ILLINOIS POLLUTION CONTROL BOARD
July 2, 1986

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 79-145
THE CELOTEX CORPORATION and PHILIP CAREY COMPANY,	)	
Respondents.	)	

ORDER OF THE BOARD (by J. Anderson):

In summary, this Order: 1) denies the Agency's May 13 motion for sanctions relating to Celotex' May 12, 1986 inspection and copying of documents at the Agency's Maywood Office, 2) grants Celotex' May 27 motion for sanctions relating to non-compliance with the Hearing Officer's April 4 Order requiring specification of water pollution standards and parameters allegedly violated by Celotex, and specifies these sanctions, and 3) specifies the nature of the sanctions imposed on the Agency pursuant to the Board's findings of April 24 and May 9, 1986 relating to inspection of the Joliet Army Arsenal groundwater documents and to failure to produce Agency witnesses for deposition.

The May 12 Maywood file inspection

The relevant filings on this issue are the Agency's May 13 motion for special Board meeting, and for sanctions, and Celotex' May 14 opposition thereto, as well as the Hearing Officer's June 3 Order granting Celotex' May 13 unopposed motion for permission to complete the inspection and copying of the Maywood documents, and the Hearing Officer's May 20 Recommendation in response to the April 24 and May 9 sanctions Orders.

The request for sanctions arises from the events occurring on May 12, 1986 during the course of Celotex' inspection of documents at the Agency's Maywood office. (This inspection of Joliet Army Ammunition documents appears to have been arranged after the Board's April 24 decision to impose sanctions for the cancellation of the April 10 inspection date.) By Order of November 11, 1985, the Hearing Officer had noted that there were some 30 to 35 wells at the Joliet Army site, and that production of some 15 years of documents for each of these wells would be unduly burdensome and oppressive. Accordingly, the Order stated that:

> "Complainant is directed to produce or make available for inspection, the records of documents in its possession relating to three wells at said site. Said wells are to be selected by Respondent. Obviously this entails some disclosure of information so as to enable Respondent to make such a selection. This Order is made on the assumption that no secret or confidential material is involved in any such disclosures. Considering the nature of the site, an objection, if any, based upon such grounds, may be made at any time prior to disclosure of the documents. Respondent is to be supplied with information by December 6, so as to enable it to select three wells for this purpose. Complainant is given 30 days from identification of said wells to supply documents in its possession or to make said documents available for inspection. Objections to this mode of production based upon technical arguments will be considered by the Hearing Officer only upon the simultaneous submission of sworn affidavits from persons with backgrounds and qualifications that might enable them to qualify as experts in the area of ground- water flow, water pollution, or the like."

Celotex' counsel, Mr. Parker, accompanied by a court reporter, arrived at the Agency's Maywood office on May 12 and was shown to a conference room. There Mr. Archier, counsel for the Agency, tendered "several piles" of documents before leaving the room. Upon his return, Mr. Archier noted that Mr. Parker had been copying documents on a portable copier. Mr. Archier, both verbally and in writing, objected to the copying on the grounds that copying was outside the scope of the Hearing Officer's order, and requested that all copies be left in the room. The verbal objection and request and Mr. Parker's responses were transcribed by the court reporter. Mr. Archier asserts that Mr. Parker took with him the copies he had made. On May 13, the Agency moved the Board for sanctions, including issuance of a default judgment as to Court IV, and issuance of an order requiring return of the copies and barring respondent from their use.

On the same day, Celotex applied to the Hearing Officer for an order permitting completion of the inspection. The motion was granted by Order of June 3, in which the Hearing Officer stated in pertinent part that

> "Insofar as there are unstated claims of privilege or trade secret or other privilege status that may attach to any such documents, Respondent is denied permission to copy any such additional documents if before the next disclosure to Respondent, a specific claim of confidentiality is raised. Obviously, Respondent has already copied certain documents. If Complainant wishes to assert confidentiality claims to such copied documents, even though the cat is out of the bag, so to speak, Complainant has leave to brief its authority to do so, and the hearing officer will take the matter under advisement. With the limitation expressed herein, Respondent has leave to copy any material disclosed to Respondent in the relevant Maywood files at its own expense."

