

ILLINOIS POLLUTION CONTROL BOARD  
September 24, 2008

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 04-207
	)	(Enforcement – Land)
EDWARD PRUIM and ROBERT PRUIM,	)	
	)	
	)	
Respondents.	)	

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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 97-193
	)	(Enforcement – Land)
COMMUNITY LANDFILL COMPANY,	)	(Consolidated)
INC.,	)	
	)	
Respondent.	)	

**HEARING OFFICER ORDER**

This order rules on the Motion To Bar Complainant’s Expert Witnesses And Report Or Alternatively, To Cancel Hearing Set For October 20-23, 2008, For Cause And To Reopen Discovery, (Motion) filed September 8, 2008 by respondents’ Community Landfill Co, Inc. (CLC), and Edward Pruum and Robert Pruum (collectively, respondents), and the Response in Opposition (Response) filed September 10, 2008, by the People of the State of Illinois (complainant).<sup>1</sup>

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<sup>1</sup> At a August 28, 2008, telephonic status conference with the hearing officer, discussion centered on complainant’s expert report authored by Gary Styzens that was served on respondent on August 26, 2008. *See* Hearing Officer Order, August 28, 2008. The complainant represented that it was intended to be used as an exhibit in the hearing scheduled for October 20 through the 23, 2008. The respondents orally objected to the report. The parties were directed to file written pleadings on the matter. The respondents were directed to respond in writing on or before September 8, 2008. The complainant was directed to file its written response on or before September 10, 2008. The respective pleadings have been timely filed. In respondents’ response, they also include objections to certain persons included in complainant’s witness list.

For the reasons set forth below, the respondents' motion is granted in part and denied in part. The October 20-23, 2008, hearings are cancelled, but will be rescheduled for December 2-5, 2008, rather than in January 2009 as respondents requested.

### **Respondents' Motion**

Respondents' motion recites some of the lengthy procedural history of this case, omitted here in the interest of brevity.<sup>2</sup> Respondents properly note that discovery in the above-captioned matter was closed on October 12, 2005, and object to complainant's named expert witness, John Nosari, and employee of the Illinois Environmental Protection Agency (Agency or IEPA). Complainant deposed Mr. Nosari on September 10, 2003. The pertinent portion of the deposition transcript reads as follows, with questions being asked by respondents' attorney Mr. LaRose, questions being answered by Mr. Nosari, and comments made by complainant's attorney Mr. Grant:

Q. Have you made any of the – have you made any determination as to any of the component parts of economic benefit?

A. No.

Q. That is your assignment, however?

A. That is my assignment.

Q. And before you testify in this case, you intend to do that?

A. That's correct.

Q. Chris, I'm not going to belabor a lot. I mean, if he doesn't have any conclusions. But once he gets them, I'd like to talk to him about it before the witness stand.

Mr. Grant. No, that's fine. I don't have any problem. As a matter of fact, we're going to ask him to prepare some sort of report which I will consider that that's a continuing obligation to supplement interrogatories that we have.

Mr. LaRose. And I promise you I won't waste your time, but I can't just ask him about it on the witness stand.

(Motion at 3-4, and attachment Exhibit B. pp. 25-26)

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<sup>2</sup> This history is set out in some detail in the Board's orders in People v. Edward and Robert Pruim/People v. Community Landfill Co, Inc., PCB 04-207 and PCB 97-193 (cons.) (April 20, 2006) abd and People v. Edward and Robert Pruim, PCB 04-207 (March 18, 2004).

Respondents represent that the report mentioned at the September 10, 2003 deposition was served on them on August 27, 2008. Furthermore, the report is authored by Gary Styzens, not Mr. Nosari. *See* Motion, Exhibit D. In support of their Motion, respondents argue that:

Complainant had nearly five (5) years to present a report by its previously disclosed witness John Nosari, who was deposed on September 10, 2003. Instead, complainant has shown a complete lack of diligence by waiting until August 27, 2008, to disclose a report that is not prepared by John Nosari but by somebody else, Gary Styzens, who had never been mentioned before August 4, 2008. It is completely unfair to expect respondents to prepare for Styzen's testimony in just over a month when complainant has had five (5) years to supplement discovery and properly present him as a witness (along with his report). Motion at 8.

Citing Supreme Court Rule 218(c), respondents state that they are entitled to have all discovery complete a full 60 days prior to hearing. Motion at 5.

Respondents also request that the testimony be barred regarding the complainant's "intention to elicit substitute testimony from IEPA employee Brian White and another newly mentioned witness IEPA employee Blake Harris". Motion at 5. Although not clear from respondents' motion, it appears that the previously named [IEPA employee] Dave Walters, as witness to a BEN report, may be substituted by Brian White, who now holds Mr. Walter's position. Motion at Exhibit F.

Respondents move in the alternative that, should the witnesses be allowed to testify and the Styzens' report allowed, that the hearing scheduled for October 20 through the 23, 2008, be cancelled and continued to a date after January 15, 2009, to allow respondents time to depose the newly disclosed witnesses, as well as enable the respondents to name any responsive witnesses of their own. Motion at 7.

