

ILLINOIS POLLUTION CONTROL BOARD
January 21, 1993

CITIZENS AGAINST REGIONAL LANDFILL,
Petitioners,
v.
THE COUNTY BOARD OF WHITESIDE COUNTY
and WASTE MANAGEMENT OF ILLINOIS,
INC.,
Respondents.

PCB 92-156
(Landfill Siting)

ORDER OF THE BOARD (by B. Forcade):

On January 6, 1993, Waste Management of Illinois, Inc. (WMII) filed its emergency motion to strike portions of the petitioner's brief. WMII also requests that the Board impose sanctions against petitioner for noncompliance with fundamental rules of procedure and advocacy. Citizens Against Regional Landfill (CARL) filed a response to the motion to strike on January 13, 1993. In the motion, CARL also seeks sanctions against respondents' attorneys for their continued allegations and abuse of the Board's procedural rules, as well as the Illinois Rules of Appellate Advocacy in attempting to taint this record erroneously, frivolously, and falsely. CARL also filed on January 13, 1993, a Motion for Review of Hearing Examiner Rulings Pertaining to Discovery and Hearing Record. The January 13, 1993 motions were accompanied by a motion to waive the filing requirement that all motions be submitted on recycled paper. A waiver of the filing requirement is granted. Also before the Board is a joint Motion to Amend the Briefing Schedule filed on January 8, 1993. A waiver of the statutory deadline was also filed, extending the statutory decision period to February 28, 1993.

On January 19, 1993, WMII filed a Motion for Leave to File Reply and Reply to Petitioner's Response to Emergency Motion. WMII requests leave to file a reply because CARL has made numerous allegations in their response that necessitate a reply. The motion for leave to file a reply is granted. While a reply to a response is usually not permitted, the Board finds that WMII should be permitted to reply to the allegations against WMII raised in CARL's response.

The Board will address the motion to strike, sanctions against both petitioner and respondent and the motion to amend the briefing schedule. The Board will postpone comment on the motion to review the hearing officer ruling as this motion is not ripe.

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Motion to Strike

WMII seeks to strike pages 12 through 28 of the petitioner's brief because it is based on exhibits that are not part of the record. The exhibits which WMII objects to consist of a newspaper article, excerpts from the deposition of William Barrett and deposition exhibits. WMII contends that the argument set forth in the Fundamental Fairness section of petitioner's brief is developed and predicated upon these improper references. WMII argues that neither WMII nor the county should be required to respond to arguments based on matters dehors of the record. Further, WMII seeks sanctions against Mr. Hudec, attorney for CARL, for noncompliance with the hearing officer's order and for signing a brief "not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." (See Illinois Supreme Court Rule 137.)

CARL withdraws its reference to the newspaper article, Exhibit A of its brief. In its response CARL notes that it did not receive a copy of the transcript until December 30, 1992,¹ the last working day prior to January 4, 1993, the due date of the brief. CARL further notes that at the time the brief was prepared the January 4, 1993 letter from the hearing officer was not part of the record. CARL contends that the entire deposition of Mr. Barrett should be provided to the Board as part of the record in chief or under an offer of proof. CARL argues that the order of the hearing officer allowed the parties to supplement the record with those portions of the deposition as the parties felt appropriate. CARL also requests that the Board impose sanctions on respondents' attorneys for their continued allegations and abuse of the Board's procedural rules, as well as the Illinois Rules of Appellate Advocacy in attempting to taint this record erroneously, frivolously, and falsely.

The Board will strike Exhibit A and any references or arguments related to Exhibit A in the petitioner's brief. The remaining exhibits in contention are all related to the deposition of William Barrett. The issue in this matter is whether the deposition and the deposition exhibits are part of the evidence in this matter. The Board will review some of the procedural history relating to the deposition of Mr. Barrett before ruling on the motion to strike.

