its decision, the City respectfully requests this Board to reconsider its order.

II. This Board Should Vacate the Penalty.

The Board's June 18, 2009 Order held that one of the "aggravating factors" was that the City (and CLC) "continued to argue against the cost requirements" for the financial assurance, which the Order characterized as "[clinging] steadfastly to their interpretation of the financial assurance requirements for surety bonds" (6/18/09 Order at 40). The Board also held that the City "benefited economically by putting off spending money to achieve compliance with the financial assurance rules," although it acknowledged there is no evidence in the record regarding any "economic benefit" to the City because of the failure to replace the Frontier bonds (6/18/09 Order at 40-41).

The Board then assessed as a penalty the sum paid to the City as "dumping royalties or tipping fees from the Landfill operations in the years 2001-2005" while ignoring the fact that the City incurred substantial costs (close to a million dollars (Exh. A, Enger Affidavit)) retaining engineers to monitor the landfill (6/19/09 Order at 41). It is respectfully submitted that the Board's June 18, 2009 order overlooked facts and misapplied the law.

A. The City's Exercise of Its Statutory Right to Litigate the Agency's Interpretation of Its Regulations Was Improperly Found to Be an "Aggravating Factor."

This Board characterized the City's exercise of its statutory right to challenge and appeal various issues as an "aggravating factor." This misapprehends the law of the case doctrine.

On remand, while the lower court (here, an agency) and appellate court are bound by the ruling of an appellate court, a litigant may preserve those issues for review by challenging the appellate court decision upon remand as palpably erroneous. *Garibaldi v. Applebaum*, 194 Ill.2d 438, 447-48, 742 N.E.2d 279, 283-84 (2000). In this way, the issue is preserved in a second appeal and, if the Illinois Supreme Court accepts review of the second appellate decision, it may also review the first appellate decision – even if the Supreme Court had already declined to review the first appellate decision. This is exactly the factual circumstance in *Garibaldi*, in which the Supreme Court rejected the argument that it lacked the authority to consider the first appellate decision (decided about five years earlier) under the law of the case doctrine.

Moreover, the City's position was not frivolous, but the subject of internal debate in the IEPA, as one of the State's witnesses testified. IEPA's Blake Harris testified at the 2007 hearing that John Taylor, a former financial assurance analyst for the Bureau of Land, believed that the Frontier bonds did, in fact, comply with the relevant regulations (9/11/07 Tr. 134, 137, 169). Taylor told others at IEPA that as he read the regulation, the Frontier Bonds were compliant (9/11/07 Tr. 134). Taylor concluded that three acceptable performance bonds totaling $17,427,366 had been provided for the Morris Community Landfill, and that "the bonds appear to comply with the relevant regulations in all respects" (9/11/07 Tr. 137). Harris acknowledged that because of the internal dispute over the proper interpretation of an ambiguous regulation, the IEPA held an internal meeting to decide whether the regulation required that a surety company only had to be licensed to transact insurance in Illinois by the Department of Insurance, or whether it required that a surety must also be listed on the Treasury Department Circular (9/11/07 Tr. 154). At the 2007 hearing, Harris agreed it was reasonable for the City to conclude that the Frontier bonds showed on their face that financial assurance was still in place through the end of 2006 (9/11/07 Tr. 171-172).

The City's good faith legal challenge to the Agency's interpretation should have been considered a mitigating factor. *See Park Crematory, Inc. v. Pollution Control Bd.*, 264 Ill.App.3d 498, 506, 637 N.E.2d 520, 525 (1994); *Harris-Hub Co. v. Illinois Pollution Control Bd.*, 50 Ill.App.3d 608, 612, 365 N.E.2d 1071, 1074 (1977) (holding that good faith is a factor to be considered in mitigation).

The City assures this Board that it was not acting in a contumacious manner in preserving these issues for further review. It is submitted that taking a legal position in good faith is not an "aggravating" factor justifying a penalty against a unit of local government.

B. This Action Is the First Time the Board Has Held that the City Is "Conducting" Landfill Operations.

This Board held another aggravating factor is that City has disregarded its obligation to post financial assurance (6/18/09 Order at 40). It is respectfully submitted that this proceeding is the first time that this Board has adjudicated the City's individual obligation to post financial assurance, and only with its June 18, 2009 Order has the amount been adjudicated.

It cannot be controverted that the prior decisions involved different issues. In *Community Landfill Co. v. PCB,* 331 Ill.App.3d 1056, 772 N.E.2d 231 (3d Dist. 2002) (PCB No. 01-170), the appellate court held that the Frontier bonds were invalid because Frontier was removed from the federal list of approved sureties. The decision refers to the City and CLC collectively as the "company," but does not address the specific issue of who (between the City and CLC) must post the $17.4 million in financial assurance.

In the other proceeding, this Board upheld the permit condition that refused to lower the amount of financial assurance based on the City's leachate treatment and held that an additional $10.0 million plus in financial assurance had to be posted. *Community Landfill Co. and City of Morris v. Illinois EPA,* cons. nos. 01-48 and 01-49 (April 5, 2001). The appellate court affirmed. *Community Landfill Co. and City of Morris v. Illinois EPA,*

No. 3-01-0552 (Ill.App. Oct. 29, 2002) (Rule 23). This 2002 decision also does not address the specific issue of who (between the City and CLC) must post the $17.4 million in financial assurance.

Because no decision by this Board or the appellate court has adjudicated the obligation of CLC versus the City to post financial assurance, those decisions are not precedent for imposing an independent obligation to post financial assurance on the City. If the issue was never "raised, decided or discussed," then a decision has no "precedential weight." *Epstein v. Chicago Bd. of Educ.*, 178 Ill.2d 370, 378, 687 N.E.2d 1042, 1046 (1997). "A judicial opinion is a response to the issues before the court, and these opinions, like others, must be read in the light of the issues that were before the court for determination." *Nix v. Smith*, 32 Ill.2d 465, 470, 207 N.E.2d 460, 463 (1965).

C. This Board Misinterpreted §42 in Imposing a Penalty Based on a Perceived Economic Benefit.

Section 42(b)(3) of the Act provides that this Board should consider, in determining the appropriate penalty to be imposed, "any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lower cost alternative for achieving compliance." 415 ILCS 5/42(h)(3). The statute thus contemplates that the amount of the penalty should be determined by assessing the benefit that was gained by noncompliance, stating that the penalty should be "as great as the economic benefits if any, accrued by the respondent as a result of the violation." 415 ILCS 5/42(h).

Here, the Board found the violation was in posting financial assurance. As shown above, however, the first time that this Board adjudicated the City's independent obligation to post financial assurance was in this case in its interim order. However, that interim order was not a final adjudication until this Court's 2009 order and was subject to revision until this Board resolved all issues. *See, e.g., Rowe v. State Bank of Lombard*, 125 Ill.2d 203, 213, 531 N.E.2d 1358 (1988) (a trial court has the authority to revise any non-final order until the entry of judgment); *see* PCB Rules 101.520 101.902.

Regardless, the State had the obligation to prove that there was a link between the violation and the benefit to determine the appropriate amount of the penalty. Here, however, it wholly failed to produce any evidence showing a benefit as a result of the claimed violation. As this Board acknowledged, there was no evidence of "profit" gained by noncompliance with the financial assurance provisions (6/18/09 Order at 41). Because there was no evidence of any profit, the Board turned to what it called "the only undisputable economic benefit figure quantified in this record," i.e., the alleged "profit" the City made through royalties and tipping fees. In fact, the City has not profited in any way. To date, the City has spent $901,991 in engineering and monitoring costs plus $57,000 for leachate treatment – over twice the penalty based on a purported "profit" (Exh. A, Enger Affidavit ¶4; Exh. B, Good Affidavit ¶6). This Board's analysis misconstrues the plain words of the statute, to which this Board must give effect. *Harshman v. DePhillips*, 218 Ill.2d 482, 493, 844 N.E.2d 941, 948 (2006). The statute requires a benefit from the violation (here, posting financial assurance), not just any benefit.

