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 **July 27, 2009**, the undersigned caused to be filed electronically before The Illinois Pollution Control Board **COMMUNITY LANDFILL CO., INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S ORDER DATED JUNE 18, 2009** 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.

/s/ Clarissa Y. Cutler
One of the Attorneys for Community Landfill Co.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois,	)	
Petitioner,	)	
-vs-	)	PCB 03-191 (Enforcement – Land)
COMMUNITY LANDFILL CO., an Illinois corporation, and the CITY OF MORRIS, an Illinois municipal corporation,	)	
Respondents.	)	

COMMUNITY LANDFILL CO., INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S ORDER DATED JUNE 18, 2009

Respondent, COMMUNITY LANDFILL CO., INC., by and through its attorneys Mark A. LaRose of LaRose & Bosco, Ltd. and Clarissa Y. Cutler, pursuant to 35 Ill.Adm. Code 101.520(a) and 101.902, hereby move the Illinois Pollution Control Board to reconsider its Order dated June 18, 2009, and in support thereof, states as follows:

I. INTRODUCTION

Community Landfill Co., Inc.'s ("CLC") Motion to Reconsider the Illinois Pollution Control Board's Order Dated June 18, 2009 is timely filed pursuant to 35 Ill.Adm. Code 101.520(a), which allows a motion for reconsideration of an order by the Illinois Pollution Control Board ("Board") to be filed 35 days after receipt of an order. In the present matter, the Order was received via registered mail by CLC on June 22, 2009. This motion is timely filed on July 27, 2009.

II. LEGAL STANDARDS

CLC moves the Board for reconsideration of its Order dated June 18, 2009 to bring the

Board's attention to errors in the Board's application of existing law. 35 Ill.Adm.Code 101.902; Citizen's Against Regional Landfill v. County Board of Whiteside County, PCB 920156, slip op. at 2 (March 11, 1993), citing Korogluyan v. Chicago Title Trust Co., 213 Ill.App.3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist 1991). A motion to reconsider may specify facts in the record which were overlooked.

CLC moves the Board for reconsideration of several rulings contained in its Order dated June 18, 2009. (See Order dated June 18, 2009, attached as Exhibit A and incorporated herein). CLC also seeks reconsideration of several issues contained in the Board's Interim Opinion and Order dated February 16, 2006. (See Order dated February 16, 2006, attached as Exhibit B and incorporated herein). However, CLC specifically reserves the right to raise on appeal to the Third District Appellate Court any and all additional issues in either Order even if not contained in the present motion.[1]

III. FACTS AND PROCEDURAL HISTORY

The underlying facts of this matter have been the subject of extensive litigation. A brief synopsis follows. With the Agency's knowledge and approval, pursuant to two significant modification permits issued to Respondents City of Morris (as owner) and CLC (as operator), 2000-155-LPM for Parcel A and 2000-156-LPM for Parcel B, respondents obtained $17,427,366 in financial assurance for closure/post-closure activities in the form of three surety bonds from

[1] The following citations will be used throughout CLC's Motion for Reconsideration: The Illinois Pollution Control Board's Order in PCB 03-191 date June 18, 2009 will be referred to as either "Exh. A at __" or "Order dated June 18, 2009 at __"; The Illinois Pollution Control Board's Interim Opinion and Order in PCB 03-191 dated February 16, 2006 will be referred to as either "Exh. B at __" or "Order dated February 16, 2006 at __"; CLC exhibits admitted at the Hearing in PCB 03-191 on September 11-12, 2007 will be referred to as "Hearing – CLC Exh. __"; CLC's Post-Hearing Brief in PCB 03-191 filed on November 30, 2007 will be referred to as "Hearing – CLC Exh. __"; CLC's exhibits filed with its Response to Complainant's Motion for Summary Judgment fled on October 3, 2005 will be referred to as "CLC Response, Exh. __"; the City of Morris' Post-Hearing Brief filed on Nov. 30, 2007 will be referred to as "City Post-Hearing Brief at __"; the Complainant's Post-Hearing Brief filed on October 19, 2007 will be referred to as "Complainant's Brief at __"; and the City of Morris' Motion for Reconsideration of the Pollution Control Board's Order of June 18, 2009 will be referred to as "City Motion for Recosideration of June 18, 2009 Order at __".

Frontier Insurance Company ("Frontier" or "surety"). (See Hearing – CLC Exhs. 15, 16 and 17). CLC is the principal for two of the bonds, nos. 158466 and 91507 which have face values of $5,906,016 and $1,439,720 respectively for a total face value of $7,345,736. The City is the principal for bond no. 158465 which has a face value of $10,081,630. Bond nos. 158466 (CLC) and 158465 (City) expired on May 31, 2005 and bond no. 91507 (CLC) expired on June 14, 2005. (See Hearing – CLC Exhs. 15, 16 and 17).

Prior to CLC's 1999 SigMod application, the closure and post-closure bond was $1.4 million. (CLC Post-Hearing Brief at 9). CLC proposed $7 million in financial assurance because the City agreed to treat the leachate and condensate from the landfill which would cost approx. $10 million. (CLC Post-Hearing Brief at 9). The Agency rejected the $7 million and requested a bond for the entire $17 million. The Agency approved the City and CLC's agreement that CLC would pay for all of the bonds and that $10 million would be in the City's name. (CLC Post-Hearing Brief at 9). The cost to CLC for the annual premiums was more than $200,000 with cash collateral of just under $200,000. (CLC Post-Hearing Brief at 9-10). The Agency reviewed the drafts of the Frontier bonds before they were issued and approved of the bonds before CLC committed to purchasing them. (CLC Post-Hearing Brief at 10). The Agency approved the bonds even though it was specifically aware that Frontier Insurance had been delisted from the U.S. Department of Treasury's Circular 570 list of approved sureties. (CLC Post-Hearing Brief at 11).

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. (CLC Post-Hearing Brief at 10). Christine Roque testified that the permit was granted in August 2000 because CLC posted adequate financial assurance. (CLC Post-Hearing Brief at

10). 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. (CLC Post-Hearing Brief at 11). Joyce Munie directed John Taylor to "find a way to accept the bonds and put the operators on the hook for $17 million in financial assurance." (CLC Post-Hearing Brief at 11). If the Agency 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. (CLC Post-Hearing Brief at 11). Instead, when the Agency approved the bonds, knowing full well that Frontier had been delisted, CLC put up the collateral and purchased the bonds for the first year premium of $208,730. (CLC Post-Hearing Brief at 11).

CLC then filed a supplemental permit application to receive approval for the construction of a separation layer and to receive authorization for the acceptance of waste for disposal in a newly constructed area and spent one year building and developing the new cell. (CLC Post-Hearing Brief at 11). 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 rejected and the permit be denied because Frontier was no longer on the 570 list. (CLC Post-Hearing Brief at 12). Harris' recommendation was accepted without question by permit manager Joyce Munie in spite of John Taylor's opinion that the bonds still conformed with the most stringent reading of the Act and the regulations as of May 2001, since: the bonds were issued when Frontier was on the 570 list; and 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. (CLC Post-Hearing Brief at 12). 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. (CLC Post-Hearing Brief at 12). If the

Frontier bonds had not been approved in August 2000, no additional financial assurance would have been tendered by CLC or the City and CLC would have been responsible for one year's premium on only $1.4 million or approximately $26,850. (CLC Post-Hearing Brief at 12).

The Board ruled that the Frontier bonds did not meet the requirements of 35 Ill.Adm.Code 811.712(b) because Frontier had been removed from the Department of the Treasury's Circular 570 list of approved sureties. Community Landfill Company and City of Morris v. Illinois Environmental Protection Agency, PCB 01-170 (Dec. 6, 2001, slip op. at 22). The Board's decision was subsequently affirmed by the Third District Appellate Court. Community Landfill Company and City of Morris v. Illinois Pollution Control Board, 331 Ill.App.3d 1056, 1061, 772 N.E. 2d 231, 235 (3rd Dist. 2002) (*modified upon denial of rehearing)*, 2002). CLC filed a petition for leave to appeal to the Illinois Supreme Court, which was denied. On April 17, 2003, Complainant filed a one-count complaint in the Illinois Pollution Control Board against the City of Morris and CLC in the present matter alleging a failure to provide adequate financial assurance.

On March 20, 2003, one month before the complaint in the present matter was filed, CLC asked Frontier about continuing payments for premiums on the bonds that the Third District Appellate Court had determined were insufficient to allow the landfill to continue operations. (See Hearing – CLC Exh. 4). On April 7, 2003, Scott Azzolini, Surety Underwriting Manager for Frontier responded "...we concur with your conclusion that no further premium billings are warranted on these bonds as the permit application was denied on May 21, 2001. As such, we are reversing all renewal billings for the above referenced bids and closing our file based on the May 11, 2001 date." (See Hearing – CLC Exh. 5).

On June 19, 2003, CLC formally requested that Frontier release its collateral. (See

Hearing – CLC Exh. 8). On July 2, 2003, Frontier requested that the Agency execute a release so that the collateral could be properly returned to CLC. (See Hearing – CLC Exh. 9). On August 21, 2003, the Agency refused to do so on the grounds that alternate financial assurance had not been received. (See Hearing – CLC Exh. 11). On December 18, 2003, CLC again made a demand for the return of its collateral. (CLC Response, Exh. J) and has continued to do so. Frontier's position has not changed; it has assured CLC that it will return the collateral upon receipt of a release from the Agency. (See CLC Response, Exh. K).

On January 27, 2004, almost one year after the Agency filed its complaint against respondents alleging inadequate financial assurance, Agency employee Beverly Anderson **specifically stated in writing** that "Morris Community Landfill is providing financial assurance for closure and post-closure costs through three Frontier Performance bonds …" (See Hearing – CLC Exh. 12). On January 29, 2004, Frontier acknowledged that the Agency had "specifically indicated that these bonds are still in force" and warranted that premiums be billed. (See CLC Response, Exh. M).

Finally, on May 27, 2005, then director of the Illinois Environmental Protection Agency, Renee Cipriano, made a demand on Frontier for bond nos. 158466 and 91507, the bonds for which CLC is the principal, for a total of $7,345,736.00. (See CLC Response, Exh. N). The Agency argued that even though the Frontier bonds did not meet the requirements of the Board regulations to allow the landfill to operate, the bonds were still valid and the Agency had every right to collect on them. (See CLC Response, Exh. N, p.6)

On July 21, 2005, nearly two months after it made its claim against Frontier, the State filed a motion for summary judgment arguing that there was no genuine issue of material fact that respondents had not posted adequate financial assurance. The Agency did not inform the

Board that it had made a claim on those very same bonds that it fought so long and hard to keep from being accepted.

On February 16, 2006, the Board issued an Interim Opinion and Order wherein it granted the Complainant's Motion for Summary Judgment on the issue of liability. The Board sent the matter for hearing on the specific issue of "remedy" including penalty, costs and attorneys fees if appropriate. (See Exh. B at 16). CLC timely filed a Motion for Reconsideration on March 31, 2006 which was denied by the Board on June 1, 2006. The matter proceeded to hearing on "remedy" on September 11-12, 2007. The Complainant's post-hearing brief was filed on October 19, 2007 and CLC's post-hearing brief was filed on November 30, 2007. On June 18, 2009, the Board issued an Opinion and Order from CLC now seeks reconsideration.

IV. ARGUMENT

A. THE "AFFIRMATIVE" RELIEF ORDERED BY THE BOARD IS IMPROPER

Respectfully, the Board has improperly ordered "affirmative" relief which is not available to the State under Section 33 of the Environmental Protection Act (the "Act"). "Affirmative" relief is only proper if the State seeks injunctive relief in the circuit court.

Pursuant to Section 33(c) of the Act, the Board may direct a respondent to cease and desist from violations of the Act and/or the Board may impose civil penalties in accord with Section 42 of the Act. 415 ILCS 5/33. On the other hand, Section 43 of the Environmental Protection Act provides that the Attorney General may institute a civil action for an immediate injunction to halt any discharge or other activity causing or contributing to the danger or to require such other action as may be necessary (emphasis added). 415 ILCS 5/43.

When the language of the statute is clear and unambiguous, it will be given effect without resort to other tools of construction. People ex rel. Ryan and Douglas v. IBP, Inc., 309 Ill.App

3d 631, 636, 723 N.E.2d 370, 374 (3rd Dist. 1999). No language is present in Section 33 that authorizes the "affirmative" relief sought by the State and ordered by the Board, including requiring respondents to post financial assurance, submit revised cost estimates, or order that no additional waste can be accepted . 415 ILCS 5/33; Exh. A at 35. Those specific acts could be ordered by the circuit court if the State had proceeded successfully under Section 43 and sought injunctive relief against CLC and the City of Morris. However, because the State did not proceed under Section 43 of the Act, and instead proceeded against the respondents under Sections 33 and 42 of the Act, the Board is limited to directing respondents to cease and desist from violations of the Act and to imposing civil penalties. Therefore, on reconsideration, the Board should vacate the "affirmative" relief it granted including requiring the posting of financial assurance in the amount of $17,427,366, submitting revised cost estimates, updating financial assurance, and ordering that no additional waste can be accepted, and hold that all of the above is improper under Sections 33 and 42 of the Act.

B. ALTERNATIVELY, IF THE BOARD DOES NOT RECONSIDER ITS AUTHORITY TO ORDER "AFFIRMATIVE" RELIEF, IT SHOULD RECONSIDER ITS FINANCIAL ASSURANCE RULINGS

If the Board does not reconsider and vacate its order of "affirmative " relief, it should reconsider the scheduling of submitting financial assurance and cost estimates and/or the amount of financial assurance to be posted.

1. Alternatively, he Board should reconsider the scheduling of submitting financial assurance and cost estimates

If the Board declines to reconsider its ruling and hold that it improperly ordered "affirmative" relief as set forth above, CLC respectfully requests that the June 18, 2009 Order be modified to first require a determination of the updated cost estimates prior to the posting of financial assurance. The cost estimates for closure and post-closure are 9 years old and there is

evidence in the record that the figures should currently be as low as $7 million. As has been set forth in detail by the City in its motion for reconsideration, the Board should first require the submission of updated cost estimates. The Board should then direct the Agency to review any and all updated cost estimates and determine the appropriate updated amount and that CLC (and the City) be allowed to post financial assurance according to the approved revised cost estimates. (See City Motion for Reconsideration of June 18, 2009 Order at 1-2 and 13-19). Without repeating the City's arguments, CLC hereby joins in those portions of the City's brief requesting reconsideration of the timing of submitting financial assurance and cost estimates. (Id. At 12-18).

C. THE BOARD'S MISAPPLICATION OF THE LAW UNDER SECTIONS 33(c) AND 42(h) OF THE ACT RENDERS THE PENALTY AGAINST CLC IMPROPER

As stated in the Board's June 18, 2009 Order, "[i]n fashioning all of its orders, the Board must consider the factors of Section 33(c) of the Act. If the Board determines a penalty is appropriate (under 33(c)), the Board must also consider the factors of Section 42(h) of the Act." (Exh. A at 32). However, respectfully, the Board misapplied several factors of both Section 33(c) and Section 42(h) as set forth below.

1. The Board Misapplied the Law under Section 33(c)(iv) of the Act

Under Section 33(c) (iv) of the Act, the Board is to consider the technical practicability and economic reasonableness of reducing or elimination the emissions, discharges or deposits resulting from such pollution source. 415 ILCS 5/33(c)(iv). However, the Board appears to have dismissed without consideration CLC's factually supported arguments that compliance by CLC was not practicable or reasonable due to the Agency's acts of (a) first approving and then later disapproving the Frontier bonds, (b) failing to grant permits based on

the Agency's reversal of position on the Frontier bonds, and (c) failing to authorize a refund to CLC of the collateral for the Frontier bonds and a refund for the premiums paid to Frontier by CLC. Instead, the Board erroneously ruled that "...the economic reasonableness and technical feasibility of the Illinois landfill permitting and financial assurance system was established during the rulemaking process." (Exh. A at 34). However, it is not the reasonableness and feasibility of the landfill permitting and financial assurance system that is to be considered under Section 33(c)(iv) – rather, it is what is technically practicable and economically reasonable **in regard to CLC** which should be considered by the Board. The Board ignored Edward Pruim's testimony that CLC investigated the possibility of obtaining substitute financial assurance. (CLC's Post-Hearing Brief at 13). CLC asked the broker who had worked with it on the Frontier bonds to exhaust all available avenues of financial assurance that CLC could possibly afford. (CLC's Post-Hearing Brief at 13). 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. (CLC's Post-Hearing Brief at 13). In other words, in order to obtain a $17 million bond, CLC would have had to post approximately $14-15 million in cash. (CLC's Post-Hearing Brief at 13). Funds available to CLC were nothing like that. (CLC's Post-Hearing Brief at 13). The company was not generating any income to be able to afford a bond for that amount. (CLC's Post-Hearing Brief at 13). CLC was informed that the only way it could be done was through a bond for which CLC did not have collateral. (CLC's Post-Hearing Brief at 13). 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.

The foregoing clearly shows that CLC set forth that obtaining substitute financial assurance was not technically practicable or economically reasonable. Respectfully, the Board ignored these arguments. On reconsideration, the Board should determine that this factor weighs in favor of CLC and determine that a civil penalty is not justified. Alternatively, the Board should determine that the penalty ordered against CLC should be significantly reduced in light of the clear factors in mitigation set forth above.

2. The Board Failed to Consider CLC's Diligence in Seeking Financial Assurance as a Mitigating Factor Under Section 42(h)(2) of the Act.

The Board's Order dated June 18, 2009 ignores more than five (5) pages in CLC's Post-Hearing Brief wherein it sets forth detailed facts describing its efforts to obtain financial assurance. (CLC Post-Hearing Brief at 9-14). The Board's Order does not mention any of CLC's arguments and appears to have not considered them at all as mitigating factors. (Exh. A at 37). Without completely restating the five (5) pages of facts and testimony ignored by the Board in CLC's Post-Hearing brief, some of the highlights include:

- CLC was diligent in its efforts to comply with the financial assurance requirements (CLC Post-Hearing Brief at 9)
- Prior to CLC's 1999 SigMod application, the closure and post-closure bond was $1.4 million (CLC Post-Hearing Brief at 9)
- CLC proposed $7 million in financial assurance because the City agreed to treat the leachate and condensate from the landfill which would cost approx. $10 million (CLC Post-Hearing Brief at 9).
- The Agency rejected the $7 million and requested a bond for the entire $7 million. The Agency approved the City and CLC's agreement that CLC would pay for all of the bonds and that $7 million would be in the City's name. (CLC Post-Hearing Brief at 9)
- The cost to CLC for the annual premiums was more than $200,000 with collateral of just under $200,000. (CLC Post-Hearing Brief at 9-10).

- The Agency reviewed the drafts of the Frontier bonds before they were issued and approved of the bonds before CLC committed to purchasing them. (CLC Post-Hearing Brief at 10).

- 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. (CLC Post-Hearing Brief at 10).

- Christine Roque testified that the permit was granted in August 2000 because CLC posted adequate financial assurance. (CLC Post-Hearing Brief at 10).

- 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. (CLC Post-Hearing Brief at 11).

- Joyce Munie directed John Taylor to "find a way to accept the bonds and put the operators on the hook for $17 million in financial assurance." (CLC Post-Hearing Brief at 11).

- If the Agency 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. (CLC Post-Hearing Brief at 11).

- Instead, when the Agency approved the bonds, CLC put up the collateral and purchased the bonds for the first year premium of $208,730. (CLC Post-Hearing Brief at 11).

- CLC then filed a supplemental permit application to receive approval for the construction of a separation layer and to receive authorization for the acceptance of waste for disposal in a newly constructed area and spent one year building and developing the new cell. (CLC Post-Hearing Brief at 11)

- 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. (CLC Post-Hearing Brief at 12)

- Harris' recommendation was accepted without question by permit manager Joyce Munie in spite of John Taylor's opinion that the bonds still conformed with the most stringent reading of the Act and the regulations as of May 2001 since:

    - The bonds were issued when Frontier was on the 570 list; and

    - 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.

(CLC Post-Hearing Brief at 12).

- 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. (CLC Post-Hearing Brief at 12).

- If the Frontier bonds had not been approved in August 2000, no additional financial assurance would have been tendered by CLC or the City and CLC would have been responsible for one year's premium on only $1.4 million or approximately $26,850. (CLC Post-Hearing Brief at 12).

- Because the permit was denied, CLC was unable to accept waste, a situation which "would certainly eventually shut the facility down". (CLC Post-Hearing Brief at 12)

- Nevertheless, during the permit appeal process, CLC paid its second year premium of $217,842. By this time, CLC had paid more than $600,000 in cash for collateral and premiums while the Agency took the position that the bonds were not compliant and CLC could not operate the landfill. (CLC Post-Hearing Brief at 12).

- In good faith, CLC attempted to obtain substitute financial assurance by directing its broker to exhaust all available avenues of financial assurance that CLC could possibly afford. (CLC Post-Hearing Brief at 13).

- Due to the lapse in time, the collateral required to obtain a $17 million bond would be 70-80% of the bond value or approximately $14-15 million in cash, which was impossible for CLC to post since it was not generating any income. (CLC Post-Hearing Brief at 13).

Clearly, CLC was diligent in its good faith efforts to obtain financial assurance, which should be considered a factor in mitigation. On reconsideration, the Board should determine that this factor weighs in favor of CLC and determine that a civil penalty is not justified. Alternatively, the Board should determine that the penalty ordered against CLC should be significantly reduced in light of the clear factors in mitigation set forth above.

3. The Board Failed to Sufficiently Consider the Complete Lack of Any Economic Benefit to CLC Due to Delayed Compliance as a Mitigating Factor under Section 42(h)(3) of the Act

The Board failed to recognize that CLC realized absolutely no economic benefit due to any delayed compliance. As set forth below, the Board ignored Agency employee Blake Harris'

testimony that the Frontier bonds were valid through 2006 resulting in no economic benefit to CLC. In addition, the Board ignored that CLC's inability to accept waste has resulted in no economic benefit to CLC.

a. The Board ignored Blake Harris' testimony that the Frontier bonds were valid through 2006 resulting in no economic benefit to CLC

The Board ignored Blake Harris' testimony that the Frontier bonds were valid through 2006. (CLC Post-Hearing Brief at 14). The Board only commented vaguely that the City "suggests" that the non-compliance period should run from January 1, 2007 through September 11, 2007. (See Exh. A at 38). However, Blake Harris' testimony is clearly not a mere "suggestion": he testified in no uncertain terms that the bonds were valid through 2005 at a minimum and 2006 with an automatic one-year extension. (CLC Post-Hearing Brief at 14). Harris further testified that he agreed with Agency employee Beverly Anderson's position in January 2004 that Frontier was providing financial assurance. (CLC Post-Hearing Brief at 14). The Board should not ignore this plain and clear testimony.

