



BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
REPEAL OF 35 ILL. ADM. CODE)
809. SUBPART I: HAZARDOUS) R91-18
(INFECTIOUS) HOSPITAL WASTE)

The following is a transcript of a hearing held in the above-entitled matter at before the Pollution Control Board at 100 West Randolph Street, Suite 9-031, Chicago, Illinois, Wednesday, September 18, 1991, commencing at the hour of 9:00 o'clock a.m.

BEFORE:
MICHELLE DRESHOW, Hearing Officer.

Board Members:
Dr. Ronald Flemal;
Ms. Joan Anderson.

HEARING OFFICER DRESLOW: I'll call the hearing to order at this time.

I'd like to welcome you to the merit hearing being conducted by the Board and the proceeding entitled the Repeal of 35 Administrative code, 809. Subpart I, Hazardous Infectious Hospital Waste.

The docket number is R-91-18.

My name is Michelle Dreslow, and I'm the hearing officer today.

To my right is Dr. Ronald Flemal. He's the attending coordinating board member for the proceedings.

Also attending is board member Joan Anderson and seated next to Dr. Flemal and seated on her right is Anand Rao, he is a member of the scientific technical section.

To my left is Mr. Phil Van Ness, who is an inter-governmental affairs attorney for the Pollution Control Board.

Just as background, the Board has opened this docket for the purpose of

accomplishing the repeal of Part 809 as required by House Bill 2491, Section 56.D2D.

The mandates requires a repeal to be completed by January 1, 1991.

The Board is beginning the regulatory process, pending the Governor's signature.

If the Governor should not sign the bill, then this repeal should not continue on at this point.

I'd also like to note that there will be an inquiry hearing at 11 a.m. in this room on docket R-91-20 and 21.

That hearing concerning the ruling making on the treatment, storage, transfer, transportation, package and labelling of PIMW or potentially infectious medical waste.

If you wish to present testimony at the 11:00 inquiry hearing, see me at this hearing, so I can schedule your testimony, if you haven't already done so.

With that, I'll -- does anyone

have any opening remarks?

MR. FLEMAL: No.

MS. ANDERSON: I would like to suggest that for purposes of these hearing, that we emphasize the fact that in the Board-conducted regulatory proceedings, anyone may ask anyone else any questions.

It's an open questioning, and please feel free to do so.

I'm sure Dr. Flemal and Mrs. Dresdow will appreciate your exercising that.

The second thing is I always say this for myself personally, and it is true also for the other members and the staff of the Board, that as we ask questions, no matter how they're phrased, it is not intended to signal some -- no, strike that and just say no matter how the questions are phrased, they are not intended to signal a preconclusory mindset.

It sometimes is just more efficient to ask them their's directly.

Thank you.

HEARING OFFICER DRESDOW: Okay. I believe that the City of Chicago has some testimony that they wanted to present.

So, if we could -- would you make your introduction and then we'll swear the witness.

MR. HENDERSON: My name is Henry Henderson, with the City of Chicago Law Department.

HEARING OFFICER DRESDOW: Could you swear in the witness, please?

(Witness sworn.)

HEARING OFFICER DRESDOW: I think it would probably be best for you to proceed with just the part of your testimony that deals with the repeal.

MR. HENDERSON: It's a very short point to be made.

And that is that the City of Chicago has an infectious medical waste regulation, which has been submitted to the Board as part of our docket, both in terms of an

ordinance and support of regulations.

It is our position in this hearing that it should be noted very clearly that until there is, until this matter has been signed by the Governor, we'll be calling for the repeal of existing 35 Illinois Administrative Code 809. Subpart 1, that it should be part of whatever comes out of this hearing, that the repeal of existing regulation should be premised upon the signing into law of that act.

The City's regulatory framework references and depends to some extent upon existence of existing regulations of the State of Illinois.

The ordinance was formulated with the anticipation that that would stay in effect, and it was our position that it is important that that regulation stay in effect until such time as there is another state law in place.

And it simply, we wanted to note that for the record in our statement, which we have pre-filed.

I just wanted to make that clear.

That's all I have to say.

HEARING OFFICER DRESDOW: Are you aware that that House Bill 2491 requires that the repealer be completed on January 1st, 1991, and that the rule making on the transportation and transfer and all that be completed on January 1st, 1992?

MR. HENDERSON: Yes.

HEARING OFFICER DRESDOW: Let me clarify that.

I meant to say 1992 for the first date and 1993 for the second date.

MR. HENDERSON: Right.