Here, the City derived no benefit from any delay. The evidence at the hearing demonstrated that it would have cost the City nothing to post a local government guarantee in the amount of its bond, and it had the current funds to cover the small shortfall (9/12/07 Tr. 24-37). 415 ILCS 5/42(h)(3). This is not the situation today (Exh. A, Enger Affidavit; Exh. D, Crawford Affidavit).

Again, until this Board's final order, the legal determination of whether the City was required to post financial assurance as a person "conducting" landfill activities and the amount had not been made. The fact that the City did not *sua sponte* post a guarantee or bond prior to this Board's order, but instead awaited a final determination by the Board concerning its responsibilities, should not be deemed an aggravating factor. It should be viewed in the context of a municipality's duty not to assume debts or responsibilities where its responsibility to do so is in doubt.

III. The Penalty Should Not Be Imposed Given All the Circumstances.

There are mitigating factors that weigh against any penalty. As explained above, before this enforcement action, there was no adjudication that the City had the individual obligation to post financial assurance because it "conducted" landfill operations. On its own volition, before this Board issued its Interim Order, the City hired Shaw Environmental approximately six years ago to monitor the landfill and assess its safety in order to safeguard the health and safety of its citizens and the environment. Shaw is currently monitoring the landfill at the City's cost. The total spent by the City on engineering fees from May 2001 to date is $901,991 (Exh. A, EngerAffidavit).

That the City did not *sua sponte* post financial assurance does not mean that the City was disregarding this Board's Interim Order. It has taken steps in response to the 2006 Interim Order. For example, it has expanded the TIF district so that revenues can be generated – although the amount is impossible to predict given the recession and the depressed housing market (Exh. A, Enger Affidavit). Moreover, although a law has passed the House and Senante and is on the Governor's desk to extend the TIF District another 12 years, the Governor could veto this bill. It appears that the bill was sent to the Governor on June 12, 2009, so if the Governor does not veto it, it becomes the law in 60 days, or the beginning of August. ILLINOIS CONSTITUTION OF 1970, art. IV §9(b).

The City has also taken steps to collect the vast amount of soil required for cover. It has required developers and the contractors who have excavated as part of a large sanitary sewer project to place excess soil on City property so that soil for a final cover would accumulate (Exh. A, Enger Affidavit). It has spent almost a million dollars monitoring the landfill for safety (Exh. A, Enger Affidavit). In 2002, before either of this Board's orders, the mayor prohibited depositing any waste at this landfill (Exh. E) [4] All of these steps establish that the City has acted in good faith.

This Board should vacate the penalty on reconsideration. Since the City lent its name for a Frontier bond (that CLC was to pay the premium on), it has been embroiled in litigation. As simply the last man standing, it appears that the City will be required

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[4] As this Board recognized, CLC is the operator who handles the daily operation and is on site. The City does not have a guard posted at the landfill and cannot prevent persons from delivering waste.

to pay millions for a landfill it has not operated since 1982. This Board should vacate the penalty of $399,308.98 imposed on this small town under these circumstances.

IV. This Board Should Reconsider Its Financial Assurance Rulings.

A. This Board Should Revise its Order Regarding the Remedies.

It is manifestly unfair to hold the City jointly and severally liable for $17.4 million in financial assurance, when the City Council only agreed to a $10.0 million bond for the treatment of leachate (see attached Exh. F, Ordinance R-99-6). This Board should reconsider its order and only require the City to be responsible for the original amount of the bond. It should be noted that if this Board modifies the timetable of its Order so that the revised estimates are first submitted (which turn out to be approximately $10.0 million, according to Shaw), this turns out to be approximately the same amount of the bond on which the City's name appears.

This Board has ordered that the $17,427,366 financial assurance may be "reduced by any amount IEPA has or will received from its claim against the Frontier bonds" (6/18/09 Order at 35). Given this Board's order, the State has every incentive to settle for a *de minimus* amount with Frontier with regard to the bonds because the State will obtain the ordered financial assurance, regardless of the recovery from Frontier. Thus, it is respectfully requested that this Board should order that the State is precluded from settling the multi-million dollar bond claims with Frontier without the approval of the City, whose taxpayers (there are less than 9,000 adults) will have to pay for Frontier's (and CLC's) financial debacle.

B. The Amount of Financial Assurance Required Under the Order Is Based On Outdated Calculations that Were Shown to Have Been Improperly Calculated, and Ignores the Revised Estimates That Have Been Repeatedly Submitted to IEPA, But Never Acted Upon.

This Board's Order requires that the City jointly and severally (with a company that claims insolvency) post financial assurance in the amount of $17.4 million. The amount of financial assurance required under the Order is based on calculations performed almost a decade ago as part of a negotiation with CLC and IEPA (9/18/09 Order at 43; 9/11/07 Tr. 215-16; People's Exh. 12 p.44 ¶6; p.33 ¶6).

The $17.4 million figure was apparently the result of negotiations with the Agency (and based on improper modeling). On August 13, 1999, before the City was involved in the bond, CLC filed an addendum to a permit application recalculating the financial assurance from $17.4 million to $7.0 million. *Community Landfill Co. v. Illinois EPA*, PCB Cons. Nos. 01-48, 01-49, slip op. at 25-26 (4/5/01 PCB op.). The permit request was denied, and an appeal taken (PCB Cons. Nos. 00-66, 00-67). An agreement was thereafter reached to resubmit the application under protest with closure/post-closure costs of approximately $17.4 million, and to exchange the financial assurance documents with the Agency in exchange for drafts of the permit, with the understanding that the resolution of the financial assurance amount would be postponed to a later date. *Community Landfill Co. v. Illinois EPA*, PCB Cons. Nos. 01-48, 01-49, slip op. at 25-26 (4/5/01 PCB op.). Pursuant to that agreement, the closure/post-closure cost estimate was set at $17.4 million. In its opinion, this Board took "administrative notice" of the facts of those proceedings (6/18/09 Order at 28).

There was testimony that a significant modification application must be submitted to change the amount of financial assurance (9/11/07 Tr. 216). However, a renewal application was submitted to IEPA in 2005 which included an addendum with a revised cost estimate of the closure and post-closure costs (based on the old modeling) (9/11/07 Tr. 216-18). These cost estimates were again revised in response to IEPA comments in November 2005 (9/12/07 Tr. 111-13, 118). This record shows no response by the IEPA.

In 2007, revised cost estimates were again submitted to the IEPA by Shaw Environmental, which developed and submitted a closure plan based on proper modeling. The only basis for the $17.4 million figure was the figures in the nine-year old CLC application, and this amount was incorrect because it is based on improper modeling (9/12/07 Tr.77-78, 83-891, 104). For example, the modeler used a Darcy velocity that was off by a factor of 40,000 (9/12/07 Tr. 78-79,87-88).

Therefore, in July 2007, Shaw submitted a revised plan for closure and post-closure with a revised cost estimate of $10,061,619 to the IEPA (9/12/07 Tr. 83-84). At the 2007 hearing, Christine Roque, the IEPA permit supervisor, testified that the revised cost estimates continued to simply remain "under review" (9/11/07 Tr. 217-18). For reasons that are unclear, IEPA has continued to refuse to address the revised cost estimates. This Board, meanwhile, criticized the City and CLC for a failure to submit revised estimates (9/18/09 Order at 41 n.14). This Board overlooked that the IEPA has not acted on revised estimates (*id.*). At this point, it appears that Shaw will have revised

estimates by mid-August, but it will take additional time to schedule the planned work (Exh. C, Varsho Affidavit).