The Board ruled that the appropriate measure of civil penalty against CLC is the amount of money CLC saved by not paying premiums for the non-compliant Frontier bonds less the amount of premiums paid. (See Exh. A at 40). The Board acknowledged that CLC is entitled to a credit in the amount of $426,531.00 for premiums paid in 2000-2001. (See Exh. A at 38). The Board completely ignored that applying Agency employee Harris' testimony to the State's own proposed penalty produces a radically different result: $596.83 per day for the time period January 1, 2007 – September 11, 2007 = $151,594.82. (City Post-Hearing Brief at 29). This is significantly less than the amount of $426,531.00 which the Board acknowledges should be credited to CLC. (See Exh. A at 38). The Board ignored that under this calculation, there is NO economic benefit to CLC.

The Board should reconsider the testimony of Blake Harris as set forth above and rule that CLC received no economic benefit due to any delayed compliance under Section 42(h)(3) of the Act. On reconsideration, the Board should determine that this factor weighs in favor of CLC and determine that a civil penalty is not justified. Alternatively, the Board should determine that the penalty ordered against CLC should be significantly reduced in light of the clear factors in mitigation set forth above.

b. The Board Ignored that CLC's Inability to Accept Waste has Resulted in No Economic Benefit to CLC

The Board ignored in its June 18, 2009 Order that CLC's inability to accept waste has resulted in no economic benefit to CLC. The Board ignored that CLC's ability to generate adequate revenue to pay ANY bond premiums was terminated when the Frontier bonds were determined to be non-compliant and the operating permit was denied. (CLC Post-Hearing Brief at 18). The Board ignored Agency employee Mark Retzlaff's testimony 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." (CLC Post-Hearing Brief at 18).

This evidence is not simply "CLC's cries of current poverty" as the Board erroneously suggests. (See Exh. A at 40). On reconsideration, the Board should determine that this factor weighs in favor of CLC and determine that a civil penalty is not justified. Alternatively, the Board should determine that the penalty ordered against CLC should be significantly reduced in light of the clear factors in mitigation set forth above.

4. If any Monetary Penalty is Imposed, the Agency is Precluded from Making a Claim on the Frontier Bonds

As argued by CLC in its Response to Complainant's Motion for Summary Judgment, any monetary penalty imposed by the Agency must be used to enforce the Act, not merely punish a

party. Harris-Hub Co., Inc. v. Illinois Pollution Control Board., 50 Ill.App.3d 608, 611 (1st Dist. 1977). If the Board takes the Agency's position that respondents have not posted adequate financial assurance and assesses a penalty, it cannot permit the Agency to simultaneously make a claim for and collect on the bonds. The Agency would impermissibly be allowed to recover twice from the same allegation, in contravention of the law as set forth above. Id.

E. IN ITS FEBRUARY 16, 2006 INTERIM OPINION AND ORDER, THE BOARD ERRONEOUSLY RULED THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT THAT ADEQUATE FINANCIAL ASSURANCE WAS POSTED AND ERRONEOUSLY APPLIED OFFENSIVE COLLATERAL ESTOPPEL

CLC seeks to preserve these issues for appeal even if it is determined that they have been previously ruled upon. Garibaldi v. Applebaum, 194 Ill.2d 438, 447-48, 742 N.E.2d 279, 283-84 (2000).

1. The Board Erroneonsly Ruled that there No Genuine Issues of Material Fact that Adequate Financial Assurance was Posted

The Board ruled that it is "undisputed" that neither Morris nor CLC have provided adequate financial assurance. (February 16, 2006 Order at 15). However, the Board failed to consider any of CLC's arguments concerning the Agency's claims against the Frontier bonds – the very same bonds that the Agency claims were inadequate. The Agency concealed its bond claims from the Board. (CLC Response to Motion for Summary Judgment at 6-8). The Agency's own act of making a claim against Frontier for $7,345,736, should preclude it from maintaining that financial assurance is not in place. If the Agency's claim is paid by Frontier, the Agency would be receiving the very financial assurance it claims has not been provided. (CLC Response at 6). Similarly, the Board failed to consider that on January 27, 2004, Agency employee Beverly Anderson, who was an accountant for the Bureau of Land Compliance Unit, admitted in a letter to Frontier that the landfill **"is providing financial assurance** for closure and post-

closure care." (CLC Response at 6, Exh. L (emphasis added). This admission alone should have precluded summary judgment on the issue of whether adequate financial assurance was in place.

2. The Board Erroneously Applied Offensive Collateral Estoppel and Determined that Any Issues Regarding the Frontier Bonds Have Been Resolved

In its February 16, 2006 Interim Opinion and Order, the Board determined that "offensive collateral estoppels applies" without further explanation and ruled that "...the respondents' noncompliance with financial assurance requirements, the same as alleged in this enforcement matter, has already been resolved", referring to Community Landfill, PCB 01-170. However, it is clear that many issues regarding the Frontier bonds have NOT been resolved. Clearly, at issue in this case at a minimum is whether the bonds were in force through the end of 2006 as testified to in September 2007 by the Agency's own employee, Blake Harris. (CLC Post-Hearing Brief at 14). Blake Harris's testimony was not available to the Board in 2006 when it found against respondents on liability and granted summary judgment in favor of complainant. Similarly, Blake Harris' agreement with Agency employee Beverly Johnson's position in January 2004 that Frontier was providing financial assurance was not available to the Board in 2006. In addition, still at issue as set forth above is whether the Agency can make a claim against the Frontier bonds when at the same time denying the bonds constitute adequate financial assurance. Clearly, numerous issues regarding the Frontier bonds are NOT resolved. Any application of "offensive collateral estoppel" is erronerous.

V. CONCLUSION

Based on the foregoing, CLC respectfully requests that the Illinois Pollution Control Board GRANT its Motion for Reconsideration and revise its June 18, 2009 and February 16, 2006 Orders as follows:

A. In regard to its June 18, 2009 Order:

1. Order that a civil penalty against CLC in the amount of $1,059,534.70 is vacated as not justified based on the clear factors in mitigation pursuant to Sections 33(c) and 42(h) of the Act as set forth above;

2. Order that the "affirmative" relief requiring CLC and the City, jointly and severally to post financial assurance in the amount of $17,427,366 and submit revised cost estimates and updating financial assurance is vacated as not justified under Section 33 of the Act;

3. Alternatively, order that the timing of submitting cost estimates and financial assurance should be revised;

4. Order that if any monetary penalty is imposed, the Agency is precluded from making a claim on the Frontier bonds

B. In regard to its February 16, 2006 Order:

5. Order that Board mistakenly ruled that there were no genuine issues of material fact that adequate financial assurance was posted; and

6. Order that the Board erroneously applied offensive collateral estoppel to determine that any issues regarding the Frontier bonds have been resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Clarissa Y. Cutler, an attorney, hereby certify that I caused to be served a copy of the foregoing **COMMUNITY LANDFILL CO., INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S ORDER DATED JUNE 18, 2009,** by electronically filing and by placing the same in the United States Mail, first-class postage prepaid, this 27th day of July 2009, addressed as follows:

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ILLINOIS POLLUTION CONTROL BOARD
June 18, 2009

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 03-191
	)	(Enforcement - Land)
COMMUNITY LANDFILL COMPANY, INC. and the CITY OF MORRIS,	)	
	)	
	)	
Respondents.	)	

CHRISTOPHER GRANT AND JENNIFER A. TOMAS, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF THE PEOPLE OF THE STATE OF ILLINOIS;

MICHAEL S. ROUBITCHEK APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY;

CLARISSA C. GRAYSON, LAROSE & BOSCO, LTD. APPEARED ON BEHALF OF COMMUNITY LANDFILL COMPANY, INC.; AND

RICHARD S. PORTER, HINSHAW & CULBERTSON LLP AND SCOTT M. BELT, SCOTT M. BELT & ASSOCIATES, P.C. APPEARED ON BEHALF OF THE CITY OF MORRIS.

OPINION AND ORDER OF THE BOARD (by S.D. Lin):

SUMMARY OF TODAY'S DECISION

In this final opinion and order, the Board assesses penalties against two respondents for violations of the Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (2006) and the Board's rules requiring the posting of financial assurance for the proper closure and post-closure care of a landfill.

On April 17, 2003, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a one-count complaint against Community Landfill Company, Inc. and the City of Morris (respondents) alleging failure to provide adequate financial assurance for closure and post-closure operations. Site permits for the Morris Community Landfill (Landfill), issued by the Illinois Environmental Protection Agency (IEPA or Agency), list Community Landfill Company, Inc. (CLC) as the operator, and the City of Morris (City or Morris) as the owner. The Landfill is a special waste and municipal solid waste landfill located at 1501 Ashley Road, in Morris, Grundy County.

This case involves one continuing violation, which began in 2000, of the Act's financial assurance requirement and two violations of corresponding Board regulations. Section 21(d)(2)

EXHIBIT A

of the Act prohibits any person from conducting a waste disposal operation in violation of any Board regulations. *See* 415 ILCS 5/21(d)(2) (2006). The Board regulations at issue are: (1) the requirement for any person conducting any disposal operations to comply with the financial assurance requirements (35 Ill. Adm. Code 811.700(f)); and (2) that any surety bonds provided must be issued by a surety company approved by the U.S. Department of Treasury as an acceptable surety in its list of acceptable sureties, known as the "Circular 570" (35 Ill. Adm. Code 712(b)).

On February 16, 2006, the Board issued an interim opinion and order in this case granting summary judgment in favor of the complainant. People of the State of Illinois v. Community Landfill Company, Inc. and City of Morris, PCB 03-191 (Feb. 16, 2006) (interim order). The Board remarked that

> The purpose of financial assurance is to provide a guarantee to the State that funds will be available in the event a landfill owner or operator fails to perform needed closure and post closure or to address any other environmental problems that may occur during and after the operating life of the landfill. People v. ESG Watts, Inc., PCB 96-233, slip op. at 11 (Apr. 16, 1998); citing 35 Ill. Adm. Code 807.603. Inadequate financial assurance could cause the State, at taxpayer expense, to clean up or even close a facility. *See* People v. ESG Watts, Inc., PCB 96-237 (Feb. 19, 1998). The Board finds the alleged violations of Section 21(d)(2) of the Act and Sections 811.700(f) and 811.712(b) of the Board's regulations, and grants the [People]'s motion for summary judgment. Accordingly, Morris' counter-motion for summary judgment is denied.

The Board affirmed its order on reconsideration June 1, 2006. People of the State of Illinois v. Community Landfill Company, Inc. and City of Morris, PCB 03-191 (June 1, 2006) (reconsideration granted, order affirmed).

The Board held a hearing on the issues of appropriate remedy on September 11-13, 2006, and in this final ruling the Board considers the parties' evidence and argument as presented at hearing and discussed in their briefs.

The People request the Board to assess a civil penalty of over $1.06 million against CLC, and nearly $400,000 against the City. The People also requested that the respondents be ordered, jointly and severally, within 60 days to: update closure estimates, post financial assurance, and to initiate closure of Parcel B of the landfill. While the People had initially requested recovery of its attorney fees and costs, the People now waive them, requesting the Board to take notice of the waiver in its evaluation of costs of any remedy.

Both respondents continue to contest the finding of liability. Each argues that, even if found in violation of the Act, no penalty should be imposed. CLC argues that it has no funds to pay a penalty as it no longer has a permit to operate the landfill and to generate revenue. The City argues that no penalty is appropriate since it never operated the landfill for which CLC was contractually obligated to provide financial assurance, enjoyed no economic benefit from any non-compliance, could have at any time given a "local government guarantee" of financial

assurance at no cost if asked, has already expended municipal funds to correct landfill problems, and anticipates expenditure of more.

Under all of these circumstances and in light of the factors of Section 33(c) of the Act, 415 ILCS 5/33(c) (2006), the Board finds that the appropriate remedy includes the following directions to respondents:

On or before August 17, 2009, respondents CLC and the City must, jointly and severally

- post financial assurance in the amount of $17,427,366.00 using any combination of financial assurance mechanisms acceptable to the IEPA under the Board's rules;
- submit revised cost estimates, and update financial assurance in accordance with approved revised estimates; and
- cease and desist from accepting any additional waste at the site, and from committing any other violations of the Landfill's permits, the Act, and Board regulations.

After considering the factors of Section 42(h) of the Act, the Board imposes a civil penalty against each respondent "at least as great as the economic benefits . . . accrued by the respondent as a result of the violation . . . unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship". 415 ILCS 5/42(h) (2006).

- Respondent CLC must pay a civil penalty of $1,059,534.70 (calculated by the People as $1,486,106.70 with reference to the costs avoided for financial assurance premiums, less $426,572.00) in premiums paid).
- The Board declines to make both respondents jointly and severally liable for payment of the $1.06 million dollar penalty, finding that to do so would impose an arbitrary or unreasonable hardship on the City's taxpayers.
- The City itself must pay a civil penalty amounting to the dumping royalties or tipping fees it received from 2001-2005, amounting to $399,308.98.

Finally, the Board does not order immediate closure of the portion of the Landfill known as Parcel B. The record in this case does not support such relief.

FACTUAL BACKGROUND AS FOUND IN FEBRUARY 16, 2006 BOARD INTERIM ORDER

The Board set forth the pertinent facts establishing both respondents' liability in this case in its February 16, 2006 opinion and order, which the Board incorporates by reference herein as if fully set forth. People of the State of Illinois v. Community Landfill Company, Inc. and City of Morris, PCB 03-191 (Feb. 16, 2006). The Board will repeat here only enough of those facts to aid the reader's comprehension of the relief discussion at hearing:

> The Morris Community Landfill is approximately 119 acres in area, and is divided into two parcels, designated parcel "A," consisting of approximately 55 acres, and parcel "B," consisting of approximately 64 acres. CLC operates the Morris Community Landfill and manages the day-to-day operations of both parcels at that site. [The City owns the

property on which the Landfill is located.] The respondents have arranged for and supervised the deposit of waste, including municipal solid waste, garbage, and special waste, into waste cells at the Morris Community Landfill since at least June 1, 2000 on parcels "A" and "B" of the landfill.

The Agency issued Significant Modification (SigMod) Permit Numbers 2000-155-LFM, covering Parcel A, and 2000-156-LFM, covering Parcel B, on August 4, 2000. Comp. at 3. On June 29, 2001, the Agency issued Permit Modification Number 2 for parcels A and B. On January 8, 2002, the Agency issued Permit Modification Number 3 for Parcel A. *Id.* The SigMod permits were issued to Morris, as owner, and CLC as operator. Pursuant to these permits, the respondents were to provide a total of $17,427,366 in financial assurance, beginning in 2000. *See* Mot. Exh. A, p. 45, par. 6; Mot. Exh. B, p. 33, par. 6; CLC and Morris v. IEPA, PCB 01-48, 49 (cons.), slip op. at 29 (Apr. 5, 2001). The respondents provided the Agency financial assurance of closure and post closure costs by way of three separate performance bonds underwritten by The Frontier Insurance Company. Comp. at 3; Mot., Exh. C. On June 1, 2000, the United States Treasury Department removed Frontier Insurance Company from the list of acceptable surety companies listed in the United States Department of Treasury publication "Circular 570." Comp. at 3. People of The State of Illinois v. Community Landfill Company, Inc. and City of Morris, PCB 03-191, slip op. at 2-3 (Feb. 16, 2006).

The Board stated that the issue in the case is what activities constitute "conducting a landfill" within the meaning of 415 ILCS 5/21(d)(2) and 35 Ill. Adm. Code 811.700(f). *Id.* at 13. The Board explained:

> In looking at the facts of the case and considering what is anticipated by the Act and Board regulations to be the behavior of an operator conducting a waste disposal operation, the Board finds both parties responsible for operating the site and, therefore, conducting the waste disposal operation that is Morris Community Landfill. While there must be at least one site operator, the Act does not prohibit more than one party from operating a site. In this case, the Board finds that both parties participated in the operations.
>
> While Morris may not actively conduct the day-to-day operations at the landfill, Morris also does not "passively own land upon which waste disposal operations are (or have been) conducted." Morris Resp. at 7. Morris financed the operation, litigated in conjunction with CLC, as well as profited from and treated the leachate from the Morris Community Landfill. While these activities alone may not constitute "operating" a waste disposal site, Morris also had discretion regarding the decisions at the site and took responsibility for some of the ancillary site operations such as the treatment of leachate from the landfill. The Board finds that the grand sum of Morris' conduct rises to the level of "operation" as anticipated by the Board in using that term in Section 811.700(f). People of The

State of Illinois v. Community Landfill Company, Inc. and City of Morris, PCB 03-191, slip op at 14 (Feb. 16, 2006).

The Board then found that neither Morris nor CLC have provided adequate financial assurance as described in the Board's rules. *Id.*

The Board went on to observe that the issue of whether the Frontier bonds complied with Board regulations was previously adjudicated and resolved in a permit appeal involving the same parties before the Board. People v. CLC and Morris, PCB 03-191 (Oct. 16, 2003); referring to Community Landfill Co. v. IEPA, PCB 01-170 (Dec. 6, 2001), affd. Community Landfill Co. v. PCB, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002), *pet. for leave to appeal den.*, 202 Ill. 2d 600; 787 N.E.2d 155 (2002).[1] In its summary judgment order in the instant case, the Board reiterated that the legal doctrine of "offensive collateral estoppels" applied to bar relitigation of the issue here. *Id.* at 14-15.

The Board concluded its order by directing the parties to hearing on the specific issue or remedy only, directing them to provide specific figures and justifications for any proposed penalty. As previously stated, the Board affirmed its order on reconsideration June 1, 2006. People v. Community Landfill Company, Inc. and City of Morris, PCB 03-191 (June 1, 2006).

OVERVIEW OF ISSUES AND EVIDENCE PRESENTED AT HEARING AND IN POST-HEARING FILINGS

Hearing was held in Morris by Board Hearing Officer Bradley C. Halloran. The hearing was opened on September 10, but testimony was presented only on September 11 and 12, 2007.[2]

Complainant's Presentation

[1]PCB 01-170 involved denial of a supplemental permit application addressing construction of the separation layer for Parcel A, an application made on November 27, 2000 pursuant to the August 4, 2000 SigMod permits. By letter dated May 11, 2001, the Agency denied the supplemental permit application. The Agency denied petitioners' permit application on two grounds: (1) the financial assurance documents submitted by petitioners did not comply with the requirements of 35 Ill. Adm. Code 811.712(b); and (2) Robert J. Pruim's felony conviction, pursuant to Section 39(i) of the Environmental Protection Act (415 ILCS 5/39(i) (2006)). In PCB 01-170 CLC and the City jointly litigated only the first issue. The Board found that the permit denial was proper. Respondents appealed that ruling to the Third District Appellate Court, which affirmed the Board and IEPA interpretation of the Board's financial assurance rule. Community Landfill Co. v. PCB, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002), *pet. for leave to appeal den.*, 202 Ill. 2d 600; 787 N.E.2d 155 (2002).

[2] The transcripts for each day of hearing begin with 'page 1'. Citations to the transcript will therefore be made date specific, *e.g.* 9/11/07 Tr. at __.

On September 11, 2007, the People presented testimony of four witnesses:

Mark Retzlaff, Inspector, IEPA Bureau of Land, Des Plaines, Illinois (primary inspector for Morris Landfill regarding observations at various site inspections);

Blake Harris, Accountant, IEPA Bureau of Air (formerly of the Bureau of Land). Springfield, Illinois (environmental protection specialist regarding some aspects of financial assurance instruments tendered for Morris Landfill by CLC and City);

Brian White, IEPA Bureau of Land Compliance Unit Manager, Springfield, Illinois (testimony concerning operation of financial assurance rules, bond claim process regarding Frontier bonds, "local guarantee" process); and

Christine Roque, Permit Engineer, IEPA Bureau of Land, Springfield, Illinois (environmental protection engineer concerning the most current (August 2000 SigMod) permits and requirements, subsequent submissions by respondents).

The People had admitted into evidence its Group Exhibit A, consisting of Exhibits 1-14. The People also made an offer of proof as to the details of a possible settlement of a bond claim made by IEPA to Frontier (9/11/07 Tr. at 187-188); this possible settlement was the subject of a motion which will be dealt with in more detail along with other "Preliminary Matters", *infra*, at p. 19-22.

The Retzlaff Testimony

IEPA inspector Mark Retzlaff stated that he was the primary inspector for the Morris Landfill, having inspected it some 18 times between 2000 and 2007. 9/11/07 Tr. at 45, 53. Among other things, he testified concerning his inspection of Parcel A of the Landfill on June 26, 2007 and of Parcels A & B on August 29, 2007, and sponsored exhibits consisting of his inspection reports and photographs taken on the site. 9/11/07 Tr. at 55-111 and Comp. Gr. Exh. A, Exh. 7-8. Generally, Mr. Retzlaff described the condition of the Landfill as "deteriorating".

During his June and August 2007 inspections, Mr. Retzlaff's discovered cover erosion in several locations (9/11/07 Tr. at 68-69), landfill gas escaping to the atmosphere (9/11/07 Tr. at 63, 68, 71), leachate escaping from the waste disposal area (9/11/07 Tr. at 63-4, 74), and uncovered refuse. 9/11/07 Tr. at 58, 60,-67, 72, 73; *see also*, photographs included in People's Group Exhibit 1, Comp. Gr. Exh. A, Exh. 7-8. Mr. Retzlaff testified that the photos showed evidence of recent and ongoing waste disposal at the site, despite the Landfill's lack of permits to accept waste. 9/11/07 Tr. 60-61, 65-67.