The Hearing Officer provided further comment on the copying issue in his May 28 Recommendation to the Board on the sanctions issue:

> "As far as the potential assertions of confidentiality raised in the inspection of the Maywood files, the Hearing Officer's November 11, 1985 order addressed a proper method for raising any such assertions. That has not been complied with. However, neither has the initial order that provided that information on three wells was all that was to be required to be provided. Complainant has apparently provided (at least for visual inspection) all of the material at Maywood relating to any well that was located at the Army site. By doing so, and doing so without explanation such as that the files were commingled, Complainant has further complicated this matter, but it should be noted, complicated it by providing more disclosure than required."

Based on the totality of the circumstances, the Board denies the Agency's motion. The Hearing Officer has made no finding that copying was clearly outside the scope of his November 11 Order. This situation does not appear to involve defiance of a Hearing Officer Order, but rather a misunderstanding which could have been prevented by closer communication during the inspection process. Finally, the Board must again comment (as it did on May 9) on the now-moot motion for special Board meeting that the motion did not plead special circumstances such as to make the need for expedited relief compelling. The Board also notes that

motions predicated on facts not of record should be supported by affidavit.

Celotex May 27 Motion for Sanctions Relating To Admissions of Fact

The filings relevant to this issue are Celotex' May 27 motion for further sanctions, the Agency's June 2 response, and Celotex' June 3 reply thereto.

On June 18, 1985, the Agency took samples from three wells at the Celotex site and specified 31 parameters for which the samples would be tested. On April 4, 1986, in the stated interest of curtailing unnecessary discovery, the Hearing Officer issued an Order directing the Agency "to identify which of the 31 tested parameters which it contends evidence violation of Illinois Water Pollution regulations" by April 18, unless a sworn affidavit was submitted explaining why this information could not be timely supplied. As no response had been filed, on April 29, the Hearing Officer ordered that a response be filed by May 2. On May 2, the Agency submitted a letter stating that the "parameters which have exceeded the applicable...Board rules "were iron for Well G101, none for G102, and boron, iron, silver and ROE (TDS) for Well G103. On the same day, Celotex filed a Seventh Request for Admission of fact based on the letter, including a request for admission (No. 49) setting forth the above parameters, and stating that "complainant contends that the specific standards of...Board Rules...Title 35, Subtitle C: Water Pollution Sections 302.201 et seq. and 302.301 et seq. are exceeded...for only [those] parameters." On May 21, the Agency denied the request to admit. Celotex characterizes this actions as "sham responses [which] throw the entire discovery process in this proceeding into a cocked hat." Celotex requests sanctions in the form of an Order denying admission of any June 18, 1985 water sample results and/or requiring the Agency to abide by the May 2 letter.

The Agency's June 2 response is that the May 2 letter was based "on the parameters compared to the general use water quality standards only, Section 302.201. Respondents' request to admit references other sections and, therefore, was appropriately denied by Complainant."

The Board does not find the Agency's explanation persuasive. The Hearing Officer's general Order on its face required evaluation of all 31 parameters against all applicable regulations. The obvious purpose was to require crystallization of the Agency's case. It would appear from the Agency's explanation that the Agency did not consider the public water supply standards of Sections 302.301 et seq. applicable on May 2, but that it reversed its decision on June 2 after Celotex' request to admit specifically focused its attention on these

rules. The Agency's failure to conduct a thorough review of Board regulations and/or to make final litigation decisions as required by the Hearing Officer's Order has not been explained, and has resulted in unfair surprise to Celotex. The motion for sanctions is hereby granted. The Agency is barred from alleging or presenting any evidence or data concerning violations of Board regulations obtained as a result of the June 18, 1985, sampling of the wells at the Celotex site other than those specified in the May 2, 1986, letter, which are: Well G101-iron, and Well G103-baron, iron, silver and ROE (TDS). In so holding, the Board must note that this sanction may be subsumed by or encompassed in the sanctions imposed below.