With its June 18, 2009 Order, the Board now imposes on the City alone (as a practical matter) the obligation to post the full (outdated and based on an erroneous model) $17.4 million. The Board has the authority to order the posting of financial assurance, an updated cost estimate, and a reduced financial assurance (6/18/09 Order at 3), so it obviously also has the authority to establish the order in which these steps are taken. Moreover, this Board should consider the fact that the IEPA has had revised estimates in its possession for years, but failed to take action. This Board should accordingly reconsider its Order and make provision for the timely review by IEPA of the revised estimates and plan.

C. This Board Should Reconsider and Revise the Schedule in Its Order.

If this Board reconsiders its order so that the financial assurance is based on an updated plan and revised estimates, then it should also revise the due dates in its Order.

Additional time is needed for the City to comply with this Board's order on financial assurance because, although the Act permits a government guarantee, that amount cannot be definitively ascertained until the City's audit is complete, which is anticipated to be in October (Exh. A, Enger Affidavit). At this point, the amount expected to qualify is between $8.0 and $8.5 million (Exh. D, Crawford affidavit). There are no current City funds available to post the other $9.1 to $9.4 million in financial assurance (Exh. A, Enger Affidavit). As the City's budget director has explained, there

are simply no funds available, and this is not a situation where funds can be transferred from all of the various accounts (Exh. A, Enger Affidavit). Although monies in some funds can be transferred, they are needed to fulfill the City's operating expenses and its contractual obligations.

An additional issue arises from this Board's order because it inconsistently held that the landfill may not accept any waste, but that Parcel B is not to be closed. The order effectively closes the landfill for operations, without ordering a formal closure. Until this Board clarifies its order, it is impossible to know whether any revenues will be generated by the landfill – although under the lease, the vast majority of the revenue will not go to the City, but to CLC.

Moreover, there are limited means by which a municipality can generate funds, all of which take time or simply are unrealistic. [5] For example, a city could generate funds through a general obligation bond issue, but this requires a referendum under state law. 65 ILCS 5/8-4-1. This Board, a creature of statute, cannot order a municipality to violate state laws in order to generate funds to comply with this Board's Order. *Flagg Creek Water Reclamation Dist. v. Village of Hinsdale*, 2006 WL 2869930 at * (IPCB No. 06-141) (PCB recognized that it has limited authority and citing *Concerned Adjoining Owners v. Pollution Control Bd.*, 288 Ill.App.3d 565, 577, 680 N.E.2d 810, 819

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[5] If this were a tort judgment, then the City could levy tax under the Illinois Local Governmental and Governmental Employees Tort Immunity Act. 745 ILCS 10/9-104. Here, there is a civil penalty and a direction to post $17.4 million in financial assurance.

(1997) [6] (holding the Board's authority does not extend to matters arising under the Municipal Code)). Administrative agencies' actions that extend beyond its statutory authority are void. *Bd. of Trustees v. Washburn,* 153 Ill.App.3d 482, 484, 505 N.E.2d 1209, 1211 (1987).

It is unknown if any surety will agree to post a bond as financial assurance under these circumstances, where this Board has ordered that Parcel B need not be closed, but simultaneously ordered the City and CLC not to accept any waste (6/18/09 Order at 3, 41 ¶9). If the landfill is permitted to operate, the majority of those funds will go to CLC under the lease, not the City. There is evidence that any bond would have to be fully collateralized by a surety (9/12/07 Tr. 109) or, prior to this Board's order, would have required 70-80% collateral (9/12/07 Tr. 161-62). The City does not currently have the funds to collateralize any bond by 80-100% (Exh. A, Enger Affidavit). It is difficult to imagine that a surety would agree to issue any bond, given these uncertain facts and a nonfunctioning landfill. Additional time is needed for the City to investigate if a surety would be willing to issue any bond.

Finally, Shaw apparently will have revised estimates within the time this Board ordered, but the finalized plan cannot be completed for at least another two months (Exh. C, Varsho Affidavit). IEPA's Christine Roque indicated that before revised cost estimates would be considered, she must review a revised closure plan that corresponds to the cost estimate (9/11/07 Tr. 229-31). Thus, additional time is needed

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6 *Concerned Adjoining Owners* was abrogated on other grounds in *Town & Country Utilities, Inc. v. Illinois Pollution Control Bd.,* 225 Ill.2d 103, 866 N.E.2d 227 (2007).

for Shaw to finalize the closure plan, and for the IEPA to complete its review (Exh. C, Varsho Affidavit).

There will be no threat posed by the current condition of the landfill if this Board modifies its decision so that financial assurance can be posted based on appropriate modeling (Exh. C, Varsho Affidavit). The landfill is being monitored (Exh. C, Varsho Affidavit). The City's independently retained engineers have spent more than 1,000 man hours, and over 10,000 groundwater and air monitoring tests have been performed over the past four years. The results include:

- Monthly monitoring of the permitted perimeter below-grade landfill gas probes previously installed on the landfill property by CLC began in June of 2005, to determine whether below grade gas migration is occurring at the Site. Readings for landfill gas within perimeter below-grade landfill probes indicate that the below-grade landfill gas concentrations are not increasing.

- The majority of landfill surface scans taken since January 2007 have not detected methane levels above 500 ppm background levels (i.e. the regulatory limit). Surface scans that did measure methane levels above 500 ppm background levels during the original scan did not confirm the methane levels during the mandatory re-sampling period, and therefore comply with the appropriate state regulations.

- Since the beginning of 2009, only one below-grade perimeter landfill probe has recorded a LEL (Lower Explosive Limit) greater than 50% for methane (over 140 LEL measurements have been preformed since the beginning of 2009). This is significant because the LEL is the percentage of methane within the air that could cause explosion and thereby a potential threat to the human health and safety.

(Exh. C, Varsho Affidavit).

The "current conditions at the Morris Community Landfill do not constitute a present, and immediate or imminent and substantial or material threat to human health

or the environment" (*id.*). Mr. Varsho has also explained that "conditions at the landfill can be more than adequately addressed by the routine corrective action measures called for by the state and federal regulations governing the landfill in question" (Exh. C, Varsho Affidavit). Because the City is continuing the monitoring of the landfill, if any problems arise, they can be promptly dealt with. A revised schedule will not harm the environment or public.

V. The Board's Interim Holding that the City Was Liable for Alleged Financial Assurance Violations Was Wrongly Decided.

The City is aware that many of the issues involved in the arguments below have in large part been previously addressed by the Board. However, there was additional evidence at the 2007 hearing. Moreover, this Board overlooked certain facts and legal arguments. So that these issues are preserved for appeal (*Garibaldi*), the City seeks reconsideration for the following reasons, in addition to those previously set forth.

A. The holding that the City was "an operator of the landfill" is contrary to the evidence and contrary to Illinois law.

Although the Board has found that CLC managed and operated the landfill, it also found that the City, too, was "an operator of the landfill" because it allegedly:

> [1] financed the operation, [2] litigated in conjunction with CLC, as well as [3] profited from and treated the leachate from the Morris Community Landfill. While these activities alone may not constitute "operating" a waste disposal site, [the City] also had [4] discretion regarding the decisions at the site and [5] took responsibility for some of the ancillary site operations such as the treatment of leachate from the landfill.

(6/19/09 Order at 4).