The Harris Testimony

IEPA Accountant Blake Harris testified he worked with financial assurance issues in the IEPA Bureau of Land from February 1999 through December of 2003 and that he testified in the PCB 01-170 permit appeal proceeding. 9/11/07 Tr. at 116-17. Mr. Harris was involved with review and evaluation of the Landfill's Frontier Insurance Company Bonds in 2000, and stated

that the annual bond premium, as shown on the face of each of the three bonds, amounted to two percent (2%) of the face value of the Frontier Bonds. 9/11/07 Tr. at 125. Mr. Harris stated that Frontier was delisted from federal Circular 570 June 1, 2000, and that 30 other landfills in Illinois were using Frontier Insurance Company surety bonds for financial assurance. All of these landfills were sent notices of violation. 9/11/07 Tr. at 125. These violation notices, sent in October-November 2000, advised that the Frontier bonds had become noncompliant, and requested that substitute financial assurance be provided. 9/11/07 Tr. at 126-129, and Comp. Gr. Exh. A, Exh. 10-11.

Mr. Harris reported that of the 30 facilities receiving violation notices, 28 subsequently replaced their Frontier bonds with compliant financial assurance. Of the two landfills that took no action one, Dowty, went out of business and is now on the State list of abandoned landfills. The Morris Community Landfill is the only remaining noncompliant landfill. 9/11/07 Tr. at 129.

The White Testimony

IEPA Bureau of Land Compliance Unit Manager Brian White testified regarding the financial assurance requirements for landfills generally, and for the Morris Landfill in particular. He testified that, under the Board's financial assurance rules at 35 Ill. Adm. Code 811.700(f) and 811.701(a) applicable to the City and CLC, the owner or the operator of a landfill must provide the required amount of closure/post closure financial assurance. He also testified that if the operator did not post the required amount of financial assurance, the landfill owner was required to do so.

Mr. White testified that the only financial assurance that had ever been provided at the Landfill under the Board's Part 811 regulations was in the form of the noncompliant Frontier Bonds. 9/11/07 Tr. at 180-83. Since the Frontier bonds were issued in 2000, neither respondent has provided IEPA with any other compliant financial assurance for the Morris Community Landfill "in the amounts of the [$17.4 million] most recent approved cost estimate and post closure cost estimate [using] one of the ten mechanisms . . . listed in [35 Ill. Adm. Code] 811.706." 9/11/07 Tr. at 190-91.

The Roque Testimony

IEPA Bureau of Land Engineer Christine Roque testified that she had worked with some 30 landfills during the course of the 15 years she has worked for IEPA; she has been responsible for the permits for the Landfill since 1996. 9/11/07 Tr. at 212. Ms. Roque estimates that, over the years, the City had been issued 50 to 55 permits for the Morris Community Landfill, and that Community Landfill Company had been issued approximately 50 permits. 9/11/07 Tr. at 213-14. Ms. Roque stated that, to obtain the 2000 SigMod permits, respondents provided three surety bonds in the amount of $17,427,366.0044. The City of Morris provided $10,081,630.00, more than half. 9/11/07 Tr. at 216-17, and Comp. Gr. Exh. A, Exh. 9.

Ms. Roque testified that Board rules require annual updates of cost estimates for closure/post-closure care costs, but that respondents had not submitted such updates. 9/11/07 Tr. at 217. While financial assurance amounts may be reduced by seeking and obtaining a permit

modification from IEPA, the respondents did not seek a permit modification until July 2007; that permit modification was under IEPA review at the time of the hearing. 9/11/07 Tr. at 217-18. The permit modification would revise the schedule of closure activities from those approved in the 2000 SigMod permits, and the revised cost estimates were some $7 million less based on these activities. 9/11/07 Tr. at 233.

The City's Presentation

On September 12, 2007, the City presented the testimony of two witnesses:

William J. Crawford, Certified Public Accountant (CPA) (concerning City finances, based on audit work performed from 1986-2007 with the exception of 2003-04 audits), 9/12/07 Tr. 17-65 and City Exh. 11; and

Devin Moose, registered Professional Engineer and Director of St. Charles office for Shaw Environmental (concerning Shaw Environmental's work for the City at the Landfill site since 2003, Tr. at 66-149 and City Exh. 1-2).

The City had 12 exhibits admitted into evidence, consisting of Shaw's updated closure cost estimates for Parcels A & B and a closure plan update (City Exh. 1-2, 10), independent auditor's reports for 2005 and 2006 (City Exh. 4-5), various permit documents (City Exh. 3 (a),(b),(c), 8, 9), lease agreements for the landfill site between the City and CLC (City Exh. 7(a),(b),(c),(d),(e),(f); a letter between the Agency and Frontier (City Exh. 6), Mr. Crawford's resume and a financial assurance worksheet completed by Mr. Crawford calculating City's ability to "self-insure" closure costs in excess of $9.1 million based on an April 30, 2007 financial statement (City Exh. 11-12.)

The Crawford Testimony

Mr. Crawford testified that he has owned his own certified public accounting firm since 1995, and has performed the City's annual audits under contract as an independent auditor for the years 1986-2007 (with the exception of 2003-04 audits). 9/12/07 Tr. 17 and City Exh. 11. Mr. Crawford describes the purpose of the annual audit as "to express an opinion of the fairness of the financial statements and to provide that in an independent external way." 9/12/07 Tr. at 17.

Mr. Crawford testified that he had reviewed the Board's financial assurance rules at 35 Ill. Adm. Code 811.716 "Local Government Financial Test" and 811.717 "Local Government Guarantee", and completed a worksheet designed to allow determination of whether the City could meet the rules' requirements based on the fiscal year ending April 30, 2007. 9/12/07 Tr. at 19-23 and Exh. 12. The Board's rules allow a municipality to guarantee landfill closure if a third party operating the landfill fails to close. Mr. Crawford states that there are two ratios of concern in meeting the test, a local government's liquidity ratio and annual debt service ratio. 9/12/07 Tr. at 24, 26. Once the local government has met those ratios, a final computation is performed to determine how much the government can guarantee: annual revenues according to generally accepted principles times 43 percent. 9/12/07 Tr. at 28-29.

Mr. Crawford testified that, to meet the rules, a local government's "liquidity ratio" (or "ratio of marketable securities in comparison to expenditures") "must be greater than 0.5". 9/12/07 Tr. at 24-25. Mr. Crawford computed the City's liquidity ratio to he 2.295 for the fiscal year ending April 30, 2007. 9/12/07 Tr. at 25. While he did not have prior audits before him, he believes that the City's liquidity "has never been a problem," and that it has met the first component of the financial test. 9/12/07 Tr. at 26.

Mr. Crawford described the annual debt service ratio as

> a comparison of the amount of expenditures for debt service, which include principal and interest in one year, compared to, again, the total expenditures of the City. And that ratio must be less than [0].2. 9/12/07 Tr. at 27

Mr. Crawford computed the City's liquidity ratio to be 0.0133 for the fiscal year ending April 30, 2007. 9/12/07 Tr. at 27. Mr. Crawford concludes that the City would meet the test for that fiscal year, and opines that it would have met the ratio since the year 2000. 9/12/07 Tr. at 28-29. Mr. Crawford stated that he did not have final figures for the City's fiscal year ending in 2007, but that he believed that the total revenues were $21,269,662, and that 43 percent of that amount is approximately $9.1 million. 9/12/07 Tr. at 30.

Mr. Crawford's analysis of revised closure cost estimates made by Shaw Environmental and provided by the City lead him to conclude that closure costs would be $7,347,572, and post closure costs of $2,714,047, for a total amount of $10,061,619. While the City could only self guarantee $9.1 million, Mr. Crawford testified that the $900,000 difference could be made up by funds available in 3 City funds: the Sanitary Landfill Contingency Fund, the Solid Waste Tax Fund, and the Garbage Fund. 9/12/07 Tr. at 30-31. Mr. Crawford testified that at the end of fiscal year 2007, the City had approximately $2.7 million in those funds, with some $777,000 earmarked to pay expenses. 9/12/07 Tr. at 32.

Mr. Crawford reported that, additionally, the City had capital projects "on the horizon": airport expansion in the amount of $2.2 million, a new municipal building with room for police and a city hall for $10-12 million, and a major drinking water and sewer expansion project for $14-15 million. 9/12/07 Tr. at 31-32. The sewer project is being funded by a $7.4 million bond issue, while the municipal building is being funded by the "TIF" fund and general city moneys. 9/12/07 Tr. at 30-31.

Mr. Crawford testified that, after a municipality provides its initial guarantee fee, it does not "cost money" in the same way buying a bond or insurance vehicle from a third party would. 9/12/07 Tr. at 30-31. In response to the question by the City's counsel that "if we assume that somehow the City had an obligation to post financial assurance since 2000, did they (sic) sustain any economic benefit by not posting their own guarantee," Mr. Crawford stated that "I don't see that". 9/12/07 Tr. at 37.

On cross-examination, Mr. Crawford stated that in a previous deposition he had stated that the City could have guaranteed $7.1 million based on 43% of the revenues for the fiscal year

ending April 30, 2005, and that the City's revenues had increased each year between 2000 and 2007. 9/12/07 Tr. at 40-41. Mr. Crawford stated that the Board's entry of the February 16, 2006 interim order in this case finding the City in violation of the financial assurance rules does not change his opinion on the financial statements. 9/12/07 Tr. at 41-45 discussing City Exh. 4 at 39. Mr. Crawford states that a $7.6 million potential liability is disclosed (9/12/07 Tr. at 44), in addition to "$10.2 million of financial assurance for leachate collection and treatment by a third party for the landfill." 9/12/07 Tr. at 45. Mr. Crawford agrees that immediately thereafter the financial statement says that the $10.2 million "amount is in dispute, because the City is presently treating, and plans to treat in the future, all leachate collected from the landfill at its own facilities at no cost to the State." 9/12/07 Tr. at 41-45 discussing City Exh. 4 at 39.

Mr. Crawford stated that he was not aware that the Board had ruled in 2001 that the City's treatment of its own leachate was insufficient, and that it would be required to post the additional $10-plus million as financial assurance. 9/12/07 Tr. at 41-45 discussing Community Landfill and City of Morris v. IEPA, PCB 01-48 and 01-49 (cons.) slip op. at 29-30 (Apr. 5, 2001), and affirmed on reconsideration (June 7, 2001). Asked whether the City could have guaranteed $17 million or more of financial assurance at any time between 2000 and 2007, Mr. Crawford stated that he was sure of his revenue figures, but that he has no idea what the closure-post-closure figures are. 9/12/07 Tr. at 51-52. He agreed that $9.1 million was the maximum the City could guarantee, and it could not guarantee $17.1 million. 9/12/07 Tr. at 53-54. Mr. Crawford stated that he was not aware how different methods of financial assurance could be combined to meet the rules, and that he has no idea if the City could afford to pay the premium for $7.4 million in surety bonds. 9/12/07 Tr. at 55-56.

Mr. Crawford stated that the City had net assets of $35 million in 2006, an increase of $4,946,000 over the previous year (2005). While the City's financial position is strong, Mr. Crawford stated that "a strong financial position may not always be indicative of a strong cash position. 9/12/07 Tr. at 57. Mr. Crawford stated that he did not know if any surety bonds taken out by the City would need to be reflected against its legal debt limit, or which capital projects previously discussed would affect the debt margin. 9/12/07 Tr. at 58-59. Mr. Crawford answered that the City could not expend $7.347 million to close Parcels A & B over a 6-month period with available funds. 9/12/07 Tr. at 61.

Mr. Crawford agreed that the Board rule at 35 Ill. Adm. Code 811.716 would require the City to include in its next financial statement a reference to its use of the financial test to guarantee closure and post-closure care costs. He was unsure whether this would have any effect on the City's ability to borrow funds. 9/12/07 Tr. at 63-64.

The Moose Testimony

Devin Moose is a licensed professional engineer, and is the director of the St. Charles office of Shaw Environmental, Inc. 9/12/07 Tr. at 67. Mr. Moose stated he has been involved in solid waste-related work since 1983. Among other things, he has designed "dozens upon dozens" of landfills, and worked on compliance problems at "dozens" of landfills. He has worked in over 60 Illinois counties, and for nearly 75 Illinois municipalities. 9/12/07 Tr. at 68.

Mr. Moose stated that he and Shaw Environmental had not been involved with the Morris Community Landfill prior to 2003, when the City engaged Shaw to do some preliminary work. (Andrews Engineering had previously done work for the Landfill, including preparation of the applications for IEPA-issued SigMod permits for Parcels A and B. 9/12/07 Tr. at 85, 135-36, Comp. Exh. 12. Mr. Moose said Shaw's involvement with the site increased significantly following an inspection in October 2004. Shaw took several steps to determine whether "there was some kind of imminent threat", including making a site visit and obtaining a copy of the entire IEPA file on the site, amounting to "over 35 linear feet" of documents. 9/12/07 Tr. at 72-73. Shaw also recommended, and the City authorized Shaw to make, evaluations of the Landfill's leachate collection system, the landfill gas system, and the groundwater monitoring system, as well as to do some monitoring of groundwater, landfill gas, and leachate. 9/12/07 Tr. at 73.

Shaw's evaluation found that "all three of these systems were in disrepair, or in some cases, never constructed." 9/12/07 Tr. at 74 But, Shaw also concluded that there were measurable, but no significant, impacts to the groundwater, and that there was no significant landfill gas present beyond the facility limits. 9/12/07 Tr. at 74-5. The evaluation and monitoring took place during over a dozen site visits between early 2005 and September 2007. 9/12/07 Tr. at 75.

Mr. Moose stated that (referring to the August 4, 2000 IEPA-issued SigMod permits for Parcel A and Parcel B of the Landfill 9/12/07 Tr. at 77, Comp. Exh. 12):

> [I]t was clear from my first inspection of the file and first inspection of the field that the actual file conditions didn't – were not congruent with what was originally permitted. So that the closure plan – well, at least partially that was in the application, which was approved, in some instances, didn't represent on the ground real-world conditions of what existed out there at the time. 9/12/07 Tr. at 76-77.

Mr. Moose stated that he thought that the $17.4 million dollar Andrews Engineering closure estimates filed with the permit applications were not reflective of field conditions either, made on the basis of "the incapability of the modeler . . . to actually get the model to meet the regulations, as opposed to what's actually best for that particular piece of ground." 9/12/07 Tr. at 78. Mr. Moose stated that he felt that the inputs in the modeling were incorrect, and that the result was that the Landfill was required to pump and treat groundwater within 100 feet of the landfill for 100 years, rather than do modeling, at an estimated cost of some $10 million. 9/12/07 Tr. at 79. Mr. Moose also believed that the model included a mischaracterization of the groundwater, to the extent the modeler used Class II groundwater rather than Class IV groundwater, creating a higher standard to pass. 9/12/07 Tr. at 87-88. Mr. Moose also stated that he felt that Darcy velocity used by the modeler was off by a factor of 40,000 from the Darcy velocity Mr. Moose measured at the site in 2006. 9/12/07 Tr. at 88-89.

Shaw Environmental prepared revised cost estimates for the City for Parcels A and B. 9/12/07 Tr. at 80, 84 and City Exh. 1-2. Mr. Moose compared the closure estimates prepared by Andrews Engineering and included in the 2000 SigMod permits.

Shaw's estimate for closure/post-closure care of both Parcels A and B was $10,061,619. 9/12/07 Tr. at 84. Shaw's costs did not include groundwater pumping and treating for 100 years, leachate pumping and treating for 100 years, or relocation of the overfill waste from Parcel B (which Mr. Moose did not feel an "appropriate course of action" due to environmental risk). 9/12/07 Tr. at 85-87.

Andrew's estimate for closure of Parcel A was $11,103,346, including $10,117,800 for groundwater treatment. 9/12/07 Tr. at 84. These excluded costs for repair and/or installation of leachate, gas collection and or groundwater monitoring. The Andrews' estimate for Parcel B was $1,927,680, including $900,000 for removal and relocation of overfill. Mr. Moose stated that Shaw's estimates included costs for leachate treatment for 100 years at a cost of over $1 million, but did not include leachate gas and groundwater monitoring, repair, and installation. 9/12/07 Tr. at 84-85.

Shaw drafted its own proposed schedule of closure activities for the site. 9/12/07 Tr. at 90 and City Exh.10. Shaw would perform a series of investigations and repairs to existing facilities, and "over a period of 5 to 6 years, take incremental steps to close out both Parcels A and B". 9/12/07 Tr. at 89-90. Mr. Moose stated that the 5-6 year estimate took into account the process of finding the large amounts of soil needed, as well as the need to properly sequence projects for cost efficiency, and the limitations of the construction season. 9/12/07 Tr. at 92-93.

Review of Shaw's estimated shows that costs include expenditures for various tasks to take place between Fall 2006 and Spring-Fall 2012 totaling $6,729,000 (Tasks 101 to 404), as well as estimates for a 30 year post-closure maintenance and monitoring period of $2,662,400, or $88,700 per year (Tasks 501-504). City Exh. 10. Tasks 101 to 404 include repair and operation of the various systems (for leachate collection, gas collection, and groundwater monitoring), and placement of cover over the fill. City Exh. 10 and 9/12/07 Tr. at 90. The largest cost item in Shaw's estimate --$1,905,000-- is for construction of landfill cover, a "fuzzy" number depending on stated variables. 9/12/07 Tr. at 91. Mr. Moose stated that the City had done two things: passed ordinances to require developers to stockpile fill from other projects at the landfill, and to authorize Shaw to perform a soil cover study to determine how much fill would actually be necessary. *Id.*

Mr. Moose testified that the revised closure/post-closure care figures had been submitted to IEPA, but that IEPA had not responded to them as of September 12, 2007. 9/12/07 Tr. at 94-95. He testified that he believed that there would be no cost savings to a municipality in failing to provide its own municipal guarantee of costs under 35 Ill. Adm. Code 811.716-717. 9/12/07 Tr. at 96-97. Mr. Moose believes that if a municipality meets the self-guarantee test, that it should not be required to buy a surety bond, since it "directs public resources from this facility to some suit sitting down on LaSalle Street . . . money [that] needs to be spent on this piece of ground. 9/12/07 Tr. at 98. Mr. Moose stated that the timing of a landfill's closure would affect the rate of payment for a surety bond. 9/12/07 Tr. at 99.

Mr. Moose testified that he believed it was reasonable for CLC to believe that it was not required to post-financial assurance "up until the motion to reconsider was denied by the

Pollution Control Board", based on the 1982 transfer of the Landfill's development and operating permit from the City to CLC and the 1982 lease agreement between the City and CLC. 100-103, and City Exh.3 (a),(b),(c). 9/12/07 Tr. at 102.

Mr. Moose does not see:

> any substantiation for the $17.4 million closure costs in the current permits, other than the closure cost estimate that was put in the application. If the work is executed the way it's (sic) permitted to . . . I don't think it's protective of the public health, safety and welfare. I don't think that's where we ought to be spending the money.
>
> It doesn't include repair to the leachate collection system for one. It doesn't include repair and installation of the gas collection system, which is flooded. Over 50 percent of it is not functioning.
>
> It also takes money and spends it where it ought not to be spent. There's no reason to pump Class IV ground water from an abandoned strip mine and send it to a sewage treatment plant. I don't think that's what we ought to be doing with anybody's money.
>
> And it also doesn't . . . really address the problems that are really out there as they exist today. . . . if you look at the amount of money compared to what the State Spends to close landfills within its program, it's very high on a per acre basis.
>
> So the amount of money, just compared empirically to other facilities, is twice what it ought to be. And the way it's dictated in the closure plan is not the best for this piece of ground. 9/12/07 Tr. at 104-106.

Mr. Moose testified that he believes that if a bonding company were to issue a bond that would "get called immediately", that it would require full collateralization of the bond, *i.e.* $17.5 million in collateral for a bond covering $17.5 million in closure/post-closure costs. 9/12/07 Tr. at 108-109.

On cross-examination, Mr. Moose admitted that the revised cost figures were not submitted to IEPA for over a year after they were developed. 9/12/07 Tr. at 110. Mr. Moose stated that Shaw had been involved in preparing the November 2005 permit applications' cost estimates, which utilized the work plan in the 2000 permits, and basically updated the costs. These applications showed a closure cost for Parcel A of about $5.7 million, and for Parcel B of $9.4 million, for a total of $15.1 million or $15.2 million. 9/12/07 Tr. at 119.

Complainant posed a question about the acceptability of violating landfill regulations "even if it doesn't cause an imminent threat [to] the environment," 9/12/07 Tr. at 124. In response, Mr. Moose testified that he thinks there are occasions where "the regulations don't squarely fit with the situation at hand", and "where consent decrees have been negotiated to put the public health, safety and welfare in practicality of the solution, above a particular code within

a regulation." 9/12/07 Tr. at 125. Mr. Moose agreed that Shaw was watching gas probe information at the site regarding possible methane exceedances. 9/12/07 Tr. at 128-130.

Still on cross-examination, Mr. Moose testified that, while not the licensed landfill operator, the City had spent a significant amount of money with Shaw to monitor the landfill, and in 2007 had funded repair activities conducted by CLC. 9/12/07 Tr. at 132-133

CLC's Presentation

On September 12, 2007, CLC presented the testimony of a single witness:

Edward Pruim, Secretary/Treasurer of CLC (sequence of events, motives, perceptions). 9/12/07 Tr. at 9/12/07 Tr. at 150-183.

CLC entered 18 exhibits, consisting mainly of correspondence between Frontier and CLC (CLC Exh. 3-10), from the IEPA to Frontier (CLC Exh. 11-14), and from Emerald Insurance to CLC (Exh. 18). CLC also entered three bonds issued by Frontier (CLC Exh.15-17).[3] CLC Exhibit 1 was also marked as Hearing Officer Exhibit 1 (HO Exh. 1).

Edward Pruim is the Secretary/Treasurer of Community Landfill Company, Inc. It is Mr. Pruim's opinion that the Board should not impose a penalty against CLC, because it "at this time has no funds available, we have no business going on there. So we don't have the cash flow that we did at one time, years ago". 9/12/07 Tr. at 151-52. Mr. Pruim also stated that no penalty should be imposed because CLC complied with all rules when it got the Frontier surety bonds in 2000. 9/12/07 Tr. at 152.