Sanctions pursuant to the April 24 and May 9, 1986 Orders.

The factual background for these sanctions is outlined in the Orders of April 24 and May 9 and will not be repeated here. Relevant pleadings are the Agency and Celotex briefs of May 7 and May 20; the Hearing Officer's Recommendation of May 28; and Celotex response thereto of June 3, leave to file which is hereby granted.

The Hearing Officer's Recommendation asserts his belief that there is interrelationship between the two sets of sanctions to the extent that the Joliet Army Munitions plant information arguably relates to groundwater flow and contamination issues concerning the Celotex and/or Carey site, and that one of the Agency deponents, Monte Nienkirk, "will be the Complainant's expert on groundwater flow, and the level of contamination, if any" at the site. The Hearing Officer does not believe that the testimony to be given by Kenneth Bechely relates to this issue. The Hearing Officer's Recommendation is that the "most serious sanctions, striking of causes of action, would not be appropriate" based on his

> "review of the legal authority cited by Complainant, and bearing in mind the statement of the Court in Cedric Spring and Associates, Inc. v. NEI Corporation, 402 N.W. 2d 352, 356, (2nd Dist. 1980) that, "A just order is one which to the degree possible insures both discovery and a trial on the merits" (citing Williams v. City of Chicago, 370 N.E.2d 119 (1st Dist. 1977) and the perception of the Hearing Officer that there has not been "a scheme of deliberate defiance of the rules of discovery and the court's [Hearing Officer's] authority or [that the Complainant] has attempted to stall significant discovery" Cedric supra at 402 N.E.2d 357...

> However, bearing in mind the sanction approved in the Williams case, supra, of an order for payment of $433 of legal fees, and also bearing in mind that cancellation of depositions may have caused Respondent to have had a court reporter present who had to be paid some amount, it would be the recommendation of the Hearing Officer that the most appropriate sanction for the delay in depositions would be assessing such attorneys fees and associated costs.
>
> With regards to the Army Munitions Plant material... option (c) [as outlined in the April 24 Order] which will probably impose significant cost upon Complainant in transporting a working file at least for one day to Chicago, appears most just and appropriate. An associated sanction, or a related sanction, might be to require that the Complainant duplicate all material in the Springfield or Maywood file at its expense and supply such file to Respondent. Since Respondent has been bearing the cost of all other duplication of this sort, this is a distinct benefit to Respondent which is somewhat related to the conduct of Complainant.

The Agency's position, in brief, is that no sanctions should be imposed against it for the deposition defaults as continuation sessions had been scheduled for late May and early June, that the striking of any portions of the Complaint is an inappropriate sanction, that no sanctions should be imposed for the document default given the events of May 12 but that the least inappropriate remedy would be option a) as outlined in the April 24 Order that "all data relating to groundwater facts at the Joliet Army Arsenal shall be barred and all presumptions from the lack of that data shall favor respondent Celotex."

Celotex, for its part, asserts that the sanctions suggested by the Hearing Officer are too narrow. There are essentially two grounds for this position. The first is that, contrary to the Hearing Officer's assessment, the Agency's responses to discovery requests evidence of a "scheme of deliberate defiance" to discovery orders, and a "deliberate and contumacious disregard of the [Board's] authority" for which there are no sufficient extenuating circumstances of the sort presented in the Cedric factual situation. The second is that the Board must impose sanctions on the Agency consistent with its Orders imposing

sanctions on Celotex, which Orders Celotex contends have established "the law of this case" concerning sanctions.*