It's simply that our ordinance is certain facilities that are regulated under state law, and until there is a state law in effect, which would -- if the bill is signed, and would then become law, there would be certain things applicable to these institutions that would be exhibited from the City's regulatory framework, and it is simply important to you that this not, that 35 Illinois Administrative Code 809 not be

set aside until there is some state law in effect.

HEARING OFFICER DRESDOW: Okay.

Does anyone else have any questions for this witness?

MS. ANDERSON: Just to be sure that the aspect of the ordinance that you're concerned about is a matter of record, in the copy of the ordinance I have, Page 20462, down at the bottom of that page, where it says whereas increasing quantities of infectious waste are not being produced and generated within the City of Chicago by facilities that are not regulated after the Illinois Environmental Protection Act and the implementing regulations for hazardous hospital waste in the hospital.

Is that the aspect of the ordinance that you are referring to as far as the focus on the state law and regulations?

MR. HENDERSON: The City's ordinance picks up on it, and attempts to fill a gap on the things that are not addressed by the hazardous and

infectious hospital waste regulations in the Illinois Environmental Protection Act.

It specifically is addressed in the application of this ordinance, and in the definition of producers.

The definition of producer is at 20464. It's under the 7-2A-511.1 definition, "producer specifically does not include any licensed hospital facility located in the City of Chicago that is presently regulated by the Illinois Environmental Protection Act for the disposal of hospital wastes, and the following provisions with regard to the application of this similarly references those entities which are regulated in the Environmental Protection Act, whose waste would fall within the hazardous and infectious waste section of the regulations."

It was the intention of our ordinance to fill a gap that was not covered by the state law.

The whereas clause signals that and these two provisions effect that.

MS. ANDERSON: Thank you.

My second question is under definitions, on page 20463, you have a definition of infectious waste, and -- you have the laboratory based pathological waste, isolation waste, et cetera that all could come under in some way or another.

I guess the question I'm asking it appears here, while I'm certainly going out of my way not to say it's a conclusion, but there, it appears that there could be a possible incompatibility with the new statutory definition, the new definition in the statute as to what constitutes potentially infectious medical waste.

Do you have any comment on that and what the implications are as far as our doing away with the state regulation and then this time gap we have under the statute?

MR. HENDERSON: Well, to the present, I'll address the time gap issue first.

To the extent that there is a time gap between, among regulations, what we would

anticipate is that we would take on a much broader regulatory role, which we are not anticipating.

We have not essentially budgeted for it or have set up for the difference of regulatory intensity, responsibility, et cetera, which is primarily our responsibility, primarily our concern with the time gap, that it would be as the, if any, time gap in terms of where there is not an existing state regulatory framework that is being managed by the state regulatory agency.

With regard to potential inconsistencies, we're not exactly clear on what those inconsistencies would be, which is why we want to be present at these hearings, to follow that so we can anticipate that the fact that if it appears there will be an inconsistency, we can have that addressed by the City Council and by the Department of Health, but in general to prejudge that at present, and hopefully there will not be an outstanding inconsistency, but it's one of the reasons we're present here is to catch that if in fact that does appear to happen.

MS. ANDERSON: Thank you.

HEARING OFFICER DRESDOW: Anyone else?

Okay.

When you pre-submitted your testimony, you included the testimony and two documents.

We would like to have those entered into the record as exhibits, so the whole Board can review them in.

MR. HENDERSON: Absolutely.

HEARING OFFICER DRESDOW: So, --

MR. HENDERSON: That's the ordinance in the regulations.

HEARING OFFICER DRESDOW: Also, why don't we have the testimony marked as Exhibit 1 and admit it as Exhibit 1?

And the ordinance as Exhibit 2, and the regulations as Exhibit 3.

Does anyone have any objection to that?

Okay. These three exhibits are admitted as marked.

MR. HENDERSON: Thank you.

HEARING OFFICER DRESDOW: Thank you for your testimony.

Anyone else that would like to make any statements for the record?

MS. SCHROEDER: I'm Susan Schroeder, with the Illinois Environmental Protection Agency.

You stated, Mr. Henderson, that the City of Chicago was going to take a Board regulatory stand.

Are you going to be proposing regulations?

Are you going to be doing anything with your ordinances?

MR. HENDERSON: You'll have to clarify.

I'm not sure what you're referring to.

MS. SCHROEDER: You were talking about the time frame?

MR. HENDERSON: What I was talking about was in the event that our ordinance excludes particular institutions as long as they're

regulated by the State, to the effect in the event that they are not regulated by the State, they then fall within regulations.

MS. SCHROEDER: So, you don't need to do any additional regulations?

MR. HENDERSON: No, it will just expand the responsibilities of the personnel at the Health Department.