Prior to CLC's first SigMod application in 1999, it had carried a bond for $1.4 million in closure/post-closure care costs. In the 1999 SigMod application, closure costs were estimated at $7 million. CLC was to post a bond in that amount, while the City would commit to leachate treatment costing roughly $10 million. IEPA rejected that application, and required the posting of a bond for the entire $17 million. 9/12/07 Tr. at 155. CLC and the City agreed that, for five years, CLC would pay for a $7 million bond in its name, as well as for a $10 million bond in the City's name. 9/12/07 Tr. at 156-57. The cost for all bond premiums was over $200,000 per year; Frontier, the bonding company, also required $200,000 in collateral. *Id.*

Frontier issued the bonds to CLC on May 31 and June 14, 2000. Frontier was removed from the federal Circular 570 list on June 1, 2000. 9/12/07 Tr. at 170 and Comp. Ex. 9. Mr. Pruim stated that if the IEPA had not initially pre-approved the Frontier bonds in 2000 as complying with the rules, CLC would have closed the landfill within 4-5 years for $1.4 million. 9/12/07 Tr.159, 168. But, having received the SigMod permit in 2000, CLC proceeded with engineering work to build and develop a new cell for waste acceptance. CLC approached IEPA for an operating permit for that new cell, and was told that it needed to replace the Frontier bonds

[3] The remaining exhibits were the previously mentioned material incorporated from PCB 01-170 (CLC Exh.1, also marked as HO Exh. 1), and CLC's 9/28/04 first supplemental response to discovery requests (CLC Exh. 2).

with another financial instrument. 9/12/07 Tr. at 160. IEPA denied the permit, and the Board and the Appellate Court affirmed the denial on appeal. 9/12/07 Tr. at 160-61.

Mr. Pruim stated that CLC paid Frontier a total of two years in premiums on the bonds; in addition to the $200,000 in collateral, then, CLC tendered roughly $600,000 in funds to Frontier. 9/12/07 Tr. at 161-62. CLC had its broker look for another bonding company, and found out that "the collateral was going to be in the range of 70, 80 percent of the bond value." 9/12/07 Tr. at 162. Mr. Pruim said that CLC did not have those funds at that time. *Id.*

Mr. Pruim stated that, once the operating permit for the new cell was denied, CLC's income was minimal and it had to let go all employees except for a general manager to oversee and maintain the landfill and a part-time secretary. 9/12/07 Tr. at 163. CLC had difficulty paying its fixed expenses and outstanding bills including insurance, equipment maintenance, fuel, and labor. 9/12/07 Tr. at 164. Mr. Pruim said that CLC did continue to take in contaminated soil at the landfill, but that was to allow CLC to "dress up the top of the fill where there was voids from settlement" which it continues to do periodically. *Id.*

Mr. Pruim stated that the last premium payment CLC made on the Frontier bonds was in 2001. 9/12/07 Tr. at 165. He said that Frontier refused to release the $200,000 collateral paid to him, on IEPA direction. (Mr. Pruim testified that he believed that the collateral was now worth $300,000-$400,000, as a result of Frontier's investment of the funds.) For the same reason, Frontier has not refunded to CLC any of the previously-paid premiums. 9/12/07 Tr. at 165-67.

Mr. Pruim stated that, even if ordered to do so by the Board, lack of funds would prevent CLC from finding a way to get financial assurance in the amount of $17 million or even $7 million, and that CLC would be unable to pay any civil penalty the Board might assess. 9/12/07 Tr. at 167-68.

On cross-examination, Mr. Pruim acknowledged that CLC had received a November 14, 2000 violation notice from IEPA regarding the non-compliant Frontier bonds, including the suggested resolution of the violation by replacement of the bonds with another method of financial assurance. 9/12/07 Tr. at 171-2 and Comp. Exh. 11. He also agreed that, given the 5-year term of the bonds, that he knew that he would need to expend closure costs at the end of the period. 9/12/07 Tr. at 172-175. Mr. Pruim stated that he would allow the City to take over the Landfill, and to begin closure at once. 9/12/07 Tr. at 176.

On re-direct, Mr. Pruim reiterated his understanding of the agreement between CLC and the City was that CLC alone was to be responsible for all closure and post-closure care, with the exception of City treatment of Landfill leachate at a cost of roughly $10 million. 9/12/07 Tr. at 176-177. Mr. Pruim stated that he was unaware that Frontier would be delisted from the Circular 570 a day after the bonds were issued, and that IEPA approved the bonds and issued the SigMod permits even after the delisting. 9/12/07 Tr. at 179. Mr. Pruim repeated that he believed that he did not need bonds for a full $17 million, given the City's $10 million leachate treatment commitment, but got bonds in that amount only to insure that IEPA would issue the SigMod permits. 9/12/07 Tr. at 180. Mr. Pruim challenged the $17 million amount, only to lose the argument at the Board and appellate court levels. *Id.* He stated that, as landfill lessee, he had

never asked the City as owner to take over closure/post-closure activities at the Landfill. 9/12/07 Tr. at 183.

Before the hearing was adjourned, a written "public statement" of Mr. John Swezey was read into the record. 9/12/07 Tr. at 188 and HO Exh. B (erroneously listed as "E" in transcript). Mr. Swezy's statement was that he was unable to appear at hearing due to a medical condition. Mr. Swezy was an alderman of the City of Morris from 1979 until 2007. Mr. Swezy commented that, while the City owns the land under the Landfill, that the City has not itself conducted disposal operations since 1982. 9/12/07 Tr. at 189. Mr. Swezy stated that, under the terms of the lease and operating agreement between CLC and the City, CLC is solely responsible for all closure/post-closure care costs. He further claimed that the City Council had no reason to believe that the City would have to pay any such costs, and that the City Council had never authorized then-Mayor Feeney in 1976 to execute any documents for the City in any capacity other than as owner of the land underneath the waste. 9/12/07 Tr. at 190. Mr. Swezy criticized IEPA for failure, prior to 2002-2003, to require the City to initiate closure of Parcel B or to post any financial responsibility, stating

> If the Parcel B really had reached its capacity in the mid-to-late 1990s, why wasn't the [I]EPA compelling CLC as the permanent operator to close it at that point in time? If the [I]EPA had done its job, the City wouldn't be in the predicament it finds itself in today.
>
> * * *
>
> [I]EPA [should be] put on notice it has an obligation to protect the environment and has failed to adequately protect the citizens of the City of Morris. As stated above, it is an injustice to now burden our taxpayers with a [$10 million] or $17 million obligation because of the [I] EPA's failure to enforce its own regulations. 9/12/07 Tr. at 192-193, Comp. Ex. 11.

Post-Hearing Filings

On October 9, 2007, Richard Kopczick, the Mayor of the City of Morris, filed an affidavit (Kopczick Affid.). In his affidavit, the Mayor stated that he had been Mayor since May 1, 2001, following aldermanic service for the City since May 1, 1995. Kopczick Affid. at 1. He stated that since transfer of the Landfill in 1982, no prior Mayor or other agent of the City was authorized to designate the City was anything other than "the owner of the land underneath the waste facility, and was not authorized to designate the City as owner of the waste operation." *Id.* The affidavit recites that the City has not:

> compacted waste at the Morris Community Landfill, operated equipment at the landfill, placed cover on the landfill, constructed or developed the landfill, set consumer rates for the landfill, paid bills of the landfill, or in any way participated in the day–to-day operations at the landfill. *Id.* at 2.

The Mayor states that in passing its Resolution No. R-99-6, regarding leachate treatment by its wastewater treatment plant for 100 years, the City reflected the $10 million valuation of

this service by the Applicant (presumably CLC). Finally, the Mayor concluded that the City Council's passing of the resolution was not intended "to obligate the City in any way to posting of closure/post-closure financial assistance." *Id.*

On October 12, 2007, the City filed a motion to strike or dismiss the Kopczick affidavit (Mot. Strike). The City filed a response in opposition (Resp. Mot. Strike) on October 26, 2007.

On October 18, 2007, the People filed a closing argument and post hearing brief (Comp. Br.) At the same time, the People filed an appeal of the Hearing Officer's ruling disallowing admission of, except as an offer of proof, testimony concerning a settlement offer made by Frontier to IEPA concerning the Frontier bonds. The City filed a response in opposition on November 2, 2008.

The City filed its closing brief and argument on November 30, 2008 (City Br.), and the People filed a reply on December 7, 2006 (Comp. Reply to City). On November 30, 2007, CLC filed its closing brief and argument (CLC Br.), and the People filed a reply on December 10, 2007 (Comp. Reply to CLC).

On December 6, 2007, the City filed a Motion to Bar Punitive Damages (City Mot. Bar), to which the People filed a response in opposition on December 13, 2007 (Comp. Reply Mot. Bar).

On June 3, 2009, the People filed a "request for final order". On June 11, 2009, the City filed a motion to strike that request. On June 15, 2009, CLC filed a motion for leave to join in the City's June 11 motion. Also on June 15, 2009, complainant filed its motion in opposition to the City's June 11 motion. On June 16, 2009, the City filed a supplemental motion to strike.

PRELIMINARY MATTERS REGARDING EVIDENCE AND PLEADINGS

The post-hearing filings raise several matters the Board must dispose of concerning which evidence is properly before the Board in its consideration of penalty matters.

Request for Final Order

The People's June 3, 2009 request for final order and all subsequent responsive and related filings are denied as moot. The Board has not reviewed, or taken into account, any of the parties' factual statements, characterizations, or arguments contained in these filings. Today's decision is being rendered consistent with the Board's own work plan to decide this action prior to the end of the current fiscal year.

Kopczick Affidavit

As previously stated, on October 8, 2007, within the deadline for filing public comment set by the Hearing Officer, Mayor Kopczick of the City of Morris filed an affidavit. In the affidavit, the Mayor states beliefs as to the City's intent in taking certain actions concerning CLC and the Landfill.

People's Arguments

The People move to strike or dismiss the affidavit on the grounds that, as an agent for the City, a party to this action, the Mayor cannot file public comment, citing American Bottom Conservancy, et al. v. Village of Fairmont City, PCB 01-159 (slip op. at 7) (Oct. 18, 2001) (ABC, PCB 01-159) (citing the Board's rules at 35 Ill. Adm. Code 101.202, 101.628(c)) (ABC, PCB 01-159). Mot. Strike at 3-4. Alternatively, the People allege that the affidavit should be stricken as outside the scope of comment allowable under and as 35 Ill. Adm. Code 101.628(c), in that it is based on evidence outside the record, and does not present legal argument citing to authorities. *Id.* at 4.

City's Arguments

In response, the City argues that the Board's rules do not, by their terms, prevent parties from filing public comments. Resp. Mot. Strike at 2-5. The City states that the Board has allowed parties to file public comment in other cases, and distinguishes ABC, PCB 01-159 on the grounds that the statement that "parties may not submit public comment" is *dicta*, and that in any case an administrative determination in one proceeding is not *res judicata* in another. Resp. Mot. Strike at 5-7. The City argues that the Mayor's affidavit in this enforcement action is clearly a "written statement[] to the Board in connection with the subject thereof". Resp. Mot. Strike at 7, quoting 415 ILCS 5/32 (emphasis added in response).

Board Ruling

After considering the parties' arguments, the Board declines to strike the Kopczick affidavit, but in so doing does not retreat from its comment on the issue in ABC, PCB 01-159. ABC was a landfill siting case, in which petitioners attempted to enter as public comment a document that had not been part of the local government's record on appeal. The City correctly states that the Board first struck the document on the grounds that the document, in its entirety, had not been part of the record before the local siting authority, citing as grounds the Act's dictate that the Board's decision was to be based "exclusively on the record before the county board or governing body of the municipality." 415 ILCS 5/40.1(b) (2006). Only after that did the Board comment that

> Petitioners cannot file public comments because they are a party to the proceeding. Public comments are reserved for members of the public that are not a party, who wish to submit information concerning the proceeding. *See* 35 Ill. Adm. Code 101.202, 101.628(c).

The cases cited by the City in support of the contention that the Kopczick affidavit is proper comment are inapposite; they do not involve cases in which the Board itself accepted post-hearing public comments from parties.[4] Members of the public are

[4] In Land and Lakes Co. v. IPCB, 319 Ill.App.3d 41, 743 N.E.2d 199 (3rd Dist. 2000), the Appellate Court was referring to public comment submitted to the local siting authority during

extended some latitude under the Act and the Board's rules so that they can express their opinions and beliefs concerning environmental issues without being unduly hampered by procedural barriers. These opinions and beliefs are afforded lesser weight than evidence and statements that are subject to cross examination. *See* 35 Ill. Adm. Code 101.628(b); *see also* 9/12/07 Tr. at 191 re Sweezy statement, HO Exh. B.

Parties in adjudicatory proceedings, particularly in enforcement cases, cannot be afforded the same latitude as members of the public who participate at hearings. Parties and their agents are subject to the rules of discovery, evidence, and administrative procedure as set out in the Board's rules. *See* 35 Ill. Adm. Code 101. Subpart F. As the People contend, post-hearing "comment"—even though accompanied by affidavit—is not subject to cross-examination, and is not an acceptable substitute for hearing testimony. The Board cannot give the full weight of sworn testimony to public comment concerning facts and opinion statements as to the intent of the City and its agents in taking particular actions. By the same token, the Board could not allow the People to present Agency affidavits attesting to post-hearing site inspections or their interpretation of Board rules or City actions.

In summary, the Board strikes the Kopczick affidavit as improper public comment. In so doing, the Board notes that the Swezey statement concerning the same matters remains as part of the record.

People's Offer of Proof re Frontier Bond Settlement Offer

During the testimony of IEPA's Brian White, the People attempted to elicit testimony concerning possible settlement of the Frontier bonds (Comp. Exh. 9). Without objection, Mr. White testified that IEPA, as beneficiary of the Frontier bonds, had made a claim on those bonds. 9/11/07 Tr. at 183. He explained that on a performance bond, IEPA must give the surety an opportunity to perform closure/post-closure. 9/11/07 Tr. at 184. If the surety does not perform, it must "pay the penal sum" on the bonds. *Id.* Mr. White stated, without objection by respondents, that Frontier would not be performing closure/post-closure at the Landfill. *Id.* Mr.

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landfill siting proceedings. In Village of Sauget v. IPCB, 207 Ill.App.3d 974, 566 N.E.2d 724 (5th Dist. 1990), the Appellate Court was not discussing Board failure to accept public comments of the petitioner, who was a permit applicant appealing IEPA denial of a permit. The case dealt with a finding of lack of due process prior to permit issuance where the applicant was unable to file effective comments with the IEPA before the close of the comment period in response to USEPA comments, since USEPA filed its comments late and failed to provide the applicant with a copy. Finally, in Waste Management of Illinois, Inc. v. County Board of Kane County, PCB 03-104, slip op. at 7 (June 19, 2003), the Board found that the local government proceedings were not made fundamentally unfair because Waste Management did not have an opportunity to respond to a document submitted in public comment to the local authority because "[p]arties to a siting approval proceeding do not have a right to submit public comment or respond to filings more than thirty days after the end of the public hearing. 415 ILCS 5/39.2(c)".

White testified that Frontier would not be paying on those claims, and went on to state that he had received information that Frontier had offered to settle the case at $400,000. *Id.*

At that point, counsel for the City interposed a hearsay objection, which was sustained by the hearing officer. 9/11/07 Tr. at 184. The People rephrased the question to ask whether Frontier had offered to pay on the claim, to the witness' knowledge, and how much the offer was for. 9/11/07 Tr. at 184-85. Counsel for the City then interposed a relevance objection. The People explained that their view was that Frontier was "in rehabilitation" and that the settlement being negotiated was substantially less than the amount needed for post-closure care. 9/11/07 Tr. at 185-86. Complainant argued that the material was relevant to the issues of gravity of the offense, since if the State:

> can claim on these bonds for the full amount of closure and post-closure care, then that limits our penalties substantially.
>
> However, if nothing more than a *de minimis* settlement offer has been made on the bonds, it shows, you know, the amount of damage to the State, the gravity of the violation. The only financial assurance that's ever been provided for $17.4 million is now worth $400,000." 9/11/07 Tr. at 186.

The hearing officer stated that he did find the information "somewhat relevant", but that the settlement was "still up in the air and it's heavy in conjecture," (9/11/07 Tr. at 187), but allowed the People to make the following offer of proof:

> Ms. Tomas: Do you know if Frontier will be paying on those claims?
>
> The Witness: I don't know if Frontier will be paying on those claims, no.
>
> Ms. Tomas: To your knowledge, have they made an offer to pay on those claims?
>
> The Witness: Yes.
>
> Ms. Tomas: And what was that amount?
>
> The Witness: $400,000. 9/11/07 Tr. at 187-88.

People's Arguments

On October 19, 2007, the People filed an appeal of the hearing officer ruling (Comp. HO App.)[5] along with its final argument and closing brief. After relaying the exchanges between counsel, the witness, and the hearing officer (Comp. HO App. at 1-3),

[5] The pages of this appeal motion are unnumbered. The first page following the notice of filing with the heading "I. Evidentiary Ruling" will be referred to as page 1, the page with footnotes 1-2 as page 2, the page with footnotes 3-5 as page 3, and the pages with footnotes 6-9 as page 4.

the People present their argument for admission into the record of the evidence contained in the offer of proof. The People state that the excluded facts were not introduced either as proof of liability against respondents. They argue that the settlement proposal was not introduced as proof of liability against Frontier,[6] or of the amount of the IEPA's claim on the bonds, which some cases state may be reasons for exclusion of the material, but instead to show the inadequacy of the funds available for closure. Comp. HO App. at 3 and n. 4.

The People reiterate their comment at hearing concerning the relevancy of the information, stating again that the "fact that only $400,000 is available to satisfy closure and post-closure obligations of $17.4 MM indicates a serious and grave injury to the general welfare". Comp. HO App at 4, citing People v. ESG Watts Inc. (Sangamon Valley), PCB 96-237 (Feb. 19, 1998).

City's Arguments

The City filed a response in opposition to the appeal of the hearing officer ruling on November 2, 2007 (Resp. HO App.). The City first argues that the appeal is untimely filed under 35 Ill. Adm. Code 101.502(b), since it was not filed within 14 days of the Board's receipt of the hearing transcript. The Board received the transcript September 24, 2007, but the appeal was not filed until 25 days later on October 19, 2007. The City argues that the People's objection to the hearing is accordingly waived, and that its appeal should be stricken or denied. Resp. HO App. at 2-3.

The City next argues, citing authority, that the hearing officer properly denied admission of the White testimony because it concerns settlement negotiations, particularly where they are introduced to prove liability. Resp. HO App. at 3. The City also argues that the hearing officer properly excluded the White testimony as hearsay and as irrelevant to penalty considerations. *Id.* at 3-5.

Board Ruling

The Board declines to strike the People's motion on the procedural objection raised by the City. The issue of the admissibility of information concerning any Frontier offer of settlement of IEPA's bond claim was the subject of an offer of proof, in addition to hearing officer rulings. Under the terms of 35 Ill. Adm. Code 101.502(b), the People's appeal was due October 8, 2000 and was so was filed some 11 days late. But, given the fact that the People were in the process of preparing a final brief for timely filing October 19, 2009, the Board finds that there is no undue filing delay on the People's part, or resulting prejudice to the respondents as a

[6] The People explain that the State's bond claim is not the subject of a lawsuit, but is being processed according to New York State insurance company rehabilitation procedures. The People assert that "[c]ounsel for Frontier Insurance Company in Rehabilitation was consulted prior to hearing in this case, and had no objection to the State's use of its $400,000.00 offer as evidence." Comp. HO App. at 3, n. 5.

result of the late filing. The People filed the appeal along with its closing brief on October 19, 2007, and the City had ample opportunity to file a reply to the motion as well as to respond to the People's arguments based on this material in its own closing brief, timely filed on November 30, 2007 under the briefing schedule set by the hearing officer before the close of hearing.

Considering the parties' arguments on their merits, the Board grants the People's motion and admits the proffered White testimony concerning Frontier's offer to settle its liability under the bonds to IEPA for $400,000. The Board is persuaded by the People's arguments that it is within the Board's discretion to accept this material, which is not offered for the purpose of a liability determination against respondents (already established in the Board's orders of February and June 2006). The material contained in the offer of proof was not, in the end, the subject of a hearsay ruling (9/11/07 Tr. at 187), and so is not excludable on that ground. The material is relevant to at least some of the penalty factors of Sections 33(c) and 42(h) of the Act. 415 ILCS 5/33(c) and 42(h) (2006). These include, as the People suggest, the degree of injury and interference with the general welfare (415 ILCS 5/33(c)(i)) and the gravity of the violation (415 ILCS 5/42(h)(1)). As the People argued, if Frontier is a ready source of funds for the full closure amount, the gravity of the violation is arguably less than if Frontier is not.

Even if the Frontier settlement figure could properly be excluded from evidence, the Board notes that this information is, to some extent, cumulative to other undisputed evidence in the record. The hearing officer was correct that the potential $400,000 bond settlement figure is speculative, in that an offer by Frontier to settle IEPA claims is not proof that the company will in fact settle the bond claim in any amount. But, the City did not object to testimony by Mr. White that Frontier will not perform closure/post-closure care. The record is clear that the full bond premium funds were never paid, so that the amount of any recovery on the bonds is unlikely to be the full face value of the bonds. Respondents have offered testimony that CLC paid two years worth of premiums for a total of $400,000 on the Frontier bonds, which had 5-year terms and could be extended for another 5 years (Comp. Exh. 9). The evidence is undisputed that CLC presented Frontier with some $200,000 in collateral, so that in all Frontier had received a total of some $600,000 from respondents as surety for closure costs of some $17.4 million. 9/12/07 Tr. at 161-62, 165-67.

Applicability and Effect of Local Governmental and Government Employees Tort Immunity Act

The City has raised the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act), 745 ILCS10/1-101 *et seq.* (2006), in two separate motions in this action: a September 5, 2007 pre-hearing motion for leave to file amended affirmative defenses, and a post-hearing December 6, 2007 motion to bar punitive damages (Mot. Bar). The People have opposed both motions on substantive and procedural grounds and on December 13, 2009 moved to strike the City's motion to bar (Mot. Strike).