The relevant Orders are the Board's Order of April 3, 1980, imposing sanctions, its Orders of May 1 and May 29, 1980, reaffirming that Order, and its Order of October 25, 1984, denying a motion to set aside the April 3, 1980, Order. The subject of sanctions was Celotex failure to answer certain interrogatories which had been propounded by the Agency on October 11, 1979. Pursuant to a motion to compel, the Hearing Officer ordered the filing of responses on or before February 18, 1980. On March 24, 1980, no responses having been filed, the Agency made a motion for sanctions. Later that day, Celotex filed interrogatory responses and objections, as well as a reply to the motion. In its April 3 Order, the Board found that:

> "Respondent has...violated the order of the hearing officer. The Board finds that the Agency has been substantially and materially prejudiced by Respondent's violations in that it is now unable to prepare for hearing and is subject to surprise at that hearing. In order to alleviate this hardship, the Board orders that Respondent be barred from introducing evidence, including witnesses and documents, at hearing regarding facts relevant to any paragraphs of the complaint to which answers of the above-cited interrogatories are material."

The May 1 and May 29 Orders reaffirm that finding with little comment. The Board's October 25, 1984, Order declined to set aside these sanctions, reasoning that:

> "Celotex had the opportunity to provide the discovery when requested and the opportunity to provide discovery when ordered to do so by the hearing officer. Having failed to do so, this Board imposed the appropriate response, sanctions against the admission of evidence at hearing. In the more than four years that have past [sic] since then the docket sheet alone shows over eight pages of filings, and hearing must now be held by December 22, 1984. To allow inquiry into the previously closed areas of evidence would further delay this matter and may prejudice the Agency as it relied on the Board's Order limiting the scope of this matter for four years."

Based on the rationale of these sanctions against it, Celotex requests that the entire complaint be stricken. Failing that, Celotex asserts that Count IV of the Complaint containing the express groundwater claims should be stricken, and in addition that:

> "Complainant should be barred, as is Celotex, from any expert testimony at the hearings (and all such testimony presently in the record should be stricken), Complainant should be barred from presenting any evidence as to title of the site in question (as is Celotex), and Complainant should be barred from introducing any evidence at the hearings concerning the nature, quantities, and source of any materials disposed of at the site (as is Celotex)."

In consideration of all the facts and circumstances of this case, the Board finds the most appropriate sanction is to strike Count IV of the Complaint, and to bar assertion of any and all groundwater claims in conjunction with any of the remaining Counts in the Complaint. The Board further finds that monetary sanctions of the type imposed in Cedric are insufficient. In Cedric, the court found that the defendant, the party sanctioned, had "advanced a reasonable explanation" for not producing two out-of-state witnesses at trial; cost of transporting them to Illinois. Further, to avoid prejudice to the plaintiff's case, the defendant had offered to make any necessary factual stipulations, to produce the witnesses at plaintiff's expense and to make various other arrangements prior to trial. By contrast, the court found it significant that the plaintiff had not attempted to secure the witnesses' testimony prior to trial through less costly and burdensome means. Under these circumstances, the court found that there was no indication of a "scheme of deliberate defiance of the rules of discovery and the court's authority or has attempted to stall significant discovery" 402 N.E.2d 352 at 357.

Viewed in the light most favorable to the Agency, the events giving rise to the four motions for sanctions described herein indicate that Celotex' attempts to make significant discovery have been stalled, through no fault of its own. Where the Agency has ventured explanations for its discovery defaults, these explanations are not reasonable. The Board finds that the imposition of the sanctions specified here is necessary to encourage future timely compliance with discovery requests in order to assure that hearings in this 7-year old action may be completed in the foreseeable future. Additionally, the Board finds that this form of sanction is also necessary to achieve parity of treatment of the parties: to reconsider and readjust the form of the sanctions against Celotex in order to equitably

impose lesser sanctions on the Agency would, as the Board stated on October 25, 1984, further delay this matter and could prejudice the remainder of the Agency's case.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 2nd day of July, 1986, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board