MS. SCHROEDER: But the rules are already in place?

MR. HENDERSON: Yes, and I guess those would be Exhibit 3 now.

HEARING OFFICER DRESDOW: Did anyone else have any questions?

MR. O'BRIEN: My name is Francis J. O'Brien, manager of BFI Medical Waste.

I'd like to read a portion of my prepared testimony that I'd like to read in full in its entirety at 11:00, that deals with the repeal of 35.

HEARING OFFICER DRESDOW: We'll need you to be sworn in.

I wasn't aware that you were going to testify.

MR. O'BRIEN: Would it be your desire that I wait?

HEARING OFFICER DRESDOW: If it deals with the repeal, it would be best to have it in this record.

Would you swear in Mr. O'Brien?

(Witness sworn.)

MR. O'BRIEN: My name is Francis J. O'Brien, Regional Manager of BFI Medical Waste.

BFI Medical Waste Systems currently provide medical waste disposal service in the State of Illinois, and as part of our service, we do provide services presently with municipalities and counties that presently have infectious waste controls at a local, municipal, county level.

In this context, I'd like to read the following regarding this docket in the repeal of 35 Illinois Administrative Code 809.Subpart I.

Upon signature of House Bill 2491, the mechanisms to replace the current regulations

with the comprehensive program, based upon House Bill 2491 should begin.

The repeal of the existing regulations should occur concurrently with the adoption of the future regulatory program.

This type of rule adoption would minimize confusion in the healthcare community as well as in the numerous county and municipal ordinance systems already adopted throughout the state, many of which, as the attorney from Chicago has tied back into the current Illinois regulatory system.

Of the existing regulations, Section 809.906, specifically the defense to enforcement action should be rewritten into any future regulatory system.

I would at this time conclude my remarks and will expand upon it as well as present the written copy of the testimony in the R-91-20 and 21 dockets.

MR. FLEMAL: Are you suggesting that we hold or repeal our action until the regulations are

promulgated?

MR. O'BRIEN: I was hoping to present those.

It really forms questions, because there are numerous, as Madam Hearing Officer pointed out, there could be a year period of time that we repeal the current regulatory system by January 1, 1992, and rule adoption of the future program January 1st, 1993, that one year could perhaps open a window of no regulations within the state, many of which the municipalities and some counties have already tied into an existing state regulatory system.

Really my question to all of us or to the Board would be what kind of procedures can be adopted in this type of scenario?

MR. FLEMAL: You looked at the interim provisions that would control during that one-year window that are written in the house bill?

MR. O'BRIEN: I'm somewhat familiar with them, yes.

MR. FLEMAL: Do you see that there are in fact gaps that would not be filled by those

statutory positions or conditions?

MR. O'BRIEN: Yes.

MR. FLEMAL: This?

MR. O'BRIEN: Yes.

MR. FLEMAL: Can you identify any of those specifically for us?

MR. O'BRIEN: The context of my testimony is specific to current regulatory ordinances or county systems that are presently in the various municipalities and counties throughout the state.

The reference specifically to sections 809 and with the exclusion of those sections and the repeal of that, there could be, there could be discontinuity amongst the present system.

MR. FLEMAL: That will be the case, however, irrespective of this repeal of 809.

If 809 disappears, any reference in the statute will be to something that doesn't exist.

MR. O'BRIEN: At the municipal and county level, correct.

MR. FLEMAL: I don't quite see how the findings of the repeal of 809 is in any way related to that problem with municipalities.

MR. O'BRIEN: I'm not sure and I propose my testimony more so as a fact-finding exercise, to insure that there is not a window of opportunity, where no regulations exist as a landfill operator within the state, too, and the prohibition that exists presently for untreated hazardous infectious hospital waste, that that does not present itself where there is in this interim period no regulations that would deal with them.

MR. FLEMAL: Just to make sure that we're all understanding the time frame, perhaps it might be useful if I suggest what I think are the time frames and see if in fact we all have a common understanding.

Let's make the assumption first of all, that you can meet the area's deadlines that exist in the House Bill.

That would have it then that up until the Governor signs the bill, the regulation

essentially consists of 809.Subpart I.

Upon the signing and the repeal of 809, then the provisions that are present in the new regulations within the act, specifically the various sections 56, accept provisions with control and would remain in control until the Board adopted the new set of regulations.

So, are there not certain sort of three periods that you're looking at, in which case with which there are state regulations, but they shift from the current 809 then to the statutory and then to the subsequent Board repeals.

I'm concerned with B, that there are no major legislation involved as we go through those transitions.