On December 17, 1992, the Board granted an emergency motion from CARL to allow the deposition of William Barrett, attorney

¹ The Board notes that it is the responsibility of the parties to obtain copies of the transcripts. Copies of the transcript were received by the Board on December 29, 1992. The Board allows 15 days from the close of the hearing for the filing of the transcript. (35 Ill. Adm. Code 103.220)

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for Whiteside County. The Board vacated a prior order by the hearing officer prohibiting the deposition due to new information presented to the Board in an affidavit attached to the emergency motion. The Board stated in its order:

Mr. Hudec has complicated the Board's deliberation by not describing the information he has received or providing the Board with copies of the information asserted in paragraph (d) above. However, the Board believes that this statement, under oath, provides an adequate basis to justify exploration of the information Mr. Barrett may possess regarding his role and compensation in such contract.

At the December 18, 1992 hearing, the hearing officer, after sitting through the deposition of Attorney Barrett, determined that Mr. Barrett would not be required to testify at the hearing. The hearing officer specified three reasons in support of his determination: 1) the information was available from other sources, 2) Mr. Barrett's testimony was not necessary to the proceedings and 3) the County would be unduly burdened if Mr. Barrett were required to remove himself as attorney due to his testifying. (Tr. at 15.)

At hearing, CARL sought clarification from the hearing officer to the admission of Mr. Barrett's deposition transcript to the Board either as part of the record or under an offer of proof. (Tr. at 131.) The attorney for WMII objected to the entire transcript of the deposition being submitted. (Tr. at 133.) The hearing officer declined to enter the entire transcript but specified some general portions of the deposition to be submitted to the Board. (Tr. at 136.) The hearing officer proposed that the transcript from Mr. Barrett's deposition be submitted to the Board in the following manner.

...the transcripts of the deposition of Mr. Barrett be submitted to me, perhaps copies to counsel as well. I can indicate that port--those portions which I think are relevant and if by either phone hook up or an opportunity for people to submit any arguments to me is what I think more or less what ought to go in and then I'll just rule on it and send that portion up to the Board,....

(Tr. at 137.)

The parties agreed to the handling of the deposition in this fashion. (Tr. at 137.)

On January 4, 1993, Mr. Hudec, attorney for CARL, submitted a complete copy of the transcript of Mr. Barrett's deposition to the Board "pursuant to the hearing examiners directive of

December 21, 1992."² In a January 5, 1993 letter to the hearing officer, Mr. Hudec informed the hearing officer that he had forwarded the entire deposition transcript to the Board "based upon your directive to the parties to supplement the record with those parts of the deposition as we felt appropriate." The hearing officer responded in a January 6, 1993 letter, stating that he had not directed the submittal of the transcript and such transmittal was contrary to the agreement reached on the record. Portions of the deposition of Mr. Barrett were submitted by the hearing officer to the Board on January 11, 1993.

The record does not support Mr. Hudec's contention that the hearing officer permitted the parties to supplement the record with those parts of the deposition as the parties felt appropriate. The hearing officer indicated that he would determine those portions to be included in the record subject to review by the parties. The record contains no directive by the hearing officer for including the entire transcript in the record. The record is clear as to the hearing officer's order on the submission of the deposition transcript. The hearing officer stated that submitting the entire transcript "defeats the purpose of Mr. Barrett not testifying here and any ramifications as appearing of counsel to flow from that." (Tr. at 136.) The hearing officer informed the Board of the agreement concerning the deposition transcript in a December 21, 1992 letter to the Board. The hearing officer, in a January 6, 1993 letter to the parties, noted that Mr. Hudec's submittal of the entire deposition transcript was "clearly contrary to the agreement" and expressed his concern of "Mr. Hudec's blatant misrepresentations on this issue".

CARL also alleges that the entire deposition should be submitted to the Board under an offer of proof (as a basis to review and reverse the hearing officer's ruling). The hearing officer clearly refused to include the entire deposition as part of the record either as part of the case in chief or as an offer of proof. Even if the deposition were allowed in as an offer of proof, it would not be considered as evidence to support the petitioner's case in chief. It is inappropriate and misleading to reference an offer of proof in support of an argument in the case in chief. Relying on facts not in evidence to support an argument violates fundamental fairness because the opposing party

² The hearing officer's letter of December 21, 1992 repeats the agreement of the parties of the handling of the deposition transcript as reached at hearing. The hearing officer notes that he will forward those portions he finds appropriate to the Board. The hearing officer notes that he will convene a telephone conference to receive any argument as to the appropriateness of his selection.

has been denied an opportunity to cross examine or rebut the facts.