The pleadings on the affirmative defense issue include the City's September 5, 2007 motion for leave to file amended affirmative defenses, the People's September 6, 2007 objection thereto, and the City's September 10, 2007 motion for leave to file a reply to the People's response. In addition to the statutory claim, the City's September 5, 2007 motion raises issues of

laches, estoppel, and other matters the Board will consider in this opinion in its considerations of the factors of Section 33(c) and 42(h) of the Act. 415 ILCS 5/33(c) and 42(h) (2006). None of these motions were addressed by the hearing officer, so that they all remain pending. 9/11/07 Tr. at 17-18. The motions for leave to file are granted; the Board has considered the content of all of these filings.

The pleadings on the motion to bar punitive damages are the City's December 6, 2007 motion, and the People's December 13, 2007 motion to strike it. The People's motion to strike is denied.

The Tort Immunity Act states that its purpose is "to protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/2-101(a). The Tort Immunity Act also states:

> Notwithstanding any other provision of law, a local public entity is not liable to pay punitive or exemplary damages in any action brought directly or indirectly against it by the injured party or a third party. 745 ILCS 10/2-102.

Among other things, "a local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109.

The City contends that:

> The Illinois Supreme Court has explained that punitive damages are those damages which are awarded in order to punish the offender and to deter that party and others from committing similar acts of wrongdoing. Loitz v. Remington Arms Co., 138 Ill.2d 404, 414, 563 N.E.2d 397 (1990). Thus, it is clear that the damages sought by the State for the purpose of punishment or as a deterrent to others constitute punitive damages, which are barred by the Tort Immunity Act. See Paulson v. County of DeKalb, 268 Ill.App.3d 78, 83, 644 N.E.2d 37, 40 (2nd Dist. 1994) (holding that the Tort Immunity Act barred the imposition of statutorily available treble damages against county-run nursing home). Mot. Bar at 1-2.

In response, the People argue that they are

> not seeking punitive damages from the Respondents . . . [as][c]ivil penalties assessed under the Act are not 'damages', but rather administrative sanctions. Environmental Protection Agency v. City of Champaign, PCB 1971-051 (September 16, 1971), 1971 WL 4357 (slip op. at 1). The purpose of civil penalties is remedial and not punitive. People v. Bentronics Corporation, PCB 1997-020 (October 17, 1996), 1996 WL 633410 (slip op. at 4) (citing Modine Manufacturing Co. v. IPCB, 193 Ill. App. 3d 643 (2d Dist. 1990)). Mot. Strike at 2 (emphasis in original).

The Board denies the City's motion to bar. The Board finds that the Tort Immunity Act does not by its terms apply. Section 2-101 of the Tort Immunity Act provides that "[n]othing in this Act affects the right to obtain relief other than damages against a local public entity or public employee." 745 ILCS 10/2-101 (2006). The City cites no authority for the proposition that an enforcement action seeking civil penalties for violation of the Act is properly charactacterized as a tort action for damages, punitive or otherwise. Early in its history, the Board held:

> [T]he City's reference to Section 2-102 of Chapter 85[the Tort Immunity Act] is totally inapplicable since that section deals with "punitive or exemplary damages," a technical term having to do with additional payments in private civil damage actions. The penalties which the Board may invoke pursuant to the Environmental Protection Act are, on the other hand, not in the nature of "damages," but are, rather, administrative sanctions . . . . IEPA v. City of Champaign, PCB 71-51C, slip op. at 1 (Sept. 16, 1971).

The Act provides separately for civil penalties and punitive damages. The People seek civil penalties under Section 42(a) of the Act (415 ILCS 5/42(a) (2006)). Punitive damages are addressed elsewhere in the Act, for example, in Sections 22.2(k) and 57.12(f) (415 ILCS 5/22.2(k), 57.12(f) (2006)). Moreover, it is well-settled that the primary purpose of civil penalties is to aid in enforcement of the Act; any punitive considerations are secondary. *See, e.g.* , People v. Fiorini, 143 Ill. 2d 318, 349, 574 N.E.2d 612, 625 (1991).

The purpose of the Tort Immunity Act is "to protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101.1 (2006). The Board believes that the City's arguments that the welfare of its taxpayers should receive special consideration here may properly be considered by the Board under Section 42(h) of the Act (415 ILCS 5/42(h)-(2006)) in the context of the "arbitrary or unreasonable financial hardship" exception to imposing a civil penalty at least as great as any economic benefit accrued from non-compliance. Accordingly, the Board will address this further in its later discussion of Section 42(h). *See infra* pp. 42-44.

STATUTORY AND REGULATORY FRAMEWORK

A short summary of the relevant statutes and rules follows.

Section 21(d)(2) of the Act provides that "[n]o person shall . . .

> Conduct any waste-storage, waste-treatment, or waste disposal operation . . . in violation of any regulations or standards adopted by the Board under this Act." 415 ILCS 5/21(d)(2) (2006).

Section 811.700(f) of the Board's financial assurance regulations provides:

> On or after April 9, 1997, no person other than the State of Illinois, its agencies and institutions, shall conduct any disposal operation at an MSLF unit that requires a permit under subsection (d) of Section 21.1 of the Act, unless that

person complies with the financial assurance requirements of this part." 35 Ill. Adm. Code 811.700(f).

Under Section 811.712(b), the surety company issuing the bond must be licensed by the Department of Insurance, pursuant to the Illinois Insurance Code, or at least licensed by the insurance department of one or more states and approved by the U.S. Department of the Treasury as an acceptable surety. 35 Ill. Adm. Code 811.712(b). Section 811.712 also provides that the U.S. Department of the Treasury lists acceptable sureties in its "Circular 570." *Id.*

Section 33(c) of the Act provides in its entirety that:

(c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:

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

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

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

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

(v) any subsequent compliance. 415 ILCS 5/33(c) (2006).

Section 42(h) of the Act provides that

In determining the appropriate penalty to be imposed . . . the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

(1) the duration and gravity of the violation;

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

(3) 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 lowest cost alternative for achieving compliance;

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

(5) the number, proximity in time, and gravity of previously adjudicated violations of the Act by the respondent;

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

(7) whether the respondent has agreed to undertake a "supplemental environmental project," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform.

In determining the appropriate civil penalty to be imposed under subsection (a) or paragraph (1), (2), (3), or (5) of subsection (b) of this Section, the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship. However, such penalty may be offset in whole or in part pursuant to a supplemental environmental project agreed to by the complainant and respondent. 415 ILCS 5/42(h) (2006).

ADDITIONAL FINDINGS OF FACT

Prior to analysis of the 33(c) and 42(h) factors, the Board will make additional findings of fact based on the hearing record. But, the Board must reiterates some earlier findings, which the Board will not revisit even to the extent of repeating the parties' arguments about them as it relates to analysis of the Section 33(c) and 42(h) factors:

Limits of Current Record

The complaint in this case concerns only the financial assurance violations alleged in the complaint. The record in this case closed in December of 2007. Again, this record does not incorporate the record in the fully-briefed, but still-pending cases alleging operating violations. [7]

Respondents' Unavailing Collateral Attack on Landfill Rules and Permit System

The Board modernized its landfill permitting and operating rules, and upgraded financial assurance requirements as dictated in Section 21.1 of the Act (415 ILCS 5/21/1 (2006) in a rulemaking proceeding. Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7 (Aug. 17, 1990). Section 29(a) of the Act provides for appeal of such rules within 35 days of their adoption. 415 ILCS 5/29(a), referencing 415 ILCS 5/41 (2006). Section 29(b) specifically provides that

> Action by the Board in adopting any regulation for which judicial review could have been obtained under Section 41 of this Act shall not be subject to review regarding the regulation's validity or application in any subsequent proceeding under Title VIII, Title IX or Section 40 of this Act. 415 ILCS 5/29(a) (2006).

The time for challenge to the landfill permitting and financial assurance rules is long past. Board does not and will not adjust closure/post-closure care cost figures in the context of an enforcement action. These cost figures, based on the permitees' own estimates of actions needed to comply with the Act and Board rules, are established in the permit process and can be modified only by the Agency under 35 Ill. Adm. Code 811.Subpart G or by the Board in a proceeding to establish a facility-specific rule or adjusted standard. *See* 415 ILCS 5/27-28 and 28.1.[8] The SigMod permits issued in 2000 set the closure/post-closure care costs at $17.4 million based on respondents' own figures. As even respondents acknowledge, the Board

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[7] These cases are People of the State of Illinois v. Community Landfill Company, Inc. and People of the State of Illinois v. Edward Pruim and Robert Pruim, PCB 97-193 and PCB 04-207 (cons.).

PCB 97-193 was initiated by a May 1, 1997 six count complaint re operation of the site, alleging, *inter alia*, water pollution, lack of appropriate financial assurance, failure to file application for permit sig mod, and various other operating deficiencies.

PCB 04-207 was begun by a May 21, 2004 19-count complaint alleging, *inter alia*, failure to adequately manage refuse and litter; failure to prevent/control leachate; failure to timely file a SigMod application; water pollution of the Illinois River; waste deposition in unpermitted portions of the landfill; conducting disposal operation without permit (2 counts); open dumping; violation of standard permit conditions (deviations without approval); improper used tire disposal; violation of permit conditions (re movable fencing, prior notification of operation of gas control facility, taking corrective action re erosion control, proper leachate disposal, prior approvals before waste placement); and failure to provide adequate financial assurance and update cost estimates.

[8] As Mr. Moose suggested, courts may make such adjustments using their general equity powers, but the Board as a creature of statute has only the specific authority given to it. *See, e.g,.* Ford. v. IEPA, 9 Ill. App.3d 711, 292 N.E.2d 540 (3rd Dist.1973).

decided in 2001, and the appellate court agreed, that the figure must include the roughly $10 million in costs for the treatment of leachate which the City agreed to undertake.

Chronology

The Board has been dealing with cases involving the Landfill, its SigMod permit applications, and financial assurance issues since 1993. The chronology of all of these events is not immediately clear from the parties' briefs, and the Board believes that some recapitulation may assist the reader's understanding of this case.

In 1982, the City of Morris executed the first of a series of agreements with CLC concerning CLC's status as sole operator of the Morris Community Landfill. While remaining the owner of the property on which the Landfill is located, since that time the City has not engaged in day-to-day operations of the Landfill. This change has been reflected in permits issued since then. Tr. 9/12/07 at 101-102.

As part of the agreement, CLC agreed to pay dumping-related royalties or "tipping fees" for CLC's use of the Landfill. CLC paid the City $399,208.98 in such fees for the years 2001 through 2005. Comp. Ex. 13, Response. No. 23. Additionally, CLC accepted responsibility for maintenance of appropriate financial assurance. 9/12/07 Tr. at 156.

Under 35 Ill. Adm. Code 814.104, owners of existing landfills permitted under Section 21(d) were required to submit a SigMod application on or before September 18, 1994, unless required to do so earlier by the IEPA. The Board takes administrative notice of the fact that, in Community Landfill Corp. v. IEPA, PCB 95-137 (Sept. 21, 1995) the respondents requested a retroactive variance on April 26, 1995. Respondents sought a retroactive variance from the Board to begin June 15, 1993 (the earlier SigMod application due date set by IEPA) and to end 45 days from the grant of variance to make the filing. The Board denied the variance. Respondents appealed the decision. The Third District Appellate Court was persuaded to order the Board to grant variance. Community Landfill Corp. v. PCB, No. 3-96-01-82 (3rd Dist. June 17, 1996) (unpublished order under Supreme Court Rule 23). Accordingly, the Board issued the variance as directed, giving the City until August 5, 1996 to file the variance. Community Landfill Corp. v. IEPA, PCB 95-137 (June 30, 1996.)

The Board takes administrative notice of the facts stated in its decision in Community Landfill Company and City of Morris v. IEPA, PCB 01-48 and PCB 01-49 (cons.) (Apr. 5, 2001)(review of conditions included in August 4, 2000 SigMod permits for Parcels A and B applied for in May, 2000).

> On August 5, 1996, respondents filed the [variance-authorized SigMod] applications. On September 1, 1999, the Agency denied the SigMod permit applications. Parcel B, Vol. I at 36. Among other things, whether CLC timely filed the applications is raised in an enforcement case currently pending before the Board. *See* People of the State of Illinois v. Community Landfill Company Inc. (April 5, 2001), PCB 97-193 (ruling on motions for partial summary judgment). PCB 01-48 and PCB 01-49 (cons.) (slip op at 5) (Apr. 5, 2001).

Beginning in 1996, CLC secured financial assurance from Frontier bonds. On May 1, 1997, the People initiated the still-pending enforcement action referenced above: People of the State of Illinois v. Community Landfill Company, Inc., PCB 97-193. Prior to CLC's SigMod application in 1999, it had carried a bond for $1.4 million in closure/post-closure care costs. In the 1999 SigMod application, closure costs were estimated at $7 million. CLC was to post a bond in that amount, while the City would commit to leachate treatment costing roughly $10 million. Again, IEPA rejected that application, and required the posting of a bond for the entire $17 million. 9/12/07 Tr. at 155. CLC and the City agreed that, for five years, CLC would pay for a $7 million bond in its name, as well as for a $10 million bond in the City's name. 9/12/07 Tr. at 156-57. The cost for all bond premiums was over $200,000 per year; Frontier, the bonding company, also required $200,000 in collateral.[9] *Id.*

CLC and the City filed their next SigMod applications in May 2000. Frontier issued $17.1 million in bonds to respondents on May 31, 2000. On June 1, 2000, Frontier was dropped from Circular 570. In August 2000, the IEPA issued the SigMod permits, and respondents appealed some 200 conditions contained in those permits.

On November 14, 2000, the IEPA sent notice to respondents that their Frontier bonds were non-compliant. On November 27, 2000, respondents filed an application for supplemental permit for Parcel A.

In April, 2001, the Board affirmed many, but not all of the various conditions contained in the 2000 SigMod permits, including the $17.4 million financial assurance amount. *See* PCB 01-48 and PCB 01-49 (cons.) (Apr. 5, 2001) (slip op at 25-30). The Board's decision was affirmed in part (including on the financial assurance amount) and reversed in part. Community Landfill Corp. v. PCB, No. 3-01-552 (3rd Dist. July 12, 2001) (unpublished order under Supreme Court Rule 23).

The IEPA denied the November 2000 supplemental permit application in May 2001, citing as grounds the non-compliant Frontier bonds. Respondents filed an appeal of this denial in August, 2001, and the Board affirmed the supplemental permit denial in Community Landfill Company and City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001). On respondents appeal, the Third District Appellate Court in turn affirmed the Board. Community Landfill Corp. v. IEPA, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002), pet. for leave to appeal denied in No. 94600, 202 Ill. 2d. 600, 787 N.E.2d 155 (2002).

CLC made its last premium payment on the Frontier bonds at some point in 2001.

It is undisputed that the only financial assurance posted for this landfill since issuance of the SigMod permits in 2000 was the non-compliant Frontier bonds. Pursuant to the agreement

[9] As the People note, there is conflicting evidence as to the actual cost of the Frontier bonds, as evidenced in the testimony of IEPA's Mr. Edwards and CLC's Mr. Pruim. *See* People's Br. at 16.

between CLC and the City, CLC was to pay premiums for both the $10 million bond for leachate treatment issued in the City's name, as well as the $7 million bond issued in CLC's name. The bonds were issued for a 5-year term, renewable for another 5 years, for a total of 10 years. IEPA approved the bonds as complying with the Board's financial assurance rules. But, as of June 1, 2000 Frontier was removed from the federal Circular 570 list. As a result, the Frontier bonds issued May 31, 2007 were no longer compliant with the rules.

Thirty Illinois landfills had purchased Frontier bonds. Of these, one closed, and 28 others obtained acceptable substitute financial assurance. The Morris Community Landfill was the only one which did not obtain substitute financial assurance, even following receipt of an IEPA notice of violation suggesting this course of action in November, 2000.

The Frontier bonds are not a present source of adequate financial assurance for closure of the Landfill. Frontier has not offered to close the Landfill using the proceeds of the bonds. CLC paid Frontier only 2 years premium on the bonds, in addition to making an initial $200,000 collateral payment. CLC's premium payment was $217,842, which the People calculate to be a cost of $596.83 per day.

The People filed this action in April 2003. In May, 2004, the People filed another enforcement action concerning operations at the Landfill. People of the State of Illinois v. Edward Pruim and Robert Pruim, PCB 04-207. At some point in 2004, the City engaged Shaw Engineering to inspect the site and evaluate the situation.

In February 2005, the Board "reluctantly" granted the Pruims motion to consolidate PCB 07-193 and PCB 04-204, noting that "both parties agree that consolidating these two proceedings will avoid duplication and that neither party will be prejudiced". People v. Community Landfill Co., Inc. and People v. Edward and Robert Pruim, PCB 07-193 and PCB 04-204 (Feb. 17, 2005).

According to the interrogatories in this case, the Landfill accepted its last waste load in 2005. Mr. Pruim stated that the Landfill currently continued to accept contaminated soil "to dress up the top of the fill where there was (sic) voids from settlement". 9/12/07 Tr. at 164.

The Board granted summary judgment in this action in February 2006. The City contends that it was not aware of any obligation to provide financial assurance for the site until the Board issued its decision in June 2006 affirming on reconsideration the February 2006 order. In the City's words:

> since the PCB found that the City would be required to assure the performance of closure, post-closure care, the City voluntarily incurred substantial costs, including hiring environmental experts to evaluate the situation at the Landfill facility and determine all necessary closure, post-closure activities, and to revise the defective closure, post-closure plan previously submitted by CLC, as well as to create current, accurate cost estimates which were submitted to IEPA approximately 6 months ago [in July 2007]. City Br. at 5, citing Tr. 9/12/07 at 94, 111-113, 229, 231.

The Board held hearing in this matter in September 2007, at which time IEPA Inspector Retzlaff reported signs of waste acceptance and other problems at the Landfill during inspections as late as August 2007. Briefing in this action concluded in December 2007.

Since 2000, Frontier has made no payments to anyone in relation to these bonds. As beneficiary of the bonds, IEPA blocked CLC's attempt to have its collateral returned. As of the close of the record in this case, IEPA had made a claim on the bonds, but had not received payment. The hearing record indicates that Frontier made an offer of $400,000 in settlement of the claim, but does not specify a date.

REMEDIES

Remedies Requested

The People here have requested Board entry of an order containing multiple remedies. The first the People characterize as "affirmative remedies": 1) requiring the respondents to post financial assurance in the amount of $17,427,366.00, submit revised cost estimates, and update financial assurance in accordance with approved revised estimates, and 2) requiring respondents to close Parcel B of the Landfill in accordance with 35 Ill. Adm. Code 811.110, and the provisions of Permit No. 2000-156-LFM6.

The People next urge the Board to assess a civil penalty against the respondents, jointly and severally, in the amount of $1,059,534.00, and an additional civil penalty against the City of Morris in the amount of $399,308.98. Comp. Br. at 25..[10] The People have waived attorney fees, asking the Board to consider this waiver when considering the costs of the various remedies the People have requested. Comp. Br. at 32-33.

CLC contends, in sum that: any CLC non-compliance was unintentional, and a direct result of the Agency's initial approval of the Frontier bonds; CLC has at all times acted in good faith and with due diligence; CLC bas received no economic benefit from non-compliance; and in any event has no funds to pay a penalty. *See, e.g.,* CLC Br. at 19.

In summary, the City argues that no remedy at all should be imposed against it. *See, e.g.,* City Br. at 5-7. The essence of the City's argument is that its conduct was at all times reasonable, that no remedy should be imposed against it because that remedy will add to the burden of the expenses already incurred by its taxpayers. *Id.*

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[10] The amount of the penalty the People request against the City for recovery of dumping royalties or tipping fees is listed as various amounts at various places throughout the brief. Compare pp. 4, 25, 27, and 35. The People state that the source of the amounts of the royalties or fees received by the City is Complainant's Exhibit 13, Response to Second Set of Interrogatories, Response No. 23. Comp. Br. at. 25. The figures listed are: 2001--$242,527.55; 2002--$63,226.01; 2003--$0; 2004--$73,925.07; 2005--$19,630.35. The Board calculates the total of these amounts to be $399,308.98, as listed at Comp. Br. at 25. The Board will consistently use the $399,308.98.

In fashioning all of its orders, the Board must consider the factors of Section 33(c) of the Act. If the Board determines a penalty is appropriate, the Board must also consider the factors of Section 42 (h) of the Act.

Section 33(c)(i): The character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people.

People's arguments. The People argue that the evidence in the record demonstrates a substantial interference with the protection of the general welfare. Based on the uncontroverted evidence in the record, there has been no compliant financial assurance in place for this site since June 1, 2000; CLC's premium payments on the non-compliant bonds ceased in 2001.

Based on record evidence in which CLC admitted it had last received waste in parcel B in 1996. Comp. Ex, 13, the People calculate that Parcel B should have been closed in 1996. But, parcel B has not been closed, and the situation at the landfill is deteriorating. Comp. Br. at 6.

City's arguments. The City maintains that, since it did not own or operate the Landfill., that it has not caused any injury, and that it has no control over facility operations since 1982. City Br. at 8-9. The City asserts that its environmental engineer, Mr. Moose, found there were "no significant" impacts to groundwater, presence of landfill gas, or gas migration, and discounts the evidence of IEPA's Mr. Retzlaff. City Br. at 10-13. However, it has taken action to address site concerns, states the City, and has approved Mr. Moose' set of recommendations for actions to be taken at the site. City Br. at 13.

CLC's arguments. CLC too argues that there is no evidence of harm, given testimony that landfills have economic value, the Morris Landfill is properly located, and that closure and post-closure activities are occurring at the Landfill. CLC Br. at 2.

Board ruling. The Board agrees with the People that the record shows a high degree of injury to the general welfare of the public. The record amply demonstrates, even through the testimony of the City's environmental consultant, that Parcels A and B remain open, although ostensible not receiving waste, and that conditions at the Landfill evidence signs of neglect including erosion. Since 2001, there has been no assurance by CLC, the City or any third party that the $17.1 closure costs can be met. Even assuming *arguendo* that a $7.1 million figure was to be found appropriate in some future-issued permit, no one has ever stepped forward to guarantee even this amount. This factor weighs against respondents.

33(c)(ii): The social and economic value of the pollution source.

People's arguments. Regarding "the social and economic value of the pollution source," *see* 415 ILCS 5/33(c)(2) (2006), the People argue that the Morris Community Landfill as it exists has become an environmental liability due to respondents' neglect. Parcel B is not permitted to accept waste at all. To the extent Parcel A may have remaining capacity, it has no operating permit allowing waste disposal. Com. Br. at 8-9.

