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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

MINERAL SOLUTIONS, INC.,

Complainant,

vs.

No. PCB 03-039

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

The following is a transcript of the above-entitled matter taken stenographically before ANN MARIE HOLLO, CSR, RPR, RMR, a notary public within and for the County of Montgomery and State of Illinois. Said hearing was taken on the 9th day of December A.D., 2002, commencing at 9:00 o'clock a.m. at the 600 South Second Street, Hearing Room 403, Springfield, Illinois.

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APPEARANCES:

ILLINOIS POLLUTION CONTROL BOARD
600 South Second Street
Suite 402
Springfield, Illinois 62704

By: Kathleen Crowley, Hearing Officer

Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza
Suite 325
Springfield, Illinois 62701

By: Patrick D. Shaw, Esq.

Appearing on behalf of the Petitioner

Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62794

By: John J. Kim, Esq. Esq.

Appearing on behalf of the Respondent

ALSO IN ATTENDANCE: Gina Roccaforte

E X H I B I T S

	Marked
Group Exhibit Nos. 1 and 2	9
Group Exhibit No. 3	21

1 HEARING OFFICER CROWLEY: Good morning.
2 This is a hearing being conducted by the Illinois
3 Pollution Control Board in the matter of PCB 03-039,
4 Mineral Solutions, Inc. versus the Illinois
5 Environmental Protection Agency.

6 My name is Kathleen Crowley, and I am the
7 hearing officer today.

8 This is a proceeding concerning the appeal
9 of a condition on a permit issued by the Illinois
10 Environmental Protection Agency to Mineral Solutions on
11 August 26, 2002. In permit appeal proceedings, the
12 petitioner challenging the condition has the burden of
13 proof, and his burden of proof is proving that the
14 condition added by the agency was not necessary to
15 accomplish the purposes of the Environmental Protection
16 Act or the Board regulations.

17 This case does have a decision deadline,
18 which we will be discussing later. Currently that
19 decision deadline is January 23rd. The board does
20 anticipate receipt of all documents. It needs to make a
21 decision no later than December 23rd.

22 That's really all I have for opening
23 remarks. So I will ask the attorneys to make their
24 appearances please.

1 MR. SHAW: Patrick Shaw for Mineral
2 Solutions, Inc.

3 MR. KIM: John Kim for the Illinois
4 Environmental Protection Agency.

5 HEARING OFFICER CROWLEY: And do you care
6 to introduce your colleague?

7 MR. KIM: Yes. With me is Gina (sp)
8 Roccaforte, R-o-c-c-a-f-o-r-t-e, who was not making an
9 appearance. She is simply here to observe.

10 HEARING OFFICER CROWLEY: Thank you. And
11 for the record, I will note that we do have some members
12 of the public in attendance today. Thank you.

13 Opening statement? Any?

14 MR. SHAW: Well, maybe an opening
15 administrative matter.

16 HEARING OFFICER CROWLEY: Great.

17 MR. SHAW: As the hearing officer knows,
18 the parties have been discussing the documents to be
19 included in the record. The agency had previously filed
20 with the board the document entitled, the parties are in
21 agreement to supplement that record, but we're not in
22 agreement with how much to supplement the record with.

23 It if pleases the hearing officer, I can
24 present the agreed supplemental part of the record, and

1 we can go on to maybe our -- actually, I'll give it to
2 you both here, the supplemental record and petitioner's
3 motion to supplement the record.

4 And I believe the supplement to the record
5 is probably any of the documents that were in the record
6 as being admitted with the intent to reserve argument on
7 the legal relevance to be based on the documents.

8 HEARING OFFICER CROWLEY: If I can just
9 make sure that I'm understanding this correctly. The
10 agency submitted to the board the agency administrative
11 record on November 12th. That was a bates number
12 stamped document, pages 1 to 133. Agreed supplemental
13 record document appears to continue -- to continue the
14 bates numbers from 132 to 251.