The portions of Mr. Barrett's deposition and the exhibits referenced in CARL's brief are not included in the evidence in this matter. Arguments premised on those documents are clearly inappropriate. Pages 12 to 28 of petitioner's brief rely on facts which are not part of the evidence. Therefore, the motion to strike pages 12 through 28 of the brief is granted.

Sanctions

WMII contends that sanctions against petitioner are necessary to ensure the integrity of the process, and to deter future instances of such conduct. WMII alleges that the following actions by the petitioner show a continuing pattern of non-compliance:

1) CARL's failure to make an offer of proof at the hearing concerning jurisdictional issues as allowed by the Board's December 17, 1992 order.

2) CARL's failure to present information at hearing concerning its allegation that it failed to respond to the motion to strike due to misleading instructions by the hearing officer.

3) CARL's failure to follow procedural rules when filing its emergency motion of December 17, 1992.

4) The Board's order allowing the deposition of Mr. Barrett was based on an unsupported assertion of fact contained in the affidavit of Mr. Hudec.

5) In its petition for hearing, CARL contended that the county board's siting approval was contrary to the manifest weight of the evidence on all nine criteria but in its brief only challenges 5 criteria.

6) Petitioner's brief contains no proof of service.

7) CARL has filed a complete transcript of the deposition of Mr. Barrett in direct contravention of the hearing officer's order.

In its response CARL contends that the allegations by WMII contain irrelevant and spurious information and misrepresents matters. CARL also argues that many of the allegations raised by WMII are not presently before the Board. CARL states that respondents have frivolously alleged a repeated and reckless disregard for the Board's procedural rules. CARL argues that the respondent should be sanctioned for their continued allegations and abuse of the Board's procedural rules, as well as the

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Illinois Rules of Appellate Advocacy in attempting to taint this record erroneously, frivolously, and falsely.

35 Ill. Adm. Code 101.280 gives the Board the authority to issue sanctions for the failure to comply with the Board's procedural rules or any order of the Board or hearing officer. (See Modine Mfg. Co. v. Pollution Control Board (1989), 192 Ill.App.3d 511, 548 N.E.2d 1145.) While WMII contends a continuing pattern of non-compliance, the Board is greatly concerned with allegations relating to the motions presently before the Board.

CARL clearly violated the hearing officer's order by submitting the entire deposition of William Barrett to the Board and referencing portions from the deposition in its brief. The hearing officer did indicate the portions he intended to include in the record and had expressed his opposition to including testimony from Mr. Barrett. Despite the hearing officer's ruling on the deposition transcript, petitioner submitted the entire transcript to the Board. Petitioner referenced the deposition transcript extensively in its brief, often referring directly to responses by Mr. Barrett. Petitioner did not attempt to indicate to the Board that the contents of the record in this matter were in dispute or not complete at the time the brief was prepared. The petitioner, instead, submitted the entire deposition and misrepresented the agreement reached on the handling of the deposition. The Board finds that the actions on the part of the petitioner warrant the imposition of sanctions against the petitioner. WMII requests that petitioner be required to pay WMII its attorney fees and expenses in preparing this motion and in attending the deposition of William Barrett.

In imposing sanctions the Board will consider the relative severity of the failure to comply, the past history of the proceeding, and the degree to which the proceeding has been delayed. (Section 101.281.) The Board considers the filing of a brief referencing facts not supported by evidence to be a serious violation of the rules concerning evidence and the rules regarding advocacy. The Board also finds CARL's filing of the entire deposition transcript and misrepresentation of the hearing officer's order to be in contumacious disregard of the hearing officer's order.