MR. O'BRIEN: That's correct.

HEARING OFFICER DRESDOW: Anyone else?

MS. ANDERSON: You raised the, what I would call the provision.

You raised the issue of the hold harmless provisions in the present 809

regulations.

MR. O'BRIEN: Yes.

MS. ANDERSON: Do you consider that provision in the interim as Dr. Flemal was describing it, its position here as something that would be a gap?

MR. O'BRIEN: I believe that the interim ability of regulations contained in House Bill 2491 would not address the gap that would be created if the hold harmless provisions were repealed, the repeal of 809.

MS. ANDERSON: I think it would be, at least it would be extremely helpful to the Board, and I think to the participants to please look at the legislation, the interim legislation and identify these potential gaps.

I'm not at all sure what mechanism exists to maybe temporarily plug in these holes, whether it's emergency regulations or legislative changes or whatever, and if there are gaps of concern, the first thing we need to do is identify them.

HEARING OFFICER DRESDOW: Anyone else?

Yes, could you state your name, please?

MR. EASTEP: Larry Eastep, with the Illinois Environmental Protection Agency.

Mr. O'Brien, you indicated that you represented a number of local county and municipality Governments.

How many counties and cities have the ordinances been in effect?

MR. O'BRIEN: Off the top of my head, Mr. Eastep, I can think of five municipal ordinances, and at least one county ordinance that regulates, the DuPage County Forest Preserve ordinance, which regulates the operation of the landfills.

MR. EASTEP: You were involved with the Government task force that prepared the report of, that preceded the legislation?

MR. O'BRIEN: Correct.

MR. EASTEP: Didn't that past Board make an attempt to set up legislation, so that there would

be self-implementing provisions that would enable this potentially infectious management to operate in the interim?

MR. O'BRIEN: Yes.

MR. EASTEP: You think there may be gaps?

MR. O'BRIEN: Since our discussions as the Governor's study group on the medical waste issue, this gap that I have referred to really is a concern that the state, municipal and county ordinances have been tied back to the initial, and we had previously discussed that, and the other gap relating to a section that I just recently remembered that beginning with Section 809.906, the defense to enforcement action, which is commonly called the hold harmless provision.

MR. EASTEP: I don't have 809 with me, but if that's similar to Section 26.1K, and H.B. 2491.

MR. O'BRIEN: I think the section presently existing, 809.906 is a defense to enforcement action of a generator of current hazardous infectious hospital waste as stating to a landfill operator that the treatment process has rendered

the wastes innocuous or non-regulatory waste.

Looking at the section, Mr. Eastep, that you referred to, it appears that it holds the landfill owner or operator specifically not tied back into a generator provision.

Perhaps I'm misreading it.

MR. EASTEP: What I was referring to was whether the section of that, I'll paraphrase, whether the owner-operator relied on written statements from the person generating, treating the waste, and that seems to me, as 809.906, because it could be the generator/treater, because now this is set-up so that all the potential infectious medical waste has to be treated, whether it's by the generator or a commercial treater.

MR. O'BRIEN: I could see that point.

Now, I guess as a fact finding, I wanted to propose this question to see if it needed the same interpretation, as a complete, a complete defense enforcement that's presently existing.

MR. EASTEP: I thought that was why the bill was in place.

MS. ANDERSON: I guess I have a question.

In the statute, option A, Section 56.10.1K, did I make it?

MR. EASTEP: They think so.

MS. ANDERSON: In there, these sections just to ask about your understanding, the other section 809.906, it says it shall be complete defense against an enforcement action, other than the generator, if the -- if anybody else had relied upon the generator's identification of the waste, as a complete defense.

I don't see how the statutory provision says at all the same thing.

It is referring to 33C and 42H, which are penalties.

The 42H are penalty factors. That I don't want to be reviewing, this is just a quick and dirty look, but there it would be, I would think, if one could argue it's in mitigation after the violation has been found.

In any event, it is the kind of depth that one might want to pursue.

I don't know.

HEARING OFFICER DRESDGW: Anyone else?

Okay. We can conclude this hearing at this time.

There is a comment period currently pending in the Illinois Register.

What I will do is I'll take a look at that time frame, and there will also be a post-hearing comment period, and I'll send out an order stating exactly what date that comments will be due.

Again, you know, all this is pending the Governor's signature on all the rest of what we've been talking about here.

In your comments, if you could specifically address that gap issue, that would be most helpful and any other issues that you think have come up here.

Thank you for your participation.

The hearing is adjourned.

(Whereupon, that was all
the proceedings which were
held in the above-entitled
matter.)