This Board failed to support the conclusions cited above with references to the evidence in the record. It is axiomatic that the Board "cannot base its findings on

information not in the record." *City of Waukegan v. Pollution Control Bd.*, 57 Ill.2d 170, 183, 311 N.E.2d 146, 153 (1974) (citing *North Shore Sanitary Dist. v. Pollution Control Bd.*, 2 Ill.App.3d 797, 802, 277 N.E.2d 754, 757 (1972)). "Findings must be based on evidence introduced in the case." *Hazelton v. Zoning Bd. of Appeals*, 48 Ill.App.3d 348, 351, 363 N.E.2d 44, 47 (1977); *see also Seul's, Inc. v. Liquor Control Comm'n*, 240 Ill.App.3d 828, 831, 608 N.E.2d 530, 532 (1st Dist. 1993) ("Illinois law requires that an administrative agency limit its decision to facts, data, and testimony which appear in the record.")

The reason decisions must be based on evidence is because "all parties [must] have an opportunity to cross-examine witnesses and to offer evidence in rebuttal." *Seul's*, 240 Ill.App.3d at 831, 608 N.E.2d at 532-33. In addition, such decisions create a pragmatic problem for reviewing courts, because meaningful review is impossible; the appellate court cannot determine if the decision is against the manifest weight of the evidence. *Chase v. Dept. of Prof'l Reg.*, 242 Ill.App.3d 279, 288, 609 N.E.2d 769, 775 (1993). Finally, the Act itself mandates that "[a]ny final order of the Board under this Act shall be based solely on evidence in the record." 415 ILCS 5/41.

As shown below, the five factors used to support the finding that the City was "an operator" of the landfill facility are not supported in the evidence and/or do not bring the City within the ambit of the regulations definition of an "operator." As a result, this Board's conclusion that the City "conducted" landfill operations should be reconsidered and modified.

1. The City did not "finance the operation"

This Board concluded that the City "financed the operation" (6/19/09 Order at 4). Presumably, this refers to the fact that the City was a named principal on one of the bonds. However, the City was never responsible for, and indeed never paid any premiums for, that bond. Rather, it was CLC who paid (i.e. "financed") the premiums on the bond, pursuant to the express terms of the parties' lease addendum (City's Exh. 7(f); 9/12/07 Tr. 159, 168, 177-79). As such, there is no evidence to support a finding that the City "financed the operation" through the purchase of a surety bond.

Even if the City provided financial assurance, this would not render it an "operator" who "conducted" landfill operations, as this Board held (6/18/09 Order at 41). The evidence at the hearing and regulations established that a person other than an operator may post financial assurance. Brian White, supervisor of the EPA's Bureau of Land Compliance Unit, and the individual charged with overseeing the Financial Assurance Program (9/11/97 Tr. 176-77), testified that the regulations regarding the local government guarantee were designed so that a local government "that's neither the owner or operator" could use the guarantee mechanism (Tr. 9/11/97 at 204-05). Thus, EPA's own financial assurance supervisor admitted that a municipality might provide financial assurance (in the form of a guarantee) when it is neither an operator nor an owner.

Moreover, the regulations expressly contemplate situations where financial assurance may be provided by a third party who is neither an owner nor an operator. *See e.g.* 35 Ill.Adm.Code §811.712(h) ("The Agency shall release the surety if, after the

surety becomes liable on the bond, the owner or operator or another person provides financial assurance for closure and post closure care...") (emphasis added); 35 Ill.Adm.Code §811.713(h)(1) ("The Agency shall release the financial institution if, after the Agency is allowed to draw on the letter of credit, the owner or operator or another person provides financial assurance for closure and post closure care...") (emphasis added). Under the regulations, providing financial assurance does not make the person who provides it an "operator," nor does it show he is "conducting operations at a landfill."

Finally, the financial assurance regulations are clear that the person who is to post financial regulations is the owner or operator "of the facility." They do not provide that the person who owns the land must post financial assurance. The definitions contained in Part 810 apply to Part 811. 35 Ill.Adm.Code §811.101(b): ("All general provisions of 35 Ill.Adm.Code 810 apply to this Part."). Part 810 defines "operator" as "the person responsible for the operation and maintenance of a solid waste disposal facility." An owner is differentiated and defined as "a person who has an interest directly or indirectly, in land, including a leasehold interest on which a person operates and maintains a solid waste disposal facility." The "owner" is the "operator" – but "only if there is no other person who is operating and maintaining a solid waste disposal facility." 35 Ill.Adm.Code §810.103 (emphasis added).

A review of the financial assurance regulations makes clear that they apply to the operator or owner "of a MSWLF unit." *See, e.g.*, 35 Ill.Adm.Code §§811.704(k)(1), 811.705(d), 811.706(c), 811.710(f), 811.712(a), 811.713(a). They do not apply to the owner

"of the property." In addition, these provisions obviously apply to only the operators and owners of the facility (not property) because there are provisions relating to abandoning or ceasing operations of the facility. The City, as a land owner, cannot abandon the land or cease operations. *See, e.g.*, 35 Ill.Adm.Code §§811.713(e)(2)(A), 811.714(e)(1), 811.715(d).

As a matter of public policy, this Board should reconsider its decision. If the act of providing "financing" for a landfill causes a person to be deemed a person "conducting" operations of a landfill and held responsible in the event of insolvency, commercial lenders and financial institutions would be unwilling to provide the financing necessary to operate.

2. The fact that the City "litigated in conjunction with CLC" was irrelevant to the question of whether the City "conducted" landfill operations.

The Board's second basis for concluding that the City was an operator was its history of having "litigated in conjunction with CLC" (6/19/09 Order at 4). The reason the City litigated the first two actions (PCB Nos. 01-48 & 01-49 and PCB No. 01-170) was because it was an interested person and its name was listed as a principal on a bond posted and paid for by CLC as financial assurance. The conclusion that somehow the City was operating the landfill with CLC because it participated in two litigated matters overlooks evidence, the history of this litigation, and administrative law principles.

The first proceeding (PCB Nos. 01-48, 01-49) concerned the amount of the bond, and whether the fact that the City was treating the leachate at its publicly owned treatment works (POTW) under its lease would mean that CLC could reduce the

amount of financial assurance (City's Exh. 7(e)). When the IEPA declined to reduce the bond because of the leachate treatment, CLC then asked the City if the City's name could be put on a five-year bond if CLC paid for the premium for it, and the City agreed (9/12/07 Tr. 155-56, 168; CLC's Exh. 15-17). CLC never looked to the City for any financial support for the bond, and CLC paid the premium (9/12/07 Tr. 156-57).

In exchange for the increased bond amount, the IEPA agreed to give CLC the SigMod permit (9/12/07 Tr. 158). On December 13, 1999, the City and CLC signed an addendum to the lease stating that IEPA's demand for an additional $10 million bond was excessive and that they would be appealing that demand (City's Exh. 7(f)). The addendum makes clear that the bond amount was contested, and would be appealed if the IEPA did not agree to reduce the amount to about $7.0 million and to terminate the City's $10.0 million bond (City's Exh. 7(f)). Again, the regulations provide for another person, not an operator and not an owner, to provide financial assurance. *See, e.g.*, 35 Ill.Adm.Code §§811.711(g)(3), 811.711(h)(1), 811.713(h)(1)). Therefore, the fact that the City took these acts did not establish that it was "an operator" and was "conducting landfill operations."

However, in the wake of the bond controversy, the City had become an interested party, having lent its name as principal on a $10.0 million bond (9/12/07 Tr. 152-52, 176-77). The fact that it participated in litigation seeking a finding that its $10.0 million bond was not required does not prove it was conducting landfill operations. The City's interest in this litigation was simply to argue that its bond was unnecessary because of the off-site leachate treatment. The appeal was unsuccessful, but the fact that

both CLC (which paid the premium on the City's bond) and the City (which sought to have the bond eliminated) participated in the litigation of an appeal regarding the bond does not establish that the City was "conducting" landfill operations under the meaning of §811.700(f).

