

ILLINOIS POLLUTION CONTROL BOARD
December 17, 1992

CITIZENS AGAINST REGIONAL LANDFILL,)
)
 Petitioners,)
)
 v.) PCB 92-156
) (Landfill Siting)
)
 THE COUNTY BOARD OF WHITESIDE COUNTY)
 and WASTE MANAGEMENT OF ILLINOIS, INC.,)
)
 Respondents.)

ORDER OF THE BOARD (by B. Forcade):

On December 16, 1992 after the regular close of business, the Board received¹ a facsimile copy of a 15 page document purporting to be an "Emergency Motion of the Petitioners to Require the Attendance of William Barrett For Deposition and at Hearing; Motion for Reconsideration and Motion for Continuance of Hearing."

¹ The document was not "filed" with the Board. The Board's procedural rules specifically state how filing is to occur:

Section 101.102 Filing Of Documents

- a) Documents and requests permitted or required to be filed with the Board or its Clerk shall be addressed and mailed to or filed with the Clerk at 100 West Randolph Street, State of Illinois Center, Suite 11-500, Chicago, Illinois 60601. Filing, inspection, and copying of documents may be done in the Clerk's office from 8:30 a.m. to 4:30 p.m. Monday through Friday, except for national and state legal holidays. The Board offices are open from 8:30 a.m. to 5:00 p.m. Monday through Friday, except for national and state legal holidays.
- b) Filings received after 4:30 p.m. will be date-stamped the following business day.
- c) Documents may be filed with the Clerk by certified, registered, or First Class mail, by messenger service, or personally at the Board's Chicago office. Filing by electronic transmission, such as telefax machine or computer modem, will not be accepted, except when specifically requested by the Board. (Emphasis Added)

The Board did not request this filing.

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The Board on its own motion specifically accepts the emergency motion received on December 16, 1992 as a filing in this matter due to the particularly unusual circumstances involved. The Board accepts such filing, and is acting on the filing without benefit of a response, to prevent undue delay and material prejudice to the Board's ability to timely complete hearings and issue a decision prior to the February 4, 1993, statutory decision deadline. See 35 Ill. Adm. Code 101.241 (b).

The Board is substantially distressed by the Petitioner's failure to read, comprehend, and comply with the Board's procedural rules regarding practice before the Board. The role of the Board and its hearing officer, motion practice, and filing requirements are all clearly delineated. Petitioner's future failure to comply will be at his own peril.

Nonetheless, the Board believes it remains appropriate to deal with the substance of the claims advanced in the motion. In paragraph (d) of his "Affidavit in Support of Motion", Mr. Hudec states:

That your affiant has received information to substantiate that Attorney William Barrett's fees for these services [negotiating a contract with Waste Management and Whiteside County relative to siting the subject landfill] exceed \$60,000 and were not to be paid until such time as the County had approved both the contract between Whiteside County and Waste Management of Illinois, Inc., and had received siting approval from the County.

Other portions of the pleadings state that Mr. Barrett was the hearing officer for the proceeding below, and presently is counsel of record for Whiteside County. Mr. Hudec asserts these facts constitute sufficient demonstration of potential lack of fundamental fairness below to justify the discovery deposition of Mr. Barrett.

Mr. Hudec has complicated the Board's deliberations 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, by discovery, of the information Mr. Barrett may possess regarding his role and compensation in such contract.

Consequently, the Board specifically vacates the protective order entered by the hearing officer pertaining to testimony by Mr. Barrett. The Board notes that this new information was not before the hearing officer at the time he issued his protective order. As a result, the Board is vacating the order based upon new information, not reversing the hearing officer. The Board is

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not reversing the hearing officer order because nothing in the record indicates it was in error based upon facts known at the time it was issued. The Board orders the deposition of Mr. Barrett be allowed for a minimum amount of time determined by the hearing officer, presumably not more than two hours, tomorrow morning at the time scheduled for the beginning of the hearing in this matter. At the conclusion of the deposition, the hearing officer shall convene the regular hearing. The decision of whether to require or admit testimony by Mr. Barrett at hearing is left to the discretion of the hearing officer, based upon his evaluation of the deposition.

Citizens Against Regional Landfill ("CARL") also requests the Board to reconsider its order of December 3, 1992 striking Section 1 of the petition. Section 1 challenged the jurisdiction of the County Board in reviewing the landfill siting application. CARL notes that the attorney representing it in this matter was not a participant at the evidentiary hearings. CARL asserts that it sought a copy of the record from the County Clerk. CARL contends that this request was not complied with. CARL states that a conference was conducted by the hearing officer on November 25, 1992, where the failure of the County to provide the petitioner with the record was addressed. CARL contends that at this time the attorney for petitioner was instructed to review the record at the Pollution Control Board and that Waste Management's motion would remain pending until the petitioner had access to the record.

The Board notes that CARL has not raised any facts or arguments addressing the jurisdictional issue to support a reconsideration of the Board's prior order. The allegations made by CARL center around procedural matters and access to the record. The Board notes the WMI's motion for dismissal was before the Board and not before the hearing officer. The Board's procedural rules prohibit the hearing officer from ruling on a motions to dismiss or motions to strike. (Section 101.247) Section 101.241 allows for a response to a motion to be filed within 7 days. If no response is filed within 7 days, such party shall be deemed to have waived objection to the granting of the motion. (Section 101.241) CARL did not file a response to the motion or a request for additional time in which to file a response with the Board.

While the Board will not modify its prior order, petitioner is free to make an offer of proof of any necessary factual material pertaining to this issue at hearing. Additionally, petitioner may present facts pertaining to any argument that the hearing officer's instruction misled Mr. Hudec regarding the response to the motion to dismiss. See paragraphs 10-12 of the motion.

Regarding the motion to continue, the Board denies the

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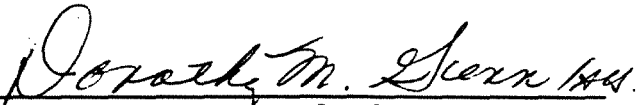
motion insofar as it would require cancellation of the presently scheduled December 18, 1992, hearing. The hearing officer is free to continue the hearing on the record from day to day as justice requires, notwithstanding any prior scheduling orders. The Board notes that prompt conclusion of this matter is of paramount importance. The present decision due date is the February 4, 1993, regularly scheduled Board meeting. The Board lacks authority to extend that statutory deadline. Only Waste Management can extend it.

The Board instructs the Clerk of the Board to provide copies of this order to all parties by facsimile transmission in addition to the regular service on the parties.

IT IS SO ORDERED.

J. Theodore Meyer voted present.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 17th day of December, 1992, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board