City's arguments. The City cites to the testimony of IEPA's Mr. Retzlaff as proof that landfills present a benefit to the public, without specifically addressing the Landfill's current condition. City Br. at 13.

CLC's arguments. CLC too argues that there is testimony here that landfills have economic value. CLC Br. at 2.

Board ruling. While properly-run, closed, monitored, and cared for landfills bave economic and social value, the Board agrees that the Landfill in its current state is an environmental liability. The Board weighs this factor against respondents.

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

People's arguments. On the issue of "the suitability or unsuitability of the pollution source to the area in which it is located," *see* 415 ILCS 5/33(c)(3) (2006), the People note that the City had obtained approximatedly 50-55 permits for the Landfill, while CLC had obtained approximately 50. Otherwise, the People contend, there is no evidence in the record regarding suitability, and so this factor is not significant in this case. City Br. at 9.

City's arguments. The City cites to the testimony of IEPA's Mr. Retzlaff as proof that the Landfill is suitably located, and notes that there is no contrary evidence. City Br. at 14..

CLC's arguments. CLC too argues that landfills have economic value, the Morris Landfill is properly located.

Board ruling. There is no evidence in this record that would lead the Board to conclude that the Landfill, when properly operated and managed, is unsuitable to the area in which it is located. This factor weighs neither for nor against respondents.

33(c)(iv): The technical practicability aud economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

People's arguments. The People also argue that providing financial assurance was both technically practicable and economically reasonable." *See* 415 ILCS 5/33(c)(4) (2006). The People contend that the financial assurance requirements of the Act and Board rules are designed to place the burden of landfill closure on those with a direct financial stake in a landfill. As to CLC, the People argued that 28 of the 30 other landfills holding non-compliant Frontier bonds in 2000 managed to find alternative insurance. Acknowledging CLC's argument that it currently has no funds available to secure financial assurance, the People contend that CLC's inability to properly conserve resources from its 20 years of waste disposal obligations should not be considered a defense to compliance. Moreover, argue the People, if Parcel B had been closed when closure was due, the problem of posting high amounts of collateral could have been avoided. Comp. Br. at 9-13.

As to the City, the People also cite to the testimony of the City's auditor Mr. Crawford that the City was "in a strong financial position," and could have provided a local government guaranteed under 35 Ill. Adm. Code 811.716-717 for $9.1 million as of fiscal year 2007, up from $7.1 million for fiscal year 2005. Comp. Br. at 10-11. While the City could therefore not have provided the full $17.4 million required under the permits, the People contend that there is every indication that the City, alone or in combination with CLC, could have provided surety bonds from 2000 to the present. Assuming a premium of two percent of face value, the annual premium would have been $348,000, a sum the People believe the City could afford. City Br. at 11.

City's arguments. The City contends this factor does not apply in this case. The City states that since the alleged violations here do not involve "emissions, discharges or deposits" of pollutants, the "technical practicability and economic reasonableness of reducing or eliminating discharges" is not relevant.

CLC's arguments. CLC argues that compliance is not economically reasonable or technically feasible for CLC due to lack of funds. CLC argues that its current situation is a direct result of the Agency's August 2000 approval of the Frontier bonds, failure to grant a permit to accept waste at the site, and failure to allow CLC to recoup its collateral from Frontier.

Board ruling. As the Board previously stated, the economic reasonableness and technical feasibility of the Illinois landfill permitting and financial assurance system was established during the rulemaking process. The Board will not further address the City's contention that this factor is irrelevant here. The record demonstrates that 28 of 30 other landfill sources were able to find alternative financial assurance following the disapproval of Frontier bonds. The Board weighs this factor against respondents.

33(c)(iv): Any subsequent compliance.

People's arguments. Addressing the final factor of any subsequent compliance, *see* 415 ILCS 5/33(c)(5) (2006), the People state that the record reflects only continued noncompliance. The People argue that respondents have done nothing to provide the required financial assurance. Although respondents challenge the financial assurance amount here, neither sought a permit modification between 2000 and July 2007. Comp. Br. 14-15.

City's arguments. The City argues that it has continued to treat leachate from the Landfill, in addition to retaining environmental consultants. As to any liability of the City for posting financial assurance, the City repeats that it continues to challenge that it has any responsibility for so doing, and that it bas been properly pursuing legal challenges and exhausting administrative remedies. The City contends that it has been complying subsequent to the Board's orders of February and June 2006, by voluntarily hiring Shaw Environmental and proceeding with closure and post-closure care activities despite the fact that the City does not conduct the waste disposal operation. City Br. at 14-15.

CLC's arguments. CLC argues that it attempted to find compliant financial assurance once the permit denial for a new operating cell was upheld in the appellate court. Because the

permit was denied, CLC could not accept waste, and was unable to make money. IEPA refused to allow Frontier to release collateral to CLC. When CLC attempted to find alternative financial assurance, it found that it would have to post collateral of $14-15 million in cash, which it could not afford to do. CLC contends that it at all times acted in good faith, and that the problem here was a result of the State's conduct.

Board ruling. At present time, it is undisputed that there is no financial assurance currently in place to guarantee funds for closure of the Morris Community Landfill. The Board finds that this factor weighs against each respondent. CLC as an operator of the Landfill, and the City as owner of the property on which the Landfill sits, and as an operator as found by the Board in February 2006, were and are jointly and severally responsible for posting the initial financial assurance, as well as for upgrading it as needed following the required annual cost updates.

Affirmative Remedies Granted

The Board finds on the basis of the record before it that the Section 33(c) factors weigh in favor of granting much of the "affirmative" relief requested by the People. In this context, the Board again notes that the People have foregone their original claim for attorney fees, requesting the Board to take notice of the fee waiver in its evaluation of costs of any remedy.

The record amply supports, and the Board orders, respondents to post financial assurance in the amount of $17,427,366.00 within 60 days; this sum may be reduced by any amount IEPA has or will receive from its claim against the Frontier bonds. Respondents may use any combination of financial assurance mechanisms acceptable to the IEPA under the Board's rules. Respondent's submission of any permit application for reduction of closure/post-closure costs to IEPA does not constitute compliance with this order.

Also within 60 days, respondents must submit revised cost estimates, and update financial assurance in accordance with approved revised estimates. The Board orders respondents to cease and desist from accepting any additional waste at the site, and from committing any other violations of the Landfill's permits, the Act, and Board regulations.

As the People point out, the Board's remedy order here is consistent with that imposed in other cases involving financial assurance violations. *See* People v. John Prior and Industrial Salvage, Inc., PCB 93-248 (July 7, 1995) (ordering closure of three landfills, development permit revocation, posting of financial assurance, and that Prior "cease and desist" from further violations); People v. Wayne Berger and Wayne Berger Management, PCB 94-373 (May 6, 1999)(ordering landfill closure and imposing $30,000 penalty).

The Board does not today require respondents to immediately close Parcel B of the Landfill in accordance with 35 Ill. Adm. Code 811.110, and the provisions of Permit No. 2000-156-LFM6. This record makes clear that a wholesale reassessment of the best approach to the closure of Parcels A and B is necessary to avoid compounding the environmental issues they currently present. But, this record does not provide the information to enable the Board to do so.

The Board finds that this record demonstrates the need for penalties. To determine the appropriate penalty amount, the Board below considers factors listed in Section 42(h) of the Act. *See* 415 ILCS 5/42(h) (2006).

Penalty Considerations under Section 42

Section 42(a) Maximum Civil Penalties.

The maximum civil penalties the Board can assess are established in Section 42(a) of the Act:

> [A]ny person that violates any provision of this Act or any regulation adopted by the Board . . . shall be liable for a civil penalty of not to exceed $50,000 for the violation and an additional civil penalty of not to exceed $10,000 for each day during which the violation continues . . . . 415 ILCS 5/42(a) (2002).

The People assert that each of the respondents committed two violations, one each of 35 Ill. Adm. Code 811.700(f) and 811.712. At the time it filed its brief, the People calculated that the maximum penalty for the violation of Section 811.700(f) should be $24,950,000 ($50,000 plus $24,900,000 (the 2,490 days from November 16, 2000 through September 11, 2007 at $10,000 fine per day).[11] At the time it filed its brief, the People calculated that the maximum penalty for the violation of Section 811.712 should be $16,580,000 ($50,000 plus $16,580,000 (the 1,658 days from November 16, 2000 through June 1, 2005 at $10,000 fine per day). Pursuant to Section 42(a) of the Act, the People assert that the Board could require Board could require respondents to pay a civil penalty of $41,580,000. Comp. Br. at 15-17.

The People do not seek the maximum penalty of $41.5 million. Instead, the People ask that the respondents at least be held liable for the economic costs avoided due to failure to have financial assurance. The People ask that respondents be held jointly and severally liable for the cost of bond premiums avoided. At roughly $600 per day for each day, the People calculate this sum as in excess of $1.49 million. Comp. Br. at 26-27. The People also request an additional penalty of $399.308.98 against the City alone, the amount of the landfill operating royalties or "tipping fees" paid to the City by CLC.Comp. Br. at 25. The People state that, "for simplicity", they waive recover of interest between the date the benefit was received to the date of hearing. Comp. Br. at 23.

Section 42(h) Penalty Factors

Section 42(h) articulates the aggravating and mitigating factors that the Board weighs in determining an appropriate civil penalty (*see* 415 ILCS 5/42(h) (2006)). Below, the Board will lay out the more significant points the parties have made in support of these factors. The Board will give its analysis of the factors following this presentation.

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[11] The Board calculates the additional fines that would have accrued during the 646 days from September 12, 2007 through June 18, 2009 to be $646,000. The total maximum civil penalty assessable today, then, would be $48,040,000.

Section 42(h)(1): Duration and Gravity of the Violation. The People argue that a conservative first date for the beginning of violation was November 14, 2000, the date CLC was advised of the non-compliant status of the Frontier bonds. Comp. Br. at 26. But, the City argues that the duration of any violation attributable to it should run only from June 1, 2006, the date of the Board's affirmance of the summary judgment order here. City Br. at 20-21.

The People argue that the evidence on the gravity of the violation is substantially the same as the evidence presented concerning Section 33(c)(1). 415 ILCS 5/33(c)(1)(2006). The People again maintain that the gravity of the violations is high, arguing prior Board precedent. Comp. Br. at 19-20, citing ESG Watts Inc. (Viola Landfill) v. Illinois EPA, PCB 01-63 (slip op. at 14) (April 4, 2002) ("financial assurance for closure/post closure of a landfill is essential to protect the State of Illinois from potential liability to care for landfills that may be abandoned"); People v. Wayne Berger, PCB 94-373 (slip op. at 20-21) (May 6, 1999) ("the [financial assurance] provisions are in place to ensure that other more threatening violations do not occur, and which provide a safety net to protect the environment if the operator cannot or will not meet his obligations under the law"); People v. ESG Watts, Inc. (Sangamon Valley Landfill), PCB 96-237 (slip op. at 5) (February 19, 1998) ("compliance with financial assurance requirements is necessary to assure that the State of Illinois will not have to pay for correcting environmental harm created by insolvent polluters."). The People suggest that a number of problems need immediate attention at the Landfill, including the closure of Parcel B, cover maintenance, correction of leachate seeps, and uncovered refuse. For these reasons, the People believe this should be considered a significant aggravating factor. Comp. Br. at 20-21

As to the gravity of the violation, CLC argues that any violation is minimal. Although it has not filed appropriate local guarantee documents, the City states that "it is and has been performing [CLC's failed obligations], even without an order from the Board." CLC Br. at 21. In addition, CLC again reargues the correctness of its interpretation of the financial assurance rules. CLC Br. 21-25.

Section 42(h)(2): Presence or Absence of Due Diligence. After applying for and obtaining in 2000 the SigMod permits with financial assurance requirements totaling $17,426,366, respondents unsuccessfully challenged the amount of financial assurance before the Board. The challenge resulted in a Board denial April 5, 2001 followed by an appellate denial in 2002. No cost updates have ever been filed. Respondents never sought regulatory relief, and respondents did not submit a permit application requesting a reduction of financial assurance until July 2007. Since the date that the Frontier bonds were deemed non-compliant, the respondents have posted no compliant financial assurance, of any kind or in any amount, for closure/post-closure of the Landfill. Comp. Br. at 21-22

The City argues that it has been diligent in pursuing resolution of any Landfill violations since at least 2004. The City asserts that Shaw submitted revised cost estimates to IEPA as early as 2005, and submitted revised estimates as recently as July 2007. City Br. at 26. The City asserts that as long as CLC remains its lessee under the lease agreement, that "the City cannot, on its own initiative, charge in and close Parcel B at CLC's facility, nor can it dictate how CLC will conduct its operation at the facility". City Br. at 27.

Section 42(h)(3): Economic Benefit from Delayed Compliance. At hearing, the only testimony concerning possibly applicable financial assurance mechanisms for compliance with 35 Ill. Adm. Code 811.706 were performance bonds under Section 811.712, local government guarantee under Section 811.717, and the local government financial test under Section 811.716. The maximum amount that the City could have guaranteed ranged from $7 million to a high of $9 million. The City posted no guarantee in any amount. Comp. Br. at 25

The People argue that respondents jointly benefitted from the avoided costs on financial assurance bonds, and suggest using the premium payments avoided for the non-compliant Frontier bonds as providing "a very conservative estimate of the avoided economic benefit." Comp. Br. at 26.

Based on the 2001 annual premium of $217,842, the People calculate that the avoided cost per day was $596.83. Based on the initial non-compliance date of November 16, 2000, until the first day of the remedy hearing September 11, 2007, the People calculate the economic benefit from non-compliance to be $1,486,107.70. Comp. Br. at 26. Even assuming a credit to CLC for the premium payments for 2000-2001, the avoided costs would be $1,059,534.70. The People assert that these costs should be assessed CLC jointly and severally. *Id.*

The City asserts it could have posted a self-guarantee without any cost to itself. City Br. at 27-28. The City argues it received no economic benefit from any compliance delay, because under Section 42(h)(3) any benefit must be "*determined by the lowest cost alternative for achieving compliance.*" City Br. at 28 (emphasis in original), citing 415 ILCS5/42(h)(3). The City also suggests that based on the testimony of IEPA's Mr. Harris that the Frontier bonds were valid on their face through 2005 and by rule through 2006, the non-compliance period should run only from January 1, 2007 through September 11, 2007, resulting in a cost of $151, 594.82 at a daily cost of $596.83. The City states that, crediting premiums paid of $426, 572, no economic benefit resulted. City Br. at 28-29.

CLC again argues that the State has refused to allow Frontier to release funds to it, and that CLC lacks the means to pay any penalty. CLC Br. at 17-18.

The People also contend that the State should recover the dumping royalties or tipping fees it received from 2001-2005, amounting to $399,308.98. This is because after the 2001 operating permit denial, the City knew that there should have been no waste dumping at the Landfill. Comp. Br. at 26-30. On this point, the City suggests that it was still permissible to continue dumping waste in Parcel A. City Br. at 28. Moreover, the City argued that it received no benefit from CLC's failure to acquire bonds only CLC was required to pay for. Overall, the City urges, "it makes no sense that the City would pay more penalty than CLC because the City accepted royalties, when the operator clearly benefited more from the direct revenues it received from the acceptance of waste." *Id.* The City argues that the City and its taxpayers have incurred substantial costs as a result of CLC's situation, and that there are no "ill-gotten gains" or "windfall profits" to be disgorged from the City. City Br, at 29-30.

Section 42(h)(4): Penalty Amount That Will Deter Further Violations and Enhance Voluntary Compliance. The People argue that deterrence is closely linked to the economic benefit factor. The People argue that

> Municipalities which own landfills may contract with other entities for operation, however, they remain jointly liable under the pertinent land disposal regulations, and therefore have the responsibility to ensure that their contract partner operates the landfill in compliance with the law. . . . These municipalities must not be allowed to stand by while their landfills deteriorate, nor must they be allowed, once dumping revenues have ceased, to shift long term maintenance responsibilities to the State. In our case, City of Morris has ignored its environmental responsibilities, while spending a significant amount of funds on other projects. Therefore the penalty assessed in this matter must make it clear to others that municipalities will not be treated differently from private owners when violations of the Act and Board regulations occur at their landfills. At a minimum, fees and royalty payments made to municipalities during periods of knowing violation must be recovered in penalty, so that there is no incentive for continued violations. Comp. Br. at 29-30.

The City argues that any penalty would only serve to further burden local taxpayers, who have already suffered mightily, and would not facilitate closure. The City argues that it is "not in the public interest to impose a harsh punishment on a small municipality (and therefore its taxpayers) for a private operator's failings". City Br. at 30-31.

Section 42(h)(5): Previously Adjudicated Violations of the Act. The People state that aside from the summary judgment order issued in this action, the only previously adjudicated violation is that in IEPA v. Community Landfill Co., AC 89-6 (Feb. 23, 1989) (uncontested, $500 fine). Comp. Br. at 32.

Section 42(h)(6): Voluntary Self-Disclosure Under Section 42(i). There was no self-disclosure here; CLC was notified of the Frontier bonds non-compliance. Comp. Br. at 32. But that, argues the City, should have no relevance to penalty considerations relative to it.

Section 42(h)(7): Supplemental Environmental Project Undertaken. There is no supplemental environmental project (SEP) proposed here. Comp. Br. at 32. Here, too, the City argues that this factor does not weigh against it, since a municipality cannot "voluntarily take on environmental projects at taxpayer expense in order to 'settle' with the State, where the City believes the IEPA's action result from a misinterpretation of the law." City Brief at 32.

Board Analysis and Penalty Calculation

The Board finds that the Section 42(h) factors justify the imposition of a penalty on both respondents. The single adjudicated administrative citation violation weighs minimally against CLC. The factors related to voluntary self-disclosure and SEP performance weigh neither for nor against respondents. Aggravating factors are many and severe.

These aggravating factors are that the on-going, grave financial assurance violations in this case have persisted since 2000, leaving unresolved problems at the Landfill. Neither respondent has exhibited due diligence in actually replacing the non-compliant Frontier bonds (for which no premiums have been paid since 2001). Compliance with financial assurance requirements has yet to be achieved, as respondents continue to argue against the cost requirements and figures based on their own SigMod permit applications.

These respondents have exhibited a course and pattern of conduct in which they appear to believe that they can unilaterally re-write the Board's landfill and permitting rules and requirements. Both respondents have clung steadfastly to their interpretation of the financial assurance requirements for surety bonds despite consistent, contrary interpretations rendered by IEPA, the Board, and even the Third District Appellate Court. Similarly, both respondents appear to believe that their closure/post-closure care costs and obligations are not those actually contained in permits, but instead those advocated by the City's new environmental engineer.

The Board finds that both respondents benefited economically by putting off spending money to achieve compliance with the financial assurance rules, and for this, Section 42(h)(3) requires recovery of benefits received. After listing the factors, the Section 42(h) goes on to provide that

> the Board shall ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in any arbitrary or unreasonable hardship. However, such civil penalty may be off-set in whole or in part pursuant to a supplement environmental project agreed to by the complainant and the respondent. 415 ILCS 5/42(h) (2006).

Based on the limitations of this record, the Board agrees that an appropriate measure of the civil penalty against CLC is the amount of money CLC saved by not paying premiums for the non-compliant Frontier bonds, less the amount of premiums paid. The Board will award the State the penalty amount it requested against CLC: $1,059,534.70.

The Board is not swayed by CLC's cries of current poverty; costs of closure have always been part of the landfill business equation. The cost/post-closure care requirements were tightened at the state and federal level in the early 1990s after lengthy and public regulatory processes. Incomplete knowledge, or even misunderstanding, of these requirements, does not excuse non-compliance with the provisions of the Act and rules designed to protect the State's taxpayers from bailing out from their closure/post-closure defaults the landfill operators who in earlier years reaped the profits of landfill operation. The $1,059,534.70 penalty assessed here is not the Board's first substantial penalty for landfill financial assurance and closure violations. *See* People v. ESG Watts, Inc. (Taylor Ridge Landfill), PCB 01-167 (Apr. 1, 2004) ($1 million penalty plus attorney fees for closure violations); People v. ESG Watts, Inc. (Viola Landfill), PCB 96-233 (February 5, 1998) ($683,200 penalty plus attorney fees for financial assurance and closure violations).

The Board finds some force in the People's arguments in favor of joint and several liability for the "premiums avoided" penalty, finding that the City has not been diligent in resolving this situation. But, the Board will not impose this $1.06 million penalty jointly and severally on CLC and the City. The Board finds that to do so would impose an arbitrary or unreasonable hardship on the City's taxpayers, within the meaning of Section 42(h).[12] Unless the City is able to recover funds from CLC in any separate civil action for breach of the lease agreement between them, the City may well be left to shoulder all necessary compliance costs.[13]

The City was lessor, owner of the underlying property, and an operator of the Landfill under all circumstances here as previously found by the Board. It is beyond question that CLC, under the Act, Board rules, and permits as well as the lease agreement with the City, was the person the State properly looked to *first* for the posting of financial assurance. But, the City was on notice that the State would look to the City *next* in terms of remediation of any problems. The Board cannot find that the City has reaped no financial benefit from its inaction. While the City argues that it *could have* "self-guaranteed" closure costs of from $7.1 up to $9.1 million in 2001 through 2007, the City has never *actually made* such a guarantee.[14] While this record does not quantify amounts, the Board finds that the City received some economic benefits from the fact that it did not formally execute the local guarantee. The Board may reasonably assume that eliminating any such pledge of the City's credit from appearing in its annual audits could only serve to have the City's credit picture appear in a more favorable light to any interested person or entity. *See, e.g.,* ESG Watts, Inc. v. PCB, 218 Ill. App. 3d 43, 668 N.E. 2d 1015 (4th Dist. 1996) (reasonable to assume timely value of money by delaying necessary expenditures on slight evidence).