Similarly, the second proceeding (PCB No. 01-170) did not establish that CLC and the City were co-operators of the landfill. When Frontier was removed from the Federal list of approved sureties, the City was involved in the litigation of necessity because it was then a named principal on a Frontier bond.

The rules for participating in any appeal are liberal, and a person who participated in the administrative hearing need only file an appearance. *See* Ill.S.Ct.R. 335, Committee Comments. The fact that there were two petitioners involved in prior litigation does not prove they were co-operators of the landfill.

3. The City did not "profit" as this Board held.

The next basis for finding that the City was an operator was the Board's finding that the City "profited" from the landfill. "Profit" is not the standard under the regulations. "Profit" to a landowner is absent from the definition of "operator," is absent from the regulation addressing who is a person who "conducts" waste disposal operations, and absent from the definition of what is meant by an owner "of a facility." *See* 35 Ill.Adm.Code §§810.103, 811.700.

As this Board recognized in its Interim Order, host agreements between local governments and landfill operators are common, and the units of government who enter into them do not, thereby, become the "operators" of area landfills (2/16/06

Order at 10). The reason local units of government agree to site landfills is, in part, because they derive some benefit from the siting of the facility. And no local unit of government would ever agree to site a landfill and accept tipping fees and royalties knowing it will be deemed a "co-operator with all the attendant obligations, including liability for the facility's closure/post-closure costs.

Here, the agreement between the City and CLC provided costs and benefits to each party. CLC obtained the use of City land and received treatment of the landfill's leachate at the City's POTW; the City, in return, received tipping fees and royalties. (People's Exh. 7). The fact that the City, for its part, received tipping fees and royalties cannot be reasonably construed to establish that the City was an operator of the landfill. It is simply incorrect that the City "profited" from the treatment of leachate; it has lost $57,000 on leachate treatment between 2001 to 2005 (Exh. B, Good Affidavit).

The Board's finding that the profit generated by the City from landfill operations made the City an operator is not only illogical, it incorrectly presumes that the City has actually "profited." As shown above, it has not profited, but instead has paid a total of $787,698 in engineering fees ($730,698.18) and treatment of leachate ($57,000) during the same time period (2001-05) that this Board held the City had a "profit" of $399,308.98 (6/18/09 Order at 41) (*see* Exh. A, Enger Affidavit; Exh. B, Good Affidavit). Between 2001-2005, the City has not realized any "profit," which is defined as a "gain," as this Board held, but a loss of $388,389.02. BLACKS LAW DICTIONARY at 1378 (4th ed.). And, to date, it has suffered a loss of $502,682.02 (Exh. A, Enger Affidavit).

4. The Board's finding that the City is an operator because it "treated the leachate" and took responsibility for "ancillary site operations such as the treatment of leachate from the landfill" is erroneous.

The Board relies on the fact that the City treats leachate at its publicly owned treatment works (POTW) as proof that the City was "conducting operations" and took responsibility for "ancillary site operations" (6/18/09 Order at 4). This finding misapprehends the regulations.

The regulations themselves contemplate that landfill operators, who are responsible for leachate treatment, may arrange to have leachate sent off-site for treatment by others at a municipal or other wastewater treatment facility. *See* 35 Ill.Adm.Code §811.309(a). [7] Section 811.307(e) provides that a landfill operator may

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[7] Section 811.309, entitled "Leachate Treatment and Disposal Systems" provides:

a) Leachate shall be allowed to flow freely from the drainage and collection system. The [landfill] operator is responsible for the operation of a leachate management system designed to handle all leachate as it drains from the collection system. The leachate management system shall consist of any combination of storage, treatment, pretreatment, and disposal options designed and constructed in compliance with the requirements of this Section.

* * *

e) Standards for Discharge to an Offsite Treatment Works

a. Leachate may be discharged to an offsite treatment works that meets the following requirements:

(a) All discharges of effluent from the treatment works shall meet the requirements of 35 Ill. Adm. Code 309.

(b) The treatment systems shall be operated by an operator certified under the requirements of 35 Ill. Adm. Code 312.

discharge leachate to an offsite wastewater treatment facility for treatment as long as the landfill operator has "secur[ed] permission from the offsite treatment works for authority to discharge to the treatment works." 35 Ill.Adm.Code §811.307(e)(2). The use of an offsite wastewater treatment facility, therefore, does not make that offsite facility part of the landfill operations.

Under these regulations, the fact that a POTW or other facility treats leachate for a landfill does not, *ipso facto*, mean that POTW (or other facility) is "conducting" landfill operations. Although there is a limited exception when 50% of the off-site facility's treatment capacity is attributable to the treatment of a landfill's leachate, this is not the case here (it is less than 1%) (*see* Exh. B, Good affidavit). The regulations are clear that the landfill "operator is responsible for securing permission from the offsite treatment works for authority to discharge to the treatment works." 35 Ill.Adm.Code §811.309(e)(1)(C)(2).

Here, the landfill operator, CLC, negotiated with the City and obtained permission (via a contract) to do exactly that which is contemplated by the regulations: discharge leachate from the landfill to a POTW for treatment. The plain language of Section 811.309 makes clear that an offsite POTW is not part of the landfill operation unless the offsite facility is primarily used to treat the leachate, which is determined by

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(c) No more than 50 percent of the average daily influent flow can be attributable to leachate from the solid waste disposal facility. Otherwise, the treatment works shall be considered a part of the solid waste disposal facility.

examining whether the leachate sent to the offsite facility constitutes greater than 50% of the total amount of influent received at that offsite facility. Here, CLC's leachate is less than 1% of the daily influent at the City's POTW. (*see* Exh. B, Good affidavit).

This Board nevertheless construed the City's treatment of leachate at its POTW to constitute evidence that the City was "conducting operations" at the landfill, and held that this established the City was responsible for "ancillary site operations" (6/18/09 Order at 4). Except for the off-site treatment of leachate – permitted by the regulations and part of the contract between CLC and the City – there is nothing in the record indicating the City is involved in any "ancillary site operations" (6/19/09 Order at 4). The City may be inspecting and monitoring through Shaw Environmental, but it is not "conducting" operations – ancillary or otherwise.

Moreover, this Board's holding that the entity treating leachate is "conducting" landfill operations creates a dangerous precedent. If, as the Board held here, a municipality can be deemed the operator and guarantor of landfill operations merely because its publicly owned waste water treatment facility processes leachate, no city or POTW is likely to be willing to accept landfill leachate because of the risk that it could be deemed the guarantor of a landfill company that claims insolvency, or surety that goes into receivership.

5. There is no evidence that the City has "discretion regarding the decisions at the site" as this Board found.

This Board found that the City retained "discretion regarding decisions at the site," yet pointed to no evidence showing that the City had any right to make decisions

– discretionary or otherwise – regarding the site operations. A review of the record conclusively shows that there is no such evidence.

It is well settled that an agency "cannot base its decisions upon facts, data and testimony which do not appear in the record. [citations] Findings must be based on evidence introduced in the case." *Hazelton v. Zonding Bd. of Appeals*, 48 Ill.App.3d 348, 351, 363 N.E.2d 44, 47 (1977). The Board must limit its decision to facts, data, and testimony which appear in the record. *Seul's, Inc. v. Liquor Control Comm'n*, 240 Ill.App.3d 828, 831, 608 N.E.2d 530, 532 (1993). Without support in the record, this finding is against the manifest weight of the evidence and should be reconsidered.

B. The conclusion that the "grand sum" shows that the City jointly "conducted operations" is not supported by the record.