### **Complainant's Response**

Complainant argues that respondents' motion should be denied in its entirety, and that hearing should be held as scheduled. Complainant represents that the Styzens' report was forwarded to the respondent on August 28, 2008, because prior to that date, complainant had not received the final calculation from its expert. Response at 3. Complainant further states that:

[it] is not engaging in new discovery, but rather is honoring its commitment to provide its expert opinion, first made in 2003. Although it proposes to substitute Gary Styzens as testifying witness, his opinion was developed in concert with previously

disclosed expert Dr. John Nosari (See: Exhibit A, p. 3). Use of a State employee witness for testimony will only reduce the overall costs of litigation. Mr. Styzens is readily available for deposition if the respondents so choose. Response at 3.

Complainant further argues that the respondents' motion to bar the testimony of Brian White and Blake Harris should be rejected because the proposed witnesses have been properly disclosed in conformance with the Board procedure. Motion at 3. In support of its proposition, the complainant's cites Section 101.616(c) of the Board's procedural rules that states "all discovery must be completed at least 10 days prior to the scheduled hearing in the proceeding unless the hearing officer orders otherwise", and that the 60 day period of Supreme Court Rule 218 does not apply. The complainant further relies on the Board's order in People v. Community Landfill Company and the City of Morris, PCB 03-191 (October 19, 2006) (CLC), and states that the Board found that a disclosure of a newly identified witness "was consistent with the deadline set by the hearing officer for the filing of CLC's witness list." *Id.* slip at 3.

Finally, complainant states that it has no objection to any further depositions taken of these newly named witnesses, but "will vigorously object to a cancellation of the hearing for this purpose". Response at 4.

### **Discussion**

While the Supreme Court rules do not expressly apply in Board proceedings, the Board and its hearing officers may look to them for guidance where the Board's procedural rules are silent. *See* 35 Ill. Adm. Code 101.100(b). In pertinent part, the Illinois Supreme Court Rule 213 (f) requires that upon written interrogatory, a party must furnish the identities of witnesses who will testify at trial, including the conclusions and opinions of the witness and the bases therefor and any reports prepared by the witness about the case. Illinois Supreme Court Rule 213 (i) also imposes upon a party a duty to seasonably supplement...whenever new or additional information subsequently becomes known to that party. *See Seef v. Ingalls Memorial Hospital*, 311 Ill. App. 3d 99, 724 N.E.2d 115,126-128 (1<sup>st</sup> Dist 2004).

Pursuant to a September 13, 2005, Hearing Officer order, all discovery was ordered to be completed on or before October 12, 2005. Based on the pleadings, complainant's witnesses, Gary Styzens, Brian White and Blake Harris were not formally identified until the witness list was filed on August 20, 2008. And it was not until August 27, 2008, that the complainant provided the Styzens' report that was first alluded to at the September 10, 2003, deposition.

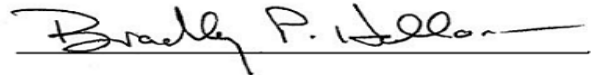
The pleadings reflect that Mr. Nosari has left the Agency, and that Mr. Walter's has moved on to another Agency position. Complainant offers no insight as to when the respective status changed as to these witnesses. The timing of complainant's disclosure of replacement Agency witnesses is not acceptable. Additionally, the Nosari deposition testimony was not seasonably supplemented by Styzens' report.

The complainant asserts that respondents' motion should be denied because relevant evidence should not be kept from the Board. However, before the Board receives evidence, it must have been properly disclosed to the opposing party.<sup>3</sup> Complainant's reliance on the Board's order in CLC is misplaced. The main issue was whether Edward Pruim, who was newly listed as a witness for the respondent, was healthy enough to testify at the upcoming hearing. The Hearing Officer order dated October 3, 2006 stated that "due to the issues that need to be addressed at hearing on the issue of remedy, it appears imperative that Edward Pruim, as financial officer of CLC, be present at the hearing and available to testify". *Id.* at 4. The apparent need for the Pruim testimony there is much like that here, where the newly disclosed witnesses will presumably testify to any alleged penalties for the Board to consider. Accordingly, respondents' motion to bar testimony and other evidence is denied.

The hearing officer also notes that he has been recently advised that the room reserved for the October 20-23, 2008, hearing is unavailable for October 20-21, 2008. Based on the parties representations, it appears that two hearing days will not be enough time in which to complete this hearing, additional hearing days would be required even if the hearing commenced on October 22 as scheduled.

Respondents' motion to cancel the hearing scheduled for October 20 through the 23, 2008, is granted in part. But, delay of hearing until January, 2009 is not acceptable. The hearing will be rescheduled for December 2 through the 5, 2008, in order to give the respondents an opportunity to depose the witnesses if they so choose. All depositions must be completed on or before November 7, 2008. Any and all pre-hearing motions are to be filed on or before November 12, 2008, with any responses due to be filed on or before November 17, 2008.

IT IS SO ORDERED.



Bradley P. Halloran  
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Illinois Pollution Control Board  
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<sup>3</sup> Section 101.616( c) of the Board's procedural rules, states that "all discovery must be completed at least 10 days prior to the scheduled hearing in the proceeding *unless the hearing officer orders otherwise*". (emphasis added).

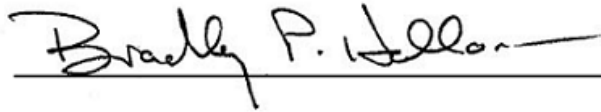


CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on September 24, 2008, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on September 24, 2008:

John T. Therriault  
Illinois Pollution Control Board  
James R. Thompson Center  
100 W. Randolph St., Ste. 11-500  
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A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath it.

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