The hearing officer refused to require Mr. Barrett to attend a deposition and provided reasoning on his ruling. (See Hearing Officer Order of December 16, 1992.) Later, the hearing officer declined to allow Mr. Barrett to testify at hearing for the same reasons that he had refused to allow the deposition of Mr. Barrett to take place; no showing that the information was unavailable from other sources. (Tr. at 15.) Despite advance notice of the hearing officer's concerns regarding the availability of this information from other sources, the attorney

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for CARL presented no facts or argument on this point at hearing. Instead of addressing the hearing officer's ruling or finding additional sources to support the arguments in an attempt to secure a favorable ruling, Mr. Hudec simply relied on information not in evidence as a part of his brief. In a similar manner, the attorney for CARL merely disregarded the hearing officer's ruling and submitted the transcript from the deposition and proceeded to represent the transcript as evidence before the Board. This disregard of the hearing officer orders and misrepresentation of the facts is inappropriate conduct before the Board. Mr. Hudec chose not to explore alternative methods of securing the contested information. He also chose not to present facts or legal argument at hearing supporting the necessity of securing the information from Mr. Barrett. The failure even to attempt these appropriate methods of admitting evidence is an exacerbating factor.

While the Board does not address the merits of each allegation raised in WMII's motion to strike, the allegations represent the past history of this proceeding. Many of the filings in this matter have contained procedural defects. The Board noted in its December 17, 1992 order that the emergency motion filed by CARL was not in accordance with the Board's procedural rules. The Board has in prior Board orders extended to CARL the opportunity, at hearing, to address issues raised in its motion. CARL did not address these issues at hearing. Some of the allegations may not rise to a blatant disregard for the Board's rules. However when considered with the filing of CARL's brief there appears to be a continuing disregard for Board rules and orders.

The failure of CARL to follow the hearing officer's order and filing of a brief not supported by evidence has created a delay in the proceedings. The parties have submitted a motion to amend the briefing schedule to correct this delay. A waiver of the statutory deadline has also been filed to allow for the amended briefing schedule.

The Board grants WMII's request for sanctions against Mr. Hudec. The Board will not require petitioner to pay costs related to the deposition of Mr. Barrett. The Board orders the attorney for CARL to pay the amount of reasonable expenses incurred by WMII in obtaining this order. WMII shall submit a bill specifying the costs related to the preparation of the motion to strike within 15 days of the date of this order. The bill shall be filed with the Clerk of the Board and served on the attorney for petitioner. CARL's attorney shall have 15 days in which to object to the filing by WMII.

While the Board has not completely analyzed each of the allegations made by WMII, the Board does not find the allegations to be frivolous. The Board does not find that the allegations

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were made in an attempt to taint the record or delay the proceedings in this matter. Therefore, CARL's request for sanctions against respondents' attorneys is denied.

Nothing in today's order should be construed as a waiver by the Board of the possibility of additional sanctions or other appropriate actions as a result of the failure to follow procedural rules or to comply with Board and hearing officer orders.

Briefing Schedule

The scheduling order entered by the hearing officer provided that the petitioner's brief was due on January 4, 1993, respondents' brief was due on January 11, 1993 and petitioner's reply brief was due January 15, 1993. CARL filed its brief on January 4, 1993; no briefs have been filed by the respondents. On January 6, 1993, WMII filed an Emergency Motion to Strike Petitioner's Brief. The motion sought to strike selected pages of CARL's brief and requested an extension in time for the filing of briefs. In a January 7, 1993 Board order, the Board declined to rule on the motion to strike, allowing time for CARL to respond to the motion. The Board noted that should the ruling be favorable to WMII, the Board would simply disregard those portions of the petitioner's brief and attachments (as well as any portions of the response briefs) which were not appropriate for consideration. The Board also specifically denied the request to extend the time for filing the briefs noting the decision deadline.

In the motion to amend the briefing schedule, the parties request that the briefing schedule be amended to allow respondents' brief to be filed on or before January 25, 1993, and petitioner's reply brief be filed on or before February 4, 1993. The parties contend that this request is not made for purposes of delay, but to allow the determination as to what constitutes the record in this appeal and thereby facilitate the considerations and disposition of this appeal.

The motion to amend the briefing schedule was filed as a joint motion. The Board grants the motion to amend the briefing schedule.

IT IS SO ORDERED.

J. Theodore Meyer abstained

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I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 21st day of January, 1993, by a vote of 5-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

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