Under the facts of this case – where the landfill operator claims insolvency and the bonding company is in rehabilitation - it is tempting to hold the City (as merely the last man standing) responsible. However, neither the Act, the regulations nor the facts in this case support this Board's finding that the City was "conducting" operations. This Board's decision shifts all potential closure and post-closure costs from the State to a small municipality (with an adult population of less than 9,000 in the last census). The decision thus deals a crippling blow to the citizens of a small town at a time when the City, like the State, faces severe economic problems due to reduced revenues (Exh. A, Enger; Exh. D, Crawford affidavit).

This Board has repeatedly recognized that it is CLC that operates the landfill and manages the day-to-day operations at the site (6/19/09 Order at 3; 2/16/06 Order at 1;

6/1/06 Order at 1; 10/16/03 Order at 1). The Board's finding to this effect squarely matches the regulatory definition of the term "operator" and the financial assurance obligation imposed on a person "conducting" landfill operations. 35 Ill.Adm.Codes §§810.103, 811.700(f). Because there is no evidence that the City was "responsible for the operation and maintenance of a solid waste disposal facility" (*id.*), the Board's conclusion that the City was conducting landfill operations is palbably erroneous and not supported by the record. This Board should therefore grant reconsideration, and find that because the City did not "conduct any waste-disposal operation," the City has not committed the violations alleged in the complaint.

CONCLUSION

For the foregoing reasons, the City of Morris respectfully requests that this Board reconsider its opinion and enter a modified order:

1. Holding that the City did not violate the financial assurance regulations, that no penalty is warranted as against the City, and that the financial assurance requirements do not apply to the City.

2. In the alternative, the City requests this Board to vacate the $399,308.98 penalty.

3. In the alternative, the City requests that the Board's Order be modified to:

A. Hold that the City is only individually liable in an amount of its original bond;

B. Require that revised and updated cost estimates for the Morris Community Landfill be submitted to IEPA within 60-90 days from the date of entry of the Board's ruling on this motion to reconsider;

C. Require that upon receipt of the updated cost estimates, that the IEPA be required to determine the appropriate revised cost estimates for the Morris Community Landfill facility within a certain time to be determined by the Board; and

D. Allow that upon IEPA's determination of the revised cost estimates, additional time be granted to the City to provide financial assurance in accordance with the regulations.

4. To give the City a total of 90 days to post financial assurance so that: the City's audit may be completed (anticipated to be October), the amount of government guarantee can be determined, and all avenues to obtain a bond or post other financial assurance may be investigated and completed.

5. To order that no person or governmental entity may resolve the claims against Frontier without the participation of the City.

6. To clarify that Parcel B is not closed and waste may be received.

7. Granting such other and further relief as this Board deems proper.

Respectfully submitted,

/s/ Nicola Nelson
One of the Attorney for the City of Morris

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BEFORE THE POLLUTION CONTROL BOARD

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

CITY OF MORRIS' MOTION FOR RECONSIDERATION OF THE POLLUTION CONTROL BOARD'S ORDER OF JUNE 18, 2009

NOW COMES the City of Morris, by and through its attorneys, and pursuant to Section 101.520 of the General Rules of the Illinois Pollution Control Board, moves the Pollution Control Board to reconsider and modify its order of June 18, 2009, for the reasons set forth in the City's currently-filed memorandum of law, which is fully incorporated herein by reference.

Respectfully submitted,

On behalf of the CITY OF MORRIS

By /s/ Nicola Nelson
One of Its Attorneys

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EXHIBITS IN SUPPORT OF

MOTION TO RECONSIDER

A	Affidavit of John Enger
B	Affidavit of Larry D. Good
C	Affidavit of Jesse P. Varsho
D	Affidavit of William J. Crawford
E	Mayor Kopczick October 7, 2002 memo prohibiting any dumping at the Community Landfill
F	City of Morris Ordinance R-99-6

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois,

Plaintiff,

v.

COMMUNITY LANDFILL CO., an Illinois Corporation, and the CITY OF MORRIS, an Illinois Municipal Corporation,

Defendants.

PCB 03-191
(Enforcement - Land)

AFFIDAVIT OF JOHN ENGER

I, John Enger, being first duly sworn on oath, do depose and state as follows:

1. I have been the City Clerk since 1987 and the Budget Officer since 1982 for the City of Morris, Illinois.

2. In my capacity as City Clerk and Budget Officer for the City of Morris, I assemble, maintain and am the custodian of all business and financial records pertaining to the receipt of revenues by the City of Morris, as well as all outgoing expenditures. My testimony in this affidavit is based on my personal knowledge which arises from my position as City Clerk and City Budget Officer.

3. I am familiar with the costs incurred by the City of Morris for environmental oversight and monitoring relating to the Morris Community Landfill since 1981, when I served on the City Council as an alderman.

4. Documents I maintain in my position as City Clerk and Budget Officer show that between May 1, 2001 and April 30, 2005, the City of Morris paid Shaw Environmental (formerly Envirogen/Emcon) a total of $69,182.93, and for the same period, the City paid Chamlin & Associates $102,111.85 for environmental oversight and monitoring. From May 1, 2005 to the present, the City has paid Shaw and Chamlin a combined total of $730,698.18 for environmental oversight and monitoring. This totals from May 1, 2001 to present $901,991. These figures exclude legal costs incurred and paid by the City for environmental oversight of the landfill facility.

5. I am familiar with the current City Budget, which includes budgeted items that arise from the City's financial obligations. For example, the City is currently under contract and obligated to pay for a municipal services building. Those funds are kept in a separate account which are not available for any other purpose.

6. The City of Morris, on its own volition and in good faith, has attempted to take a proactive approach to this situation. One step the City took was to amend and

enlarge the boundary of its real property Tax Increment Financing ("TIF") District in January 2009 to include, among other properties, both parcels of the Morris Community Landfill. In addition, the City's TIF plan was amended to specifically include approved expenditures from the TIF fund for anticipated costs associated with the landfill.

7. Creating a TIF District is a process for eliminating blighted areas within a municipality by establishing a revenue source through tax increments. When the procedures of the TIF Act are followed, all the properties' equalized assessed valuations (EAVs) are frozen as of the effective date that the TIF district is created (or modified). As time passes, there are presumably new developments (increasing the tax basis), and the incremental increase of the base EAV flows into the TIF fund from all taxing bodies (such as counties, school districts, townships, library districts, fire districts and municipalities). The other taxing bodies will continue to receive taxes based on the "frozen" or base EAV, and the City receives any incremental increase over the base EAV until the TIF district expires. The theory of a TIF district is that as the EAVs increase, the tax increment (revenues) will presumably increase as well. When property values are depressed, there is a potential that the revenue stream could be reduced.

8. Unless extended by state law, the TIF District in Morris will terminate in December 2009, eliminating a major funding source for the City and the landfill. It is my understanding that the bill to extend the Morris TIF for an additional twelve years has passed the House and Senate is now on the Governor's desk.

9. Another proactive action that the City has taken on its own volition is to pass a resolution requiring that new developments place excess soil on City property to be used for cover at the Community Landfill if needed. The City also had a large sanitary sewer project, during which the contractors were required to excavate dirt. They were also required by the City to place excess soil on City property to be used for cover at the Community Landfill if needed.

10. The three City funds primarily designated for garbage/solid waste include the Garbage Fund, the Solid Waste Tax Fund, and the Sanitary Landfill Contingency Fund. The current fund balances of all three funds have significantly diminished since 2007. One of the funds - the Garbage Fund - is projected to run a deficit of $60,503 at the end of this fiscal year as of April 30, 2010.

11. The Solid Waste Tax Fund pays for recycling ($310,615.67) and operations of the Grundy County Solid Waste Committee ($82,504). The projected balance as the end of the fiscal year will be $111,030.