The only undisputable economic benefit figure quantified in this record is that the City has received dumping royalties or tipping fees from Landfill operations in the years 2001-2005, amounting to $399,308.98. The Board gives little credence to the City's arguments to the effect that it has been an innocent bystander held captive by the feckless actions of its royalty-paying lessee. The Board notes that the City has been ably assisted by counsel through many appeals of determinations by the IEPA and the Board. *See supra* at pp. 27-30. The Board is unable to credit that the City could in good faith believe that it could contract away any responsibility to post financial assurance, or to assume that without posting acceptable financial assurance that CLC would always be able to remediate pollution on land the City owns.

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[12] In this case, this finding is not in consistent with the taxpayer-protection aims of the Tort Immunity Act, 745 ILCS10/1-101 *et seq.* (2006), as discussed *supra* pp.22-24.

[13] Assuming *arguendo* that Frontier Insurance was ready, willing, and able to refund all monies received by it from CLC in both collateral and bond premiums, this record establishes that this would amount to some $600,000. This sum falls far short of financial assurance costs needed here by any party's reckoning.

[14] The City's argument also ignores the fact that at all times pertinent the permit-established closure costs have been at least $17.4 million, figures which should have been but were not routinely and annually updated.

As a prudent landlord and steward of its own property, the City had an obligation to its taxpayers to ensure that CLC lived up to its obligations under the lease agreement. The Board has long held, and the courts have long affirmed, that even *passive* ownership of property[15] is sufficient to allow a finding of liability for pollution under the Act. *See, e.g.,* Perkinson v. IPCB, 187 Ill. App.3d 698, 543 N.E. 2d 901 (1989); Ryan v. McFalls, 313 Ill.App.3d 223, 728 N.E.2d 1152 (2000). When a person owns the land from which discharges originate, that person has long been held liable for the resulting violations of the Act. *See, e.g.,* Meadowlark Farms, Inc. v. PCB, 17 Ill. App. 3d 891, 308 N. E. 2d 829, 835-36 (1974).

The Board finds that it is appropriate under all of the above circumstances to recover from the City the monies it received from 2001-2005, amounting to $399,308.98. The People have made their case that the City knew or should have known that further disposal activities on the site were being conducted without proper financial assurance during these years. As the courts have repeatedly held, the primary purpose for authorization of civil penalties in the Act is to aid in the enforcement of the Act; any punitive considerations are secondary. *See, e.g.,* Fiorini, 143 Ill. 2d at 349, 574 N.E.2d at 625. The Board does not consider the recoupment of these dumping royalties or tipping fees to be punitive in nature. The City has a long record of disregard of the State's landfill requirements, and requiring it to forego some of the financial benefits of its lease arrangement is appropriate here to aid in the enforcement of the Act within the meaning of Section 42(h).

Mindful of the City's taxpayers and the potential costs of the remedies ordered today, the Board is not imposing any additional penalty amount on the City or CLC in this case. In so stating, the Board again notes that these respondents could be assessed statutory penalties under Section 42(a) in this case alone amounting to over $48 million.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1) The Board finds that respondents Community Landfill Corporation, Inc. (CLC) and the City of Morris (City) have violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2006)), and Sections 811.700(f) and 811.712(b) of the Board's regulations. 35 Ill. Adm. Code 811.700(f), 811.712(b). The Board incorporates by reference herein as if fully set forth its orders of February 1, 2006 and June 1, 2006 granting summary judgment in favor of complainant, the People of the State of Illinois.

2) Within 60 days of the date of this order, on or before August 17, 2009, CLC and the City must, jointly and severally, post financial assurance in the amount of

[15] The Board reminds that it has not found the City's role here to be mere passive land ownership. *See infra* at p. 4-5, quoting the Board's February 2006 summary judgment order. People of The State of Illinois v. Community Landfill Company, Inc. and City of Morris, PCB 03-191, slip op at 14 (Feb. 16, 2006).

$17,427,366.00 in such form(s) as meet the requirements of the 35 Ill. Adm. Code 811.700, and the current permits for the Morris Community Landfill (Landfill). Respondents may use any financial assurance mechanism, or combination of mechanisms acceptable to the IEPA under the Board's rules. Respondents' submission of any permit application for reduction of closure/post-closure costs to IEPA does not constitute compliance with this order.

3) Within 60 days of the date of this order, on or before August 17, 2009, CLC and the City must, jointly and severally, provide updated cost estimates for closure/post-closure care as meet the requirements of 35 Ill. Adm. Code 811.705(d).

4) Within 60 days of providing the update cost estimate required in paragraph 3), above, CLC and the City must, jointly and severally, upgrade the financial assurance for closure and post closure, as required by 35 Ill. Adm. Code 811.701.

5) Respondent CLC must pay a civil penalty of $1,059,534.70 no later than Monday, August 17, 2009, which is the first business day after 60 days from the date of this order. Such payment must be made by certified check, money order, or electronic transfer of funds, payable to the Environmental Protection Trust Fund. The case number, case name, and CLC's federal employer identification number must be included on the certified check or money order.

6) Respondent City must pay a civil penalty of $399,308.98 no later than Monday, August 17, 2009, which is the first business day after 60 days from the date of this order. Such payment must be made by certified check, money order, or electronic transfer of funds, payable to the Environmental Protection Trust Fund. The case number, case name, and City's federal employer identification number must be included on the certified check or money order.

7) Respondents must each send the certified check, money order, or confirmation of electronic funds transfer to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

8) Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2006)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2006)).

9) Respondents must cease and desist from accepting any additional waste at the site, further violations of the Act and the Board's regulations

IT IS SO ORDERED.

Member G.L. Blankenship concurred.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 18, 2009, by a vote of 5-0

John T. Therriault

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
June 18, 2009

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 03-191
	)	(Enforcement -Land)
COMMUNITY LANDFILL COMPANY, INC. and the CITY OF MORRIS,	)	
	)	
	)	
Respondents.	)	

CONCURRING OPINION (by G.L. Blankenship):

I respectfully concur in all aspects of the Board's order today with the exception of paragraph six, which assesses a civil penalty of $399,308.98 against respondent City of Morris. Given the costs of the remedy ordered, I believe that imposition of a civil penalty on the City would be an arbitrary or unreasonable hardship upon the City's taxpayers, who may bear costs associated with closing this landfill.

For this reason, I respectfully concur.

Gary L. Blankenship
Board Member

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the above concurring opinion was submitted on June 18, 2009.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
February 16, 2006

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 03-191
	)	(Enforcement – Land)
COMMUNITY LANDFILL COMPANY,	)	
INC., an Illinois corporation, and the CITY OF	)	
MORRIS, an Illinois municipal corporation,	)	
	)	
Respondents.	)	

INTERIM OPINION AND ORDER OF THE BOARD (by N.J. Melas):

On April 17, 2003, the Office of the Attorney General, on behalf of the People of the State of Illinois (AGO), filed a one-count complaint against Community Landfill Company, Inc. and the City of Morris (respondents) alleging failure to provide adequate financial assurance for closure and post-closure operations. Community Landfill Company, Inc. (CLC) is the operator, and the City of Morris (Morris) the owner, of the Morris Community Landfill, a special waste and municipal solid waste landfill located at 1501 Ashley Road, Morris, Grundy County.

This order addresses the parties' counter-motions for summary judgment. The primary issue is whether both respondents failed to provide adequate financial assurance for waste disposal operations in violation of the Environmental Protection Act (Act) (415 ILCS 5/1 *et al.* (2004)) and Board regulations. This order also addresses CLC's motion to strike parts of the AGO's motion for summary judgment that seeks the Board to impose an interim and immediate remedy.

For the reasons set forth below, the Board grants CLC's motion to strike the requests for an interim remedy from the AGO's motion for summary judgment and strikes those parts. The Board then grants the AGO's motion for summary judgment and denies Morris' counter-motion. Today the Board orders the hearing officer to proceed expeditiously to hearing on the issue of remedy.

PROCEDURAL BACKGROUND

The Board accepted the complaint for hearing on May 1, 2003. On June 13, 2003, the City of Morris filed an "Answer and Affirmative Defenses" (Morris Ans.). The filing, however, contained no affirmative defenses.

On June 16, 2003, CLC filed an answer along with four affirmative defenses (CLC Ans.). On July 16, 2003, the AGO filed a reply and a motion to strike the affirmative defenses alleged

EXHIBIT B

by CLC (Mot. to Strike). On August 1, 2003, CLC responded to the AGO's motion to strike (Resp.).

On October 16, 2003, the Board granted the AGO's motion to strike in part and denied the motion in part. The Board granted the AGO's motion to strike the alleged affirmative defense of estoppel. The Board also granted the AGO's motion to strike CLC's second, third and fourth alleged affirmative defenses. The Board denied the AGO's motion to strike *laches*.

The Environmental Protection Agency (Agency) has denied a supplemental permit application filed by CLC in a prior permit appeal before the Board due to inadequate financial assurance. On appeal by CLC and Morris, the Board upheld the denial of the permit applications due to the respondents' failure to provide adequate, compliant financial assurance. *See* CLC and Morris v. IEPA, PCB 01-170, slip op. at 22 (Dec. 6, 2001). In Community Landfill; PCB 01-170, the Board found that the Frontier Bonds did not meet the requirements of 35 Ill. Adm. Code 811.712(b). The Board's finding was confirmed on appeal. CLC v. PCB, 331 Ill. App. 3d 1056; 772 N.E. 2d 231 (May 15, 2002).

On July 21, 2005, the AGO moved the Board to grant summary judgment in its favor. On October 3, 2005, CLC responded and moved to strike portions of the AGO's motion for summary judgment. On October 4, 2005, Morris responded to the AGO's motion and filed a counter-motion for summary judgment. On October 18, 2005, the AGO made several filings, including a response to CLC's motion to strike and a response to the counter-motion for summary judgment. On that same day, the AGO moved the Board for leave to file a reply in support of the AGO's motion for summary judgment *instanter*. The AGO claimed that CLC misrepresented the issue of relief and stated that the misrepresentation could result in material prejudice if the AGO was not allowed to reply. The Board grants the motion and accepts the AGO's reply.

FACTUAL BACKGROUND

The Site

The Morris Community Landfill is approximately 119 acres in area, and is divided into two parcels, designated parcel "A," consisting of approximately 55 acres, and parcel "B," consisting of approximately 64 acres. Comp. at 2. CLC operates the Morris Community Landfill and manages the day-to-day operations of both parcels at that site. The respondents have arranged for and supervised the deposit of waste, including municipal solid waste, garbage, and special waste, into waste cells at the Morris Community Landfill since at least June 1, 2000 on parcels "A" and "B" of the landfill. Comp. at 2.

The Agency issued Significant Modification (SigMod) Permit Numbers 2000-155-LFM, covering Parcel A, and 2000-156-LFM, covering Parcel B, on August 4, 2000. Comp. at 3. On June 29, 2001, the Agency issued Permit Modification Number 2 for parcels A and B. On January 8, 2002, the Agency issued Permit Modification Number 3 for Parcel A. *Id.* The SigMod permits were issued to Morris, as owner, and CLC as operator. Pursuant to these

permits, the respondents were to provide a total of $17,427,366 in financial assurance, beginning in 2000. *See* Mot. Exh. A, p. 45, par. 6; Mot. Exh. B, p. 33, par. 6; CLC and Morris v. IEPA, PCB 01-48, 49 (cons.), slip op. at 29 (Apr. 5, 2001).

The respondents provided the Agency financial assurance of closure and post closure costs by way of three separate performance bonds underwritten by The Frontier Insurance Company. Comp. at 3; Mot., Exh. C. On June 1, 2000, the United States Treasury Department removed Frontier Insurance Company from the list of acceptable surety companies listed in the United States Department of Treasury publication "Circular 570." Comp. at 3.

REGULATORY FRAMEWORK

A short summary of the relevant statutes and rules follows. Section 21(d)(2) of the Act provides that "[n]o person shall . . . Conduct any waste-storage, waste-treatment, or waste-disposal operation . . . in violation of any regulations or standards adopted by the Board under this Act." 415 ILCS 5/21(d)(2) (2004). Section 811.700(f) of the Board's financial assurance regulations provides:

> On or after April 9, 1997, no person other than the State of Illinois, its agencies and institutions, shall conduct any disposal operation at an MSLF unit that requires a permit under subsection (d) of Section 21.1 of the Act, unless that person complies with the financial assurance requirements of this part." 35 Ill. Adm. Code 811.700(f).

Under Section 811.712(b), the surety company issuing the bond must be licensed by the Department of Insurance, pursuant to the Illinois Insurance Code, or at least licensed by the insurance department of one or more states and approved by the U.S. Department of the Treasury as an acceptable surety. 35 Ill. Adm. Code 811.712(b). Section 811.712 also provides that the U.S. Department of the Treasury lists acceptable sureties in its "Circular 570." *Id.*

SUMMARY JUDGMENT STANDARD

Section 101.516 of the Board's procedural rules regarding motions for summary judgment provides:

> If the record, including pleadings, depositions and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment. 35 Ill. Adm. Code 101.516; *see also* 415 ILCS 5/26 (2004).

Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Putrill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). "Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would

arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

THE AGO'S MOTION FOR SUMMARY JUDGMENT

The AGO urges the Board to grant summary judgment in their favor and find the respondents in violation of the Act and the Board's financial assurance regulations. Further the AGO seeks an order requiring the respondents to cease and desist from further operations at the landfill and comply with the closure and post-closure financial assurance regulations, and finally to immediately set a date for hearing on the issue of civil penalty.

CLC, on the other hand, argues that genuine issues of material fact exist that preclude a finding of summary judgment at this time. CLC contends that while the Agency states that CLC and Morris have not provided adequate financial assurance, the Agency has made a claim on the very same bonds it claims are inadequate for closure and post-closure care. CLC Resp. at 5. CLC maintains that the Agency's conduct regarding the surety bonds is conflicting and confusing.

Respondents Conducted a Waste Disposal Operation

The AGO states that the respondents submitted reports to the Agency, signed by the Mayor of Morris and the President of CLC, acknowledging the receipt of solid waste at the landfill. Mot. at 8; citing Mot. Exh. H. The AGO further states that waste disposal has continued at the landfill through at least May 18, 2005. According to the AGO, the signed reports and continuing disposal demonstrate that CLC is the operator of the landfill, and was a recipient of the SigMod permits. Mot. at 8; citing CLC Ans. par. 5.

The AGO claims that Morris applied for the SigMod permits and provided a Frontier Insurance Company surety bond in the sum of $10,081,630.00 as principal. Mot. at 9. The AGO argues that Morris has profited from waste disposal at the site and has taken an active role in the permitting process. Mot. at 9. For these reasons, argues the AGO, both respondents operate the landfill.

Offensive Collateral Estoppel: Performance Bonds Not Listed in the Circular 570

The AGO contends that Section 811.712 of the Board's regulations requires that performance bonds used as financial assurance be listed in the U.S. Department of the Treasury "Circular 570." Mot. at 10; citing 35 Ill. Adm. Code 811.712. The AGO states that the Board has already found the Frontier Bonds noncompliant in PCB 01-170. For this reason, the AGO argues that collateral estoppel applies because: (1) the issue decided in PCB 01-170 is identical with the one presented here because the bonds are the same; (2) there was a final judgment on the merits; and (3) CLC and Morris were also parties to the proceeding in PCB 01-170. Mot. at 10-11; citing People v. CLC *et al*, PCB 03-191, slip op. at 4-5 (Oct. 16, 2003).

The AGO states there is no unfairness to apply offensive collateral estoppel here and it is reasonable because there is no further need to litigate the status of the Frontier Bonds. Mot. at 11-12. Therefore, claims the AGO, the Board should find that the AGO is entitled to judgment on this issue as a matter of law. Mot at 12.

In response to the status of the Frontier bonds, CLC argues that the Agency's own conduct should preclude it from maintaining that financial assurance is not in place. CLC states that on January 27, 2004, almost a year after the present complaint was filed alleging that the respondents had failed to provide financial assurance, the Agency stated in a letter that Morris Community landfill "is providing financial assurance for closure and post-closure costs." CLC Resp. at 6; citing Resp. Exh. L. At the very least, argues CLC, the letter raises an issue of fact as to whether adequate financial assurance is in place.

Respondents' Failure to Provide Adequate Financial Assurance Continues

The AGO further states that the respondents have failed to substitute any adequate financial assurance even after the appellate court's 2002 ruling and the Illinois Supreme Court's denial of their petition for review. The AGO claims that by continuing to conduct waste operations at the facility after August 4, 2000, the respondents therefore violated Section 811.700(f). 35 Ill. Adm. Code 811.700(f). The AGO contends that the respondents have also failed to provide annual updates of closure or post-closure costs, or even to annually adjust estimates for inflation, in violation of Section 811.701(c) and their SigMod permits. Mot. at 13.

Because of the alleged violations of Board regulations, the AGO states the respondents also violated Section 21(d)(2) of the Act, the Act's prohibition against violating any of the Board's land pollution or refuse disposal regulations. 415 ILCS 5/21(d)(2) (2004).

Respondent's Violations Were Willful, Knowing, and Repeated

According to the AGO, the respondents' actions demonstrate a willful, knowing, and repeated violation of the Act and Board regulations. The AGO states that the respondents violated the financial assurance requirements of the Board's regulations and their permits since August 4, 2000. Since the Illinois Supreme Court's denial of their petition for leave to appeal on December 5, 2002, argues the AGO, the respondents have been aware that the Frontier Insurance Company bonds were noncompliant, yet continue to operate the landfill. Mot. at 15.

Requested Relief

The AGO specifically requests that a separate hearing be held on the issue of civil penalty. The AGO further requests that the Board order interim relief. The AGO asks the Board to order the respondents to cease and desist from transporting and depositing any additional waste at the landfill until they are fully compliant with their permits and the Board's financial assurance requirements. Further, the AGO asks that the Board find that the respondents' violations were willful, knowing, and repeated. The AGO asks the Board to order the

respondents to immediately provide financial assurance, update the closure or post-closure costs in accordance with their permits, and initiate closure of parcels A and B of the landfill.

Regarding the requested relief, CLC states that if the Agency prevails, it will essentially be recovering "twice from the same allegation." CLC Resp. at 6.[1] CLC states that if the Agency prevails on its claim, the result is likely to be financial penalties to CLC and Morris. CLC continues that the Agency will also likely recover for the very closure and post-closure care for which it claims financial assurance has not been provided. According to CLC, this result would allow the Agency to recover twice from the same allegation and result in a contravention of its duty to use penalties only to enforce the Act, not to punish. CLC Resp. at 6.

The AGO moved to file a reply *instanter*, claiming that CLC confused the issue of relief, and stating that this misrepresentation could result in material prejudice. The AGO reiterates that the Agency has *not* recognized the Frontier Bonds as acceptable. Reply at 3.

The AGO states that there is nothing "unjust" about the AGO's requested relief. The AGO states that the Agency knew nothing about the "collateral" that CLC speaks of in the response, or that CLC and Frontier had agreed that CLC was not required to make payments on the bonds. The violation, claims the AGO, lies in that the respondents never substituted financial assurance once the Frontier Bonds were deemed noncompliant, and continued to operate the landfill. Reply at 4.

The AGO states that payment or performance by Frontier is not the relief the AGO seeks in the motion for summary judgment. The AGO contends that by continuing operations for three years after the Frontier Bonds were found noncompliant without providing alternate financial assurance, CLC has demonstrated a knowing, willful, and continued violation of the Act. Reply at 5.

For these reasons, the AGO argues it is entitled to an order requiring CLC and Morris to cease and desist from additional violations. CLC and Morris must also provide, states the AGO, new, compliant financial assurance.

MORRIS' COUNTER MOTION FOR SUMMARY JUDGMENT

Morris moves the Board for summary judgment in its favor because it did not "conduct" and disposal operation at the Morris Community Landfill, and because it has complied with

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[1] As discussed below, CLC references the Agency and the AGO interchangeably, at times, throughout pages 5-7 of CLC's response to the AGO's motion for summary judgment. For example, by stating "[i]f the Agency prevails on its claims . . ." the CLC is confusing the complainant in this proceeding. The Board nonetheless discusses CLC's arguments in the discussion section below.

Sections 811.706 and 811.717 of the Board's regulations. Morris Mot. at 2, 8; citing 35 Ill. Adm. Code 811.706, 811.717.

The AGO states that Morris' argument that it is not "'conducting a waste disposal operation' at the Morris Community Landfill . . . defies common sense, and is legally incorrect." Resp. at 1-2. The AGO contends that Morris has been permitted as either an "owner" or "operator" and actively participated in landfill decisions since 1974. AGO Resp. at 2. The AGO further states that Morris contracted with CLC on all permitting and financial assurance issues, and financially benefited from landfill operations. *Id.*

Morris Did Not "Conduct Any Waste Disposal Operation"

Morris' Arguments

Morris' first argument in support of a Board granting summary judgment in its favor is that Morris did not "conduct any waste disposal operation" at the Morris Community Landfill. Morris contends that Section 21(d)(2) of the Act provides "no person shall . . . conduct any waste-storage, waste-treatment, or a waste-disposal operation . . . in violation of any regulations or standards adopted by the Board under this Act." 415 ILCS 5/21(d)(2) (2004). Therefore, according to Morris, by the plain language of the Act, the requirements of that section only apply to a person that "conducts" a waste disposal operation. Morris Mot. at 2. Morris contends that the well-settled rules of statutory construction provide that words must be given their plain and ordinary meaning. *Id.*; citing King v. First Capital Financial Services Corp., 215 Ill. 2d 1, 828 N.E.2d 1155, 1169 (2005).

Morris cites to the Black's Law Dictionary's definition of "conduct:" "to manage; direct; lead; have direction; carry on; regulate; do business." Morris Mot. at 2; citing Black's Law Dictionary, 295 (6th Ed. 1990). Morris states that based on the definition of "conduct," there is no question that Morris does not conduct a waste disposal operation because it is not managing, leading directing, carrying on, regulating or doing business as a waste disposal facility. Rather, argues Morris, it merely owns and is the fee titleholder of the property that CLC uses for waste disposal activities. Morris Mot. at 2.

Morris states that CLC is listed as the operator on the Agency-issued permits. Morris Mot. at 3. Further, argues Morris, Mr. Brian White, an affiant the AGO relied upon in support of the motion for summary judgment, states that the owner of a facility does not necessarily have to post closure and post closure financial assurance. Morris Mot. at 3, Exh. B at 37-38.

