

ILLINOIS POLLUTION CONTROL BOARD  
June 17, 1999

CENTRAL C&D RECYCLING, INC.,            )  
  )  
    Petitioner,                                 )  
  )  
    v.   )     PCB 99-122  
  )     (Permit Appeal - Land)  
ILLINOIS ENVIRONMENTAL                 )  
PROTECTION AGENCY,                     )  
  )  
    Respondent.                             )

ORDER OF THE BOARD (by K.M. Hennessey):

This case arises out of the Illinois Environmental Protection Agency's (Agency) denial of petitioner Central C&D Recycling, Inc.'s (Central) application for a permit to develop and operate a waste transfer station. Now pending before the Board are Central's Motion for Sanctions (Motion for Sanctions), the Agency's Motion for Leave to File Administrative Record *Instantly* (Motion for Leave), and the Agency's Motion to Strike and Alternative Response to Motion for Sanctions (Motion to Strike). The Board grants the Agency's Motion to Strike in part, denies Central's Motion for Sanctions, and grants the Agency's Motion for Leave.

BACKGROUND

Central filed a petition for review of the Agency's permit denial on February 26, 1999. On March 4, 1999, the Board accepted this matter for hearing and stated: "Unless otherwise ordered by the hearing officer, the Agency shall file the record of its review in this matter within 14 days of notice of the petition." Central C&D Recycling, Inc. v. Illinois Environmental Protection Agency (March 4, 1999), PCB 99-122, slip op. at 1 (the March 4 order). The Agency did not file the record within that period.

On May 13, 1999, Central filed the Motion for Sanctions. In the Motion for Sanctions, Central asks that the Board sanction the Agency for its failure to file the record in accordance with the March 4 order. Motion for Sanctions at 4. Central states that it had originally agreed with the Agency that it may not be necessary to file the record because the parties might be able to agree to stipulated facts. *Id.* at 1-2. Central also agreed to waive the decision deadline in this case to August 19, 1999, in the hope that the parties would agree to stipulated facts and accelerate resolution of this case. *Id.* at 2, 3.

By the time Central filed the Motion for Sanctions, the parties had not agreed on stipulated facts and the Agency had not filed the record. Motion for Sanctions at 3. Central claims the Agency's delay in finalizing stipulated facts or filing the record has placed significant hardship on Central. *Id.* at 4. Central notes that it is under a court order to obtain

a permit, and that it cannot accept non-recyclable materials at its facility until it obtains a permit. *Id.* Central argues that this restriction significantly restrains its operations. *Id.* Central further argues that the Agency has unreasonably delayed these proceedings. *Id.*

Central argues that the Board has power to award sanctions under 35 Ill. Adm. Code 101.280, which provides that “[i]f a party or any person . . . fails to comply with any order entered by the Board[,] . . . the Board will order sanctions.” Motion for Sanctions at 3. As a sanction, Central requests that the Board enter a default judgment in Central’s favor and award Central the attorney fees it incurred to file the Motion for Sanctions and to draft a joint stipulation of facts. *Id.*

On May 24, 1999, the Agency filed the Motion for Leave, in which it seeks to file the record *instanter*.<sup>1</sup> In the Motion for Leave, the Agency states that the parties agreed that the Agency would not need to file the record unless a hearing was necessary. Motion for Leave at 2. The Agency states that the parties reiterated this agreement in a telephone conference call with the hearing officer. *Id.* The Agency states that it did not file the record because it believed this agreement was still in effect. *Id.* The Agency argues that Central will not be prejudiced if the Board grants the Motion for Leave. *Id.* Central did not respond to the Motion for Leave.

On May 26, 1999, the Agency filed the Motion to Strike. The Agency moves to strike the Motion for Sanctions because it does not comply with 35 Ill. Adm. Code 101.242(a), which provides that “[f]acts asserted which are not of record in the proceeding shall be supported by affidavit.” Motion to Strike at 1. In the alternative, the Agency reasserts the arguments that it made in the Motion for Leave and argues that sanctions are not appropriate. Motion to Strike at 2-12. Central did not file a response to the Motion to Strike.

### DISCUSSION

As an initial matter, the Board grants the Motion to Strike in part. Paragraphs 4, 5, 6, 7, 8, 11, 12, 13, 14, and 15 generally recite facts regarding Central’s agreement with the Agency regarding the filing of the record; Central’s attempts to reach agreement with the Agency on stipulated facts; the Agency’s failure to agree to stipulated facts; the effect on Central of that failure, and of the Agency’s failure to timely file the record; and Central’s facility. The facts recited in these paragraphs are not of record and are not supported by affidavit, as Section 101.242(a) requires. The Board therefore strikes those paragraphs.

However, the Motion for Sanctions remains viable. It asserts that the Board ordered the Agency to file the record within 14 days of its notice of the petition, and that the Agency has not done so. Motion for Sanctions at 1, 3. These facts are of record and allow the Board to consider the Motion for Sanctions. See People v. Shell Oil Company (September 17,

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<sup>1</sup> The Board notes that the Agency attached a copy of the record to the Motion for Leave, which the Agency filed on May 24, 1999. The Board received another copy of the record on May 25, 1999. The Board construes the Motion for Leave to relate only to the record attached to the Motion for Leave filed on May 24, 1999.

1998), PCB 97-30, slip op. at 2 (striking a factual allegation in a motion to dismiss not supported by an affidavit, but refusing to deny the motion on those grounds).

In its response to the Motion for Sanctions, which is supported by affidavit, the Agency argues that the parties' agreement regarding the record, and their discussion of that agreement in the hearing officer's presence, constitute "substantial compliance" with the March 4 order. Motion to Strike at 8. The Board disagrees. The March 4 order granted the hearing officer, not the parties, authority to modify the order. The hearing officer did not do so; therefore, the order stands, and the Agency has violated it.

In this case, however, sanctions are not warranted.<sup>2</sup> Central acquiesced in at least some of the delay, and the Board cannot find that any hardship or prejudice has resulted from the Agency's violation. See People v. Scrap Tire Recycling Center, Inc. (January 21, 1999), PCB 98-17, slip op. at 2 (refusing to impose sanctions on respondents for their late responses to discovery requests, noting that respondents had since complied and petitioner suffered no prejudice from the delay). The Board therefore denies the Motion for Sanctions.

Central does not oppose the Agency's Motion For Leave, and the Board will grant the Motion for Leave to ensure that there is a complete record. This order does not mean, however, that the Board will continue to accept records sought to be filed *instantly*, or decline to impose sanctions in future cases. If the Agency cannot timely file the record, the Agency should seek leave to extend the time to file the record before the time to file the record has expired.

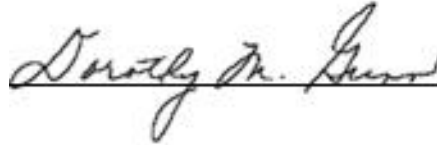
In summary, the Board grants the Agency's Motion to Strike in part, denies Central's Motion for Sanctions, and grants the Agency's Motion for Leave.

IT IS SO ORDERED.

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<sup>2</sup> Even if sanctions were warranted, the Board notes that it cannot award attorney fees as a sanction. See ESG Watts, Inc. v. Illinois Pollution Control Board, 286 Ill. App. 3d 325, 339, 676 N.E.2d 299, 308-309 (3d Dist.), appeal denied, 173 Ill. 2d 684 N.E.2d 1335 (1997).

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 17th day of June 1999 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board