12. The balance of the Solid Waste Contingency Fund is projected to be $304,949 at the end of the fiscal year.

13. The municipality operates with about 20 different funds, in addition to the three funds mentioned above. These funds have limited uses, such as Motel Tax Fund

which is limited to use for tourism, promotion and park improvement. The General Fund must pay salaries and benefits, and the City's operating expenses, excluding water and sewer. The funds in the Municipal Building Fund are already contractually committed. Funds such as the Illinois Municipal Retirement Fund or Police Pension Fund cannot be used for anything other that the designated purposes (described by their titles). Use of the Motor Fuel Tax fund is limited to Illinois Department of Transportation approval for road and bridge improvements. The Water and Sewer Fund is an enterprise fund and can only be used for maintenance and operation of the City combined water and sanitary sewer system (including, for example, water/sewer mains, wells, water towers, and treatment plants). There are two airport funds which are used for the development of an expansion to the current City airport. These are largely funded by the operation of the existing airport and subsidized if necessary by the City's General Funds. There are other small funds (such as the Senior Citizen's Van fund which has $10,000).

14. For most of these funds, the City is precluded from transferring the monies from fund to fund.

15. I am familiar with the Pollution Control Board's imposition of the penalty and the requirement that the City post financial assurance in the amount in excess of $17.4 million. The City is without the funds to comply with the Pollution Control Board's order to pay the penalty or to post $17.4 million in financial assurance within the sixty (60) days ordered by the Pollution Control Board.

16. If the City were to levy additional taxes to raise the amount of money needed to comply with the June 18, 2009 Order, I believe this would impose a serious financial hardship on the City's taxpayers. Moreover, the City would not realize any revenues from the real property tax increases until probably the third quarter of 2010.

17. The audit for the 2008-2009 fiscal year is not yet completed, however, it is expected to be completed and approved by the Morris City Council in October of 2009.

18. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Further the Affiant sayeth naught.

John D. Enger

John Enger

Dated: July 22, 2009

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois,

Plaintiff,

v.

COMMUNITY LANDFILL CO., an Illinois Corporation, and the CITY OF MORRIS, an Illinois Municipal Corporation,

Defendants.

PCB 03-191
(Enforcement - Land)

AFFIDAVIT OF LARRY D. GOOD

I, Larry D. Good, being first duly sworn on oath, do depose and state as follows:

1. I am a licensed professional engineer, and have been continuously employed in that capacity since 1975.

2. I am currently employed by Chamlin & Associates, Inc., which has been the city engineer for the City of Morris since approximately 1955.

3. I am the engineer primarily responsible for the design, engineering and oversight of potable water and wastewater treatment facilities, and am personally familiar with the leachate treatment services provided by the City of Morris at its publicly owned treatment works.

4. The City treats leachate from the Morris Community Landfill at its wastewater treatment works; based on figures provided by Shaw Environmental, the leachate from the Morris Community Landfill constitutes less than one percent (approximately .74%) of the influent received at the City's wastewater treatment works.

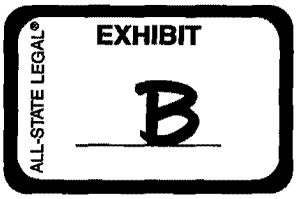
5. I am familiar with the costs incurred by the City of Morris in conjunction with its treatment of leachate from the Morris Community Landfill. The cost of such treatment is, on average, approximately $11,400 per year.

6. Based on the volume figures provided by Shaw Environmental and Engineering, the City's total cost for leachate treatment from the Morris Community Landfill between 2001 and 2005 was approximately $57,000.

7. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Larry D. Good

Dated: July 22, 2009



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

AFFIDAVIT OF JESSE P. VARSHO

I, Jesse P. Varsho, being first duly sworn on oath, do depose and state as follows:

1. I am currently employed as the Head of Landfill Engineering for the St. Charles, Illinois office of Shaw Environmental, Inc. (Shaw), located at 1607 E. Main Street, St. Charles, Illinois 60174. Shaw is an international engineering and consulting firm.

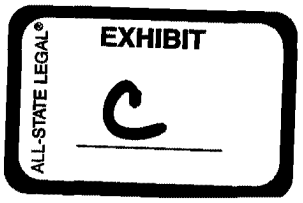
2. I am a Professional Engineer and Geologist, with over eight years of experience in the area of geological, geotechnical and environmental engineering.

3. My practice focuses on the siting, permitting, construction/development/operation and closure of pollution control facilities (most notably landfills), as well as remedial aspects of operation and closure of pollution control facilities, and I have been involved in the siting, permitting, and due diligence review of over twenty (20) landfills across the country.

4. I was retained in December of 2004 by the City of Morris to undertake a comprehensive investigation and evaluation, on an ongoing basis, of conditions at the Morris Community Landfill.

5. In my role as Project Manager for the Morris Community Landfill ("the landfill" or "the Site"), I was responsible for supervising the review of the IEPA operating record, which consisted of thousands of pages of information.

6. Working under my supervision, other Shaw personnel (including other professional engineers, professional geologist, geological engineers and other licensed experts in the area of solid waste management), performed numerous site inspections, and, based upon those site inspections, developed work plans for the characterization and evaluation of site conditions and possible corrective action measures.



7. The effort by Shaw at the Site has entailed more than 1,000 man hours, and over 10,000 groundwater and air monitoring tests have been performed over the past 4 years.

8. Monthly monitoring of the permitted perimeter below-grade landfill gas probes previously installed on the landfill property by CLC began in June of 2005, to determine whether below grade gas migration is occurring at the Site. Readings for landfill gas within perimeter below-grade landfill probes indicate that the below-grade landfill gas concentrations are not increasing.

9. The majority of landfill surface scans taken since January 2007 did not detect methane levels above 500 ppm background levels (i.e. the regulatory limit). Surface scans that did measure methane levels above 500 ppm background levels during the original scan did not confirm the methane levels during the mandatory re-sampling period, and therefore comply with the appropriate state regulations.

10. Since the beginning of 2009, over 140 LEL measurements have been performed and only one below-grade perimeter landfill probe has recorded a LEL (Lower Explosive Limit) greater than 50% for methane. This is significant because the LEL is the percentage of methane within the air that could cause explosion and thereby a potential threat to human health and safety.

11. Based upon Shaw's review of the IEPA regulatory file on this matter, field inspections and investigations, numerous analytical and field test results, and my professional knowledge and experience, it is my professional opinion that the current conditions at the Morris Community Landfill do not constitute a present, and immediate or imminent and substantial or material threat to human health or the environment, and that conditions at the landfill can be more than adequately addressed by the routine corrective action measures called for by the state and federal regulations governing the landfill in question.

12. We are currently at work on the revised cost estimates and believe they can be completed by mid-August. However, additional work is needed in order to develop the schedule of the required work for the closure and post-closure plans. I estimate that Shaw can complete both tasks in not less than two months, or by mid-September, although three to four months would be much better for Shaw which has other conflicts.

13. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

7-22-09

Jesse P. Varsho, P.E., P.G. Date

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AFFIDAVIT OF WILLIAM J. CRAWFORD

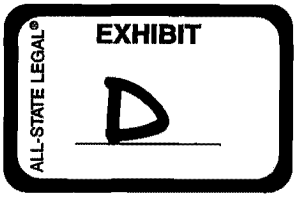
I, William J. Crawford, being first duly sworn on oath, do depose and state as follows:

1. I am a Certified Public Accountant, whose principal place of business is located at 590 West Perry Street, Coal City, Illinois.

2. My firm has been the independent auditor for the City of Morris, Illinois for the past 15 years, with the exception of the fiscal years ended April 30, 2003 and 2004. In that regard, I have audited the financial statements of the governmental activities of the City of Morris, its business activities, the status of each major fund maintained by the City, and all other aggregate fund information for the City of Morris (which information collectively comprises the City's basic financial statements). My responsibility as independent auditor is to express opinions on these financial statements based upon my audit of these records.