Morris states that the Board has held that where a waste disposal operation is owned and operated by separate entities, it is the operators of such sites, not the owners, who are responsible for posting of the requisite financial assurance. Morris Mot. at 7; citing People v. Wayne Berger and Berger Waste Management, PCB 94-373 (May 6, 1999). Morris notes that in Berger, the Board held that the owner of the landfill did not become the operator when it received title to the property and, consequently, was not liable for the financial assurance violation alleged in Section 21(d) of the Act.

Morris argues that like the owner company in Berger, and in accordance with the plain language of Section 21(d)(2) of the Act and Section 811.700(f) of the Board's regulations, Morris does not conduct a waste disposal operation at the site. Morris Mot. at 8.

The AGO's Response

According to the AGO, the Board should find that, as a matter of law, holding an Illinois EPA permit for waste disposal at a landfill constitutes "conducting a waste disposal operation." AGO Resp. at 2. The AGO states that Morris obtained 35 Agency permits, including modifications, regarding waste disposal at the Morris Community Landfill. *Id.* at 3. The AGO asserts that Agency records show that five permits issued to Morris show Morris as the "owner and operator." AGO Resp. at 4.

Above and beyond being a named operator of the landfill, the AGO states that joint action with CLC demonstrates that Morris was an active participant at the landfill. For example, the AGO notes that Morris applied for and received joint waste disposal permits with CLC, provided noncompliant financial assurance in excess of ten million dollars, litigated the validity of the Frontier Bonds along with CLC, and failed to replace the Frontier bonds with substitute financial assurance. The AGO also states that Morris benefited financially from the landfill operations. AGO Resp. at 6. These activities, claims the AGO, demonstrate that Morris was an active participant in the landfill.

The AGO contends that Wayne Berger is clearly distinguishable from the facts at hand. In Wayne Berger, the Board found that the landowner did not "conduct a waste disposal operation." Wayne Berger is distinguishable, however, because the operator transferred the property to the landowner after being cited for operational and financial assurance violations, no permit was transferred with ownership of the property, and the landowner was never issued any Agency-issued permits. AGO Resp. at 7; citing Wayne Berger, slip op. at 8.

In contrast, states the AGO, Morris is a permitee of 35 permits for waste disposal activities, five of which name Morris as "owner and operator." AGO Resp. at 7. Further, the AGO asserts that Morris did not acquire the landfill after the violations occurred. Rather, Morris has owned the Morris Community Landfill since its original development. *Id.*

The AGO states the rules of statutory construction dictate that the Act and Board regulations should be construed to affect their purpose and to avoid absurd results. AGO Resp. at 8; citing Mulligan v. Joliet Regional Port District, 123 Ill. 2d 303.313 (1988); Lionel Trepanier *et al.*, v. Speedway Wrecking Co., PCB 97-50 (Jan. 6, 2000).

The AGO first contends that the term "conduct" should be broadly construed. The AGO states that Morris is not only the owner of the property, but also of the Morris Community Landfill itself. AGO Resp. at 10. The AGO states that although Morris leased the landfill to CLC, it never conveyed the title to CLC. Rather, Morris has continued to be bound under subsequent permits, provided surety bonds, and appealed permit denials. AGO Resp. at 10.

The AGO contends that pursuant to Morris' interpretation, Section 21(d) of the Act and regulations promulgated under it would only apply to the person physically disposing of the waste. Morris's approach, claims the AGO, would allow permitted owners to set up "operator" entities to avoid the consequences of violating the Board's landfill management regulations. AGO's Resp. at 10. At the Morris Community Landfill neither the owner nor the operator of CLC has provided compliant financial assurance.

CLC's Response

CLC opposes Morris' counter-motion for summary judgment stating that it lacks legal foundation and must be denied. CLC states that Morris is not merely a fee title holder of the landfill, but rather an operator that is substantially involved in conducting the waste disposal operation. CLC Resp. at 1. CLC states that courts and the Board itself have broadly interpreted the definition of an operator depending "on the specific facts of the case as a whole." CLC Resp. at 2; citing People v. Bishop, 315 Ill. App. 3d 976, 978; 735 N.E.2d 754, 757 (5th Dist. 2000).

According to CLC, the Board's regulations are clear that "[t]he owner or operator shall provide financial assurance to the agency . . . ." CLC Resp. at 2; citing 35 Ill. Adm. Code 811.700(b). CLC's interpretation is that this Section does not limit the responsibility solely to either entity. Further, Morris has litigated financial assurance issues involving the Morris Community Landfill for years.

CLC also states that Morris' involvement in the permitting process and pledge of financial assurance qualify as substantial involvement in the operation of the landfill. CLC states that Morris has committed, in an addendum to a lease agreement, to treat leachate, condensate, and groundwater at the landfill. CLC Resp. at 3; Exh. 2; citing Bishop.

CLC contends that pursuant to Board rules, the operator, not the owner "is responsible for the operation of a leachate management system designed to handle all leachate as it drains from the collection system." CLC Resp. at 3; citing 35 Ill. Adm. Code 811.309(a). Therefore, by agreeing to treat leachate at the landfill, and providing financial assurance, Morris is an operator that conducts a waste treatment operation. CLC Resp. at 3. CLC states that at the very least, Morris' actions demonstrate a genuine issue of material fact making summary judgment inappropriate at this time. *Id.*

Morris' Reply

In its reply, Morris disputes the AGOs' arguments for several reasons. First, Morris states that the AGO's argument that Morris "conducts a waste disposal operation" simply because it was listed as an "owner and operator" on permits issued decades ago must fail. Morris contends that when it was issued permits in 1974 and supplemental permits in 1978, 1980, and 1989 that listed Morris as the "owner and operator," there was no obligation for a local unit of government to post any financial assurance. Even currently, Morris states that the financial

assurance requirement under Section 807.601(a) does not apply to "any unit of local government. Morris Reply at 1; citing 35 Ill. Adm. Code 807.601(a).

Morris agrees that "whether one is an operator pursuant to the Act depends on the specific facts as a whole." Morris Reply at 2; citing Bishop, 315 Ill. App. 3d 976, 979, 735 N.E.2d 754, 757 (5th Dist. 2000). Morris states, however, that it has not conducted any disposal operation since 1982. Morris states no City of Morris employee has ever spread and compacted waste, operated earth-moving equipment or conducted any other waste disposal operations at the landfill. Morris Reply at 3.

Agency employees, states Morris, concede that CLC is the entity that performs the day-to-day operations, not Morris. Morris contends that the record shows that Morris is not conducting a waste disposal operation, and thus, has no duty to post financial assurances for closure or post-closure care. Morris Reply at 5. Morris states that "merely contracting with an operator does not make the other contracting party the 'conductor' of a landfill operation." *Id.* at 6; citing Bishop, 735 N.E.2d 754, Termaat v. Anderson, *et al.*, PCB 85-129 (Oct. 23, 1986), Berger, PCB 94-373. Likewise, Morris states, receiving financial benefit does not mean that Morris is conducting a waste disposal operation. Morris Reply at 7. Morris asserts that host fee agreements are common and that no local unit of government would ever vote in favor of siting a landfill if doing so would subject it to financial assurance requirements. *Id.* at 7-8. That argument, states Morris, is "disingenuous and ridiculous." *Id.* at 8.

Morris states that enforcing the Act and Board regulations to require owners *or* operators, but not both, to provide financial assurance does not produce absurd results. Morris Reply at 9. According to Morris, the law is clear that a unit of local government is exempt from the financial assurance requirements unless it conducted landfill operations after April 9, 1997. *Id.*; citing 35 Ill. Adm. Code 811.700(c), (f). According to Morris, the Board need only enforce the plain language of the statute and regulations to award summary judgment in favor of Morris. Morris Resp. at 10. Morris states that because it is excluded from posting financial assurance in this case, Morris has not committed any willful or repeated violations. For all of these reasons, Morris urges the Board to grant summary judgment in its favor. Morris Resp. at 11.

Morris Has Complied With All Financial Assurance Requirements

Morris' second argument in support of a finding of summary judgment in its favor is that Morris has complied with the financial assurance requirements of Sections 811.706 and 811.717 of the Board's procedural rules. 35 Ill. Adm. Code 811.706, 811.717.

Morris disputes the AGO's argument that Morris has failed to provide financial assurance in compliance with one of the ten mechanisms, a surety bond guaranteeing performance under subsection 811.706(a)(3), set forth in Section 811.706(a). Morris states that it "can and would provide financial assurance in compliance with the mechanism set forth in Section 811.717," which is the local government guarantee. Morris contends that because it could comply with Section 811.706 through the posting of local government guarantee to perform closure and post

closure activities, the Board should find there is no genuine issue of material fact that Morris can and will comply with all rules and regulations and grant summary judgment in its favor.

The AGO claims that Morris' argument that it has offered, or could offer, the Agency financial assurance in the form of a local government guarantee is misleading and false. In fact, states the AGO, neither respondent has provided financial assurance in the form of any of the ten mechanisms in Section 811.706. It is not enough for Morris to say that it "can and would" provide the local government guarantee as the method of financial assurance. Morris simply has not met the requirements of Section 811.716 or 811.717. AGO Resp. at 15.

The AGO again state that Morris' failure to provide compliant financial assurance since August 8, 2000 to the present, especially subsequent to the Illinois Supreme Court's ruling that the Frontier Bonds were noncompliant on December 5, 2002, demonstrates that the alleged violations are knowing, willful, and repeated. AGO Resp. at 16.

CLC'S MOTION TO STRIKE PARTS OF THE AGO'S MOTION FOR SUMMARY JUDGMENT

CLC moves the Board to strike portions of the AGO's motion for summary judgment in which CLC claims the AGO alleged continuing violations and separate relief beyond that which is set forth in the initial complaint. Mot. to Strike at 1-2. CLC asks the Board to strike both allegations that disposal operations continued at the landfill (Mot. at 4, par. 7, 8, par. 17), and a request that the Board order CLC to cease and desist from transporting or depositing any additional material at the landfill (Mot. to Strike at 16, par. 38(3)).

In general, the AGO contends that CLC's motion to strike is untimely. The AGO argues that CLC was granted an extension of time to respond *only* to Morris' counter motion for summary judgment. The AGO contends, therefore, that CLC's motion to strike should be denied as untimely.

Allegations of Continuing Disposal Operations

CLC states that the Board's procedural rules require the AGO to move to amend the complaint and to provide just and reasonable cause for the amendments. Mot. to Strike at 2; citing People v. Petco Petroleum Corp., PCB 05-66, slip op. at 3 (May 19, 2005). Regarding the new request for relief, CLC contends that while the Board's procedural rules allow the moving party to "move the Board for summary judgment for all or any part of the relief sought," the relief the AGO seeks is newly pled. Mot. to Strike at 3; citing 35 Ill. Adm. Code 101.516(a).

The AGO responds that the motion for summary judgment does not seek to add any additional violations. For this reason, CLC's reliance on Petco Petroleum is not applicable. Resp. at 3; citing Petco Petroleum, PCB 05-66. The AGO states that also included in its motion is a request for specific interim relief. The AGO states that the Board's orders that accept matters for hearing demonstrate that the Board encourages such a request. Resp. at 3.

Request for Cease and Desist Order

Further, contends CLC, while the Board does have the power to issue a cease and desist order, it may only do so upon issuing a final order. 415 ILCS 5/33(a) and (b) (2004). CLC states that a cease and desist order is premature. CLC, therefore, asks the Board to strike the AGO's request for a cease and desist order.

The AGO states that nothing in the Act prevents the Board from issuing a cease and desist order after a finding of liability, but before issuing a final order. Resp. at 4. The AGO claims that the language of Section 33 of the Act stating ". . . the Board shall issue and enter such final order, or make such final determination . . ." assumes that there will be cases where only certain issues are determined. Resp. at 5; citing 415 ILCS 5/33 (2004). The AGO cites Section 33(b) of the Act that states "such order may include a direction to cease and desist from violations of this Act . . . ," which allows the Board to issue cease and desist orders dealing with those certain issues. *Id.*

As an example of where the Board has granted partial summary judgment prior to hearing on penalty, the AGO cites to People v. Michael Stringini, PCB 01-43 (Oct. 16, 2003). Resp. at 5-6; citing also Krautsack v. Patel *et al.*, PCB 95-143 (Aug. 21, 1997) (granting partial summary judgment, ordering the respondents to cease and desist from further violations, and ordering a respondent to remediate the site, but deferring the Board's final decision on civil penalty). Finally, the AGO states that the appellate courts have recognized that the Act has "conferred upon the . . . Board those powers that are reasonably necessary to accomplish the legislative purpose of the administrative agency . . . and necessarily the power to order compliance with the Act." Resp. at 6; citing Discovery South Group Ltd. v. PCB, 275 Ill. App. 3d 547 (1st Dist. 1995).

The AGO states that the interim relief requested is the only way for respondents to come into compliance with the Act. Resp. at 6. In fact, the AGO contends that the Board should deny CLC's motion to strike and order the respondents to come into compliance on an expedited basis. *Id.* at 7.

BOARD DISCUSSION

Board Analysis of CLC's Motion to Strike

The Board grants CLC's motion to strike both the AGO's allegations of continuing disposal operations as well as the AGO's request for an interim order requiring CLC to cease and desist from further violations of the Act. The Board disagrees with CLC's argument that the AGO has alleged new violations. Rather, the Board finds that the AGO's allegations that disposal operations have continued at the landfill are allegations of continuing violations, not newly pled violations.

The Board further finds it is premature to rule on the issues of penalty or attorney fees at this time. Under Section 33 of the Act, a Board order may include a direction to cease and

desist from violations of the act or any rule adopted under this Act, but only after determining the reasonableness of the emissions. *See* 415 ILCS 5/33(a)-(c) (2004). As held in the past, the Board looks to the factors in Section 33(c) and Section 42(h) of the Act (415 ILCS 5/42 (2004)) in determining and assessing penalties and each of those factors require factual determinations. People v. CLC, PCB 97-193, *slip op.* at 10 (Apr. 5, 2001). The Board has previously found that "the factors are not appropriately discussed in an order on cross motions for summary judgment." CLC, PCB 97-193, *slip op.* at 10 (Apr. 5, 2001); *see also* People v. J & F Hauling, Inc., PCB 02-201 (June 6, 2002). After today's finding of violations, the Board will consider factors such as the duration of the violations, and whether they are continuing, in its remedy analysis.

The parties may address the economic benefits gained by respondent, the duration of the violations, as well as the remaining factors under Section 42(h) of the Act (415 ILCS 5/42 (2004)) at hearing and in final briefs on the issue of remedy. Further, whether a respondent's violations were willful, knowing, and repeated are considered in deciding whether to award a complainant attorney fees. For this reason, the Board grants CLC's motion and strikes references to the AGO's requests for relief from the summary judgment pleading.

Board Analysis of Cross Motions for Summary Judgment

The Board finds that there are no genuine issues of material fact regarding the alleged violations. Therefore summary judgment is appropriate and the Board grants summary judgment in favor of the complainant for the reasons discussed in more detail below.

This case involves a single alleged violation of the Act and two violations of corresponding Board regulations. Section 21(d)(2) of the Act prohibits any person from conducting a waste disposal operation in violation of any Board regulations. *See* 415 ILCS 5/21(d)(2) (2004). The Board regulations at issue are: (1) the requirement for any person conducting any disposal operations to comply with the financial assurance requirements (35 Ill. Adm. Code 811.700(f)); and (2) that any surety bonds must provided by a surety company approved by the U.S. Department of Treasury as an acceptable surety in its list of acceptable sureties, known as the "Circular 570" (35 Ill. Adm. Code 712(b)).

Therefore, the issue is what constitutes "conduct" in determining whether CLC and Morris conducted any waste-disposal operations at the Morris Community Landfill. The Board addresses the counter motions together and grants summary judgment in favor of the AGO, finding that both CLC and Morris violated the Act and Board regulations that require any person conducting disposal operations to comply with the financial assurance requirement mandating that surety bonds must be licensed as an acceptable surety in the U.S. Department of Treasury's Circular 570.

CLC and Morris Conducted Waste Disposal Operations

The Board is persuaded by the AGO's argument that the Board takes a broad view of what types of activities might constitute "operating" a waste disposal site. People v. Poland,

Yoho, and Briggs Ind., Inc., *et al.*, PCB 98-148, slip op. at 18 (Sept. 6, 2001). The Board does not, however, adopt the AGO's position that as a matter of law, holding an Illinois EPA permit for waste disposal at a landfill constitutes "conducting a waste disposal operation" (AGO Resp. at 2). Like the court in Bishop, the Board looks beyond the permit to the specific facts of the case as a whole. *See* Bishop, 735 N.E.2d at 757-58.

For example, in Briggs, PCB 98-148, the Board found that Briggs was involved in the day-to-day operations of the site. Briggs was responsible for half of the bulldozing expenses and half of the engineering fees. The record showed that Briggs did not even profit from disposal activities at the unpermitted site, but despite the fees paid, the arrangement was still a "good deal" for Briggs. While the facts of Briggs are distinguishable in some ways from the facts at hand, similarities may be drawn since the Board typically "looks beyond the permit" to day-to-day operations and maintenance.

In Termaat, Boone County and the City of Belvedere, listed as owners of the landfill at issue, had assumed responsibility to assure proper closure and post-closure care of the site, used the tipping fees and, when necessary, other public funds to pay for all site operations. In comparison, the Board considered the activities of an independent contractor who actually operated the site. The contractor performed limited services under the direction of the City and County and had little discretion in performing his duties. The Board concluded that the contractor's responsibility "do not rise to the level of an operator conducting a waste disposal operation as anticipated in the Act and Board regulation." Termaat, PCB 85-129 slip op. at 5.

In looking at the facts of the case and considering what is anticipated by the Act and Board regulations to be the behavior of an operator conducting a waste disposal operation, the Board finds both parties responsible for operating the site and, therefore, conducting the waste disposal operation that is Morris Community Landfill. While there must be at least one site operator, the Act does not prohibit more than one party from operating a site. In this case, the Board finds that both parties participated in the operations.

While Morris may not actively conduct the day-to-day operations at the landfill, Morris also does not "passively own land upon which waste disposal operations are (or have been) conducted." Morris Resp. at 7. Morris financed the operation, litigated in conjunction with CLC, as well as profited from and treated the leachate from the Morris Community Landfill. While these activities alone may not constitute "operating" a waste disposal site, Morris also had discretion regarding the decisions at the site and took responsibility for some of the ancillary site operations such as the treatment of leachate from the landfill. The Board finds that the grand sum of Morris' conduct rises to the level of "operation" as anticipated by the Board in using that term in Section 811.700(f).

Compliance With Financial Assurance Requirements

The Board disagrees with Morris' argument that it has complied with any or all financial assurance requirements. The *capacity to comply* is not relevant, only actual compliance with the

Act and the Boards' requirements. It is undisputed that neither Morris nor CLC have provided adequate financial assurance.

Offensive Collateral Estoppel Applies

On October 16, 2003, the Board found that the issue of whether the Frontier bonds complied with Board regulations has been previously adjudicated and resolved in a permit appeal involving the same parties before the Board. People v. CLC and Morris, PCB 03-191 (Oct. 16, 2003); referring to Community Landfill, PCB 01-170. The Board reiterates here that the respondents' noncompliance with financial assurance requirements, the same as alleged in this enforcement matter, has already been resolved.

The Board also notes that *res judicata*, the rule that a final judgment by a court of competent jurisdiction is a bar to subsequent action involving the same claim,[2] does not apply between PCB 01-170 and this proceeding because there is no required identity of causes of action. "An enforcement case and a permit appeal are not the same 'cause of action,' primarily because of the different inquiry involved in each." ESG Watts, Inc., v. IEPA, PCB 97-210, slip op. at 4 (July 23, 1998). On the other hand, and as discussed in the Board's October 16, 2003 order, collateral estoppel *can* apply to preclude relitigation of a specific issue, even where the requirements of *res judicata* are not met. *See Id.*

In Community Landfill, PCB 01-170, the Board affirmed the Agency's decision denying CLC's SigMod permit request. The Board found that because Frontier was removed from the Circular 570 list on June 1, 2000, the Agency properly denied CLC's permit application on May 11, 2001. Community Landfill, slip op. at 13. The Agency's denial letter identified its reason for denying the permit with respect to financial assurance as CLC's noncompliance with Sections 811.700(f) and 811.712(b). Community Landfill, slip op. at 9.

The purpose of financial assurance is to provide a guarantee to the State that funds will be available in the event a landfill owner or operator fails to perform needed closure and postclosure or to address any other environmental problems that may occur during and after the operating life of the landfill. People v. ESG Watts, Inc., PCB 96-233, slip op. at 11 (Apr. 16, 1998); citing 35 Ill. Adm. Code 807.603. Inadequate financial assurance could cause the State, at taxpayer expense, to clean up or even close a facility. *See* People v. ESG Watts, Inc., PCB 96-237 (Feb. 19, 1998). The Board finds the alleged violations of Section 21(d)(2) of the Act and Sections 811.700(f) and 811.712(b) of the Board's regulations, and grants the AGO's motion for summary judgment. Accordingly, Morris' counter-motion for summary judgment is denied.

This interim opinion and order constitutes the Board's findings of fact and conclusions of law.

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[2] *Black's Law Dictionary*; West Publishing Co., 6th Edition, 1996.

ORDER

1. The Board grants Community Landfill Corporation's motion to strike and strikes the requests for an interim remedy from the AGO's motion for summary judgment.

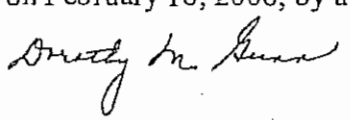
2. The Board grants the AGO's motion for summary judgment in part, finding that Community Landfill Corporation and the City of Morris violated Section 21(d)(2) of the Act (415 ILCS 5/21(d)(2) (2004)), and Sections 811.700(f) and 811.712(b) of the Board's regulations. 35 Ill. Adm. Code 811.700(f), 811.712(b).

3. The Board denies the City of Morris' counter motion for summary judgment.

4. The Board directs the parties to hearing on the specific issue of remedy, including penalty, costs, and attorney fees, if appropriate. The parties are only to present evidence that is relevant under Sections 33(c), 42(f) and 42(h) of the Act (415 ILCS 5/33(c), 42(f), (h) (2004)). The Board directs the parties to provide specific figures and justifications for any proposed penalty.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on February 16, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board