3. Based upon these responsibilities, I am familiar with the financial statements and financial records of the City of Morris. However, the audit for the fiscal year ending April 30, 2009, is not complete.

4. I offered testimony on behalf of the City of Morris in this regard during the course of the "remedy" hearing which was held in this matter on September 11-13, 2007. In addition, I have reviewed the Final Order issued by the Illinois Pollution Control Board in this matter on or about June 18, 2009 (and, more specifically, pages 42 and 43 of that Order), which includes financial assurance requirements imposed upon the City by the Illinois Pollution Control Board and the timeframes for posting financial assurance. I am also generally familiar with the methods of posting closure/post closure financial assurance included in Title 35, Illinois Administrative Code Part 811.700 *et seq.* for landfills such as the one which is the subject of this action.



5. During my deposition (before the hearing based upon the April 30, 2005 audit), I estimated that the amount of the government guarantee would be around $7.1 million, given the statutory formula. Later, at the 2007 hearing (based upon the April 30, 2007 audit), I estimated that the figure would be around $9.1 million. Today, however, there is a recession, and that figure is decreasing. While the audit is not complete, I would estimate that the amount that the city could guarantee based on the statutory formula is between $8.5 and $8.75 million.

6. I also testified about three funds during my 2007 testimony maintained by the City (i.e., the Sanitary Landfill Contingency Fund, the Solid Waste Tax Fund and the Garbage Fund). Some, but not all, of these funds conceivably could be used for the financial assurance. However, some of these funds must be used for garbage costs (the Garbage Fund) and for recycling costs (the Solid Waste Tax Fund). Moreover, these three funds all have significantly lower balances than were on hand at the time of my testimony in September, 2007. The figures as of April 30, 2009, are: $340,479 for the Sanitary Landfill Contingency Fund; $242,138 for the Solid Waste Tax Fund; and $402,258 for the Garbage Fund. The Garbage Fund is no longer receiving any royalties from Community Landfill Company.

7. Although the City has other funds, they have been allocated for other critical city needs or are limited based upon state statute. For example, Motor Fuel Tax Funds can only be used for approved Motor Fuel Tax projects (such as roadway construction). Use of any other funds or monies in the possession of the City to attempt to post closure/post closure financial assurance would significantly and adversely impact the City's ability to meet its ongoing operational needs.

8. In my opinion, it would be unlikely, if not impossible for the City of Morris to be able to post closure/post closure financial assurance in the amount $17,427,366 within sixty (60) days of the date of the Board's June 18, 2009 Order. This opinion is based upon: the assumption that given the current situation with the landfill, any insurance company would require the City to provide full collateralization on the bond; and the facts discussed above. As noted above, the extent to which the City is able to self guarantee financial assurance under Section 811.716 is less than the amount I testified to during the September 2007 hearing. Moreover, the three available funds I previously testified to are significantly lower than in 2007. Finally, the City has already budgeted the other funds for city operations.

9. In addition, the gross City revenues derived from sales and income tax receipts have begun to decline significantly for the first time in 15 years due to the current recession. The decrease in sales and income taxes has accelerated on a monthly basis. Comparing the month April 2008 with April 2009, there is a decrease in collections of $136,955, or 23%.

10. Even if the City were to entertain a real estate tax increase, tax revenues derived from any such increase in real estate tax rates would not begin to be received until

(at the earliest) the end of June 2010, more likely, significant increases of tax revenue monies would not be realized by the City until the third quarter of 2010.

11. In addition, the Tax Increment Finance District (TIF District) (in the funding mechanism attended thereto) which I refer to in my September 2007 testimony will terminate at the end of this year unless extended by state law (which may or may not occur). It is my understanding that this bill (I believe it is HB1628) is on the Governor's desk.

12. If the City was required to levy additional taxes, I believe this would impose a financial hardship on the City's taxpayers.

13. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Further the Affiant sayeth not.

William J. Crawford

CITY OF MORRIS

320 Wauponsee Street • Morris, Illinois 60450
Phone (815) 942-0103 • Fax (815) 942-0216

MEMORANDUM

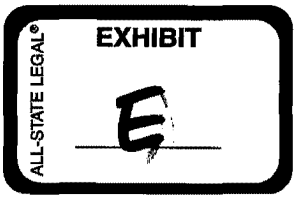
TO: **ALL CITY EMPLOYEES**

FROM: **MAYOR KOPCZICK**

DATE: **OCTOBER 7, 2002**

RE: **DUMPING AT COMMUNITY LANDFILL**

Effective immediately, there will be no more dumping of any kind by the City of Morris at the Community Landfill site on Ashley Road. This is inclusive of both sides of the road, Parcel A (east side) or Parcel B (west side).



Ken Seidler Kenneth Sereno Jeff Arnold Tom Hammons

RESOLUTION NO: R-99-6

Be it resolved by the City Council of the City of Morris, Illinois as follows:

WHEREAS, an addendum to the lease dated July 1, 1982 and as amended between the City of Morris and Community Landfill Company concerning the Morris Community Landfill has been recommended by the Finance Committee of the City of Morris; and

WHEREAS, the addendum is necessary to promote public health and safety; and

WHEREAS, the Legislature of the State of Illinois has granted municipalities the authority to enter into such agreements and/or addendums; and

WHEREAS, the addendum is necessary to protect the City of Morris as to closure and post closure care of the Morris Community Landfill; and

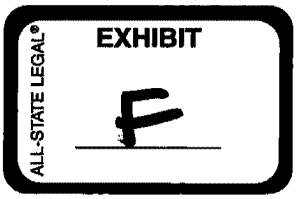
WHEREAS, the City of Morris is materially interested in the transaction in which the City of Morris will apply to the Frontier Insurance Company for a performance bond to secure its obligations for closure and post-closure care of the Morris Community Landfill; and

WHEREAS, the Frontier Insurance Company has executed or is willing to consider the execution of such bond, as surety, upon being furnished with the written indemnity of the City of Morris; and

WHEREAS, the City of Morris hereby agrees to purchase a performance bond in the amount of $10,081,630 from Frontier Insurance Company or its agent in order to insure the performance of the City of Morris' treatment of leachate and groundwater in the City of Morris publicly owned treatment facility for the post closure care period of the Morris Community Landfill; and

WHEREAS, it is necessary to authorize the Mayor to do all things and sign all documents necessary to secure said performance bond; and

WHEREAS, Community Landfill Company has agreed to pay all bond premiums of said bond.



IT IS HEREBY resolved that the Mayor and the City Clerk are hereby authorized to execute any and all documents necessary to secure said aforementioned performance bond and to enter into the addendum to the lease dated July 1, 1982 by and between the City of Morris and Community Landfill Company.

Passed this 13th day of December A.D. 1999.

7 Ayes
0 Nayes
0 Pass

Approved:

Robert T. Feeney

Mayor Robert Feeney

Attest:

John D. Enger

City Clerk/John Enger

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 July 22, 2009, she caused to be served a copy of the foregoing upon:

Mr. Christopher Grant Assistant Attorney General Environmental Bureau 69 W. Washington St., Suite 1800 Chicago, IL 60602	Mark LaRose LaRose & Bosco, Ltd. 200 N. LaSalle, Suite 2810 Chicago, IL 60601
Mr. John T. Therriault, Assistant Clerk Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601 **(via electronic filing)**	Bradley Halloran Hearing Officer Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601
Mr. Scott Belt Scott M. Belt & Associates, P.C. 105 East Main Street Suite 206 Morris, IL 60450	Clarissa Y. Cutler Attorney at Law 155 N. Michigan Ave., Suite 375 Chicago, IL 60601

__/s/ Nicola Nelson__
Nicola Nelson

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