15 So that's material that you both agree
16 belongs in this record?

17 MR. SHAW: Yes. It sounds to me like the
18 bates stamping is -- is there an overlap here? I may
19 not have the last page of the document, John. I
20 don't --

21 MR. KIM: Well, the administrative record
22 that was filed by the agency went up to page 131 bates
23 stamp, as the hearing officer pointed out.

24 MR. SHAW: Did I -- maybe I misheard. I

1 thought she said up to 132.

2 MR. KIM: Your agreed motion begins on 132,
3 which is correct.

4 HEARING OFFICER CROWLEY: Okay. And then
5 we have an additional motion by petitioner to supplement
6 the record with a discovery deposition of William Child
7 taken in Brockman versus IEPA, PCB 93-162. Is that an
8 agreed motion?

9 MR. KIM: That is not an agreed motion.
10 And I don't want to -- you know, Mr. Shaw, I'm sure will
11 present his arguments as to why that document should be
12 in.

13 But what I was going to ask before we got
14 to that document, I think that the parties in presenting
15 the agreed supplement to the record, supplemental record
16 to the board, are also seeking to have the board admit
17 both the administrative record and now the agreed
18 supplemental record into evidence, so that we can make
19 reference to those documents through briefing admitted
20 documents. Is that correct?

21 MR. SHAW: Correct.

22 MR. KIM: Okay.

23 HEARING OFFICER CROWLEY: That's fine that
24 the documents are entered as exhibits.

1 I will just add for the benefit of our
2 audience today, the board is required to determine
3 whether the agency's imposition of the condition was
4 appropriate based on the administrative record that the
5 agency had before it. So that's why there will be some
6 discussion as to whether some bits of information were
7 actually before the agency as part of its record or
8 whether they were not, so.

9 MR. KIM: And as to the motion to
10 supplement, the agency objects to the motion of the
11 request. You know, I would certainly defer to Mr. Shaw
12 to make his arguments as to why he thinks the documents
13 should be in, and I'd be happy to respond.

14 HEARING OFFICER CROWLEY: Mr. Shaw?

15 MR. SHAW: I want to make sure we get all
16 our agreements together, and now we can start with our
17 disagreements.

18 HEARING OFFICER CROWLEY: I appreciate
19 that.

20 MR. SHAW: The document that is the subject
21 of the motion to supplement the record, as the hearing
22 officer noted, is a deposition of William Child taken
23 from another case.

24 The issue here, as determined by the

1 language of section 40D of the Act, which says that in
2 reviewing the denial of any condition of a permit issued
3 by the agency pursuant to rules and regulations adopted
4 under section C of 9.1 of this Act, the decision of the
5 board will be based exclusively on the record before the
6 agency, including the record of the hearing, based and
7 held pursuant to paragraph F3 of section 39, unless the
8 parties agree to supplement the record.

9 The Boards' procedural rules accordingly
10 also state that the hearing shall be based exclusively
11 on the record similar to the Act.

12 The reason the deposition is part of the
13 record -- and I also note that Mineral Solutions, Inc.
14 noticed up the permit review to come here to testify
15 today. After talking with the agency, we said that it
16 would not be necessary, that the basic facts supporting
17 our request are already in the record. It was admitted
18 here today. On page 76 of the administrative record,
19 there was a letter from --

20 HEARING OFFICER CROWLEY: Just one moment
21 please.

22 MR. SHAW: Sure.

23 HEARING OFFICER CROWLEY: To make sure that
24 we have a clear record here, the administrative record

1 is filed by the agency in November. I will be marking
2 that as Group Exhibit 1, and that will be bate stamps
3 number -- pages number 1 to 131.

4 I will mark as Exhibit Number 2 the agreed
5 motion to -- the agreed supplemental record filed
6 today. And with the agency -- initial agency record,
7 I'm going to also include the notice of filing, which
8 does have the index to that record, and we have an index
9 of sorts to the supplemental record, which is why I've
10 divided them into two exhibits.

11 [Group Exhibit Numbers 1 and 2
12 were marked for identification.]

13 HEARING OFFICER CROWLEY: So please go
14 ahead, Mr. Shaw. And what page are you referring to?

15 MR. SHAW: My reference will solely be
16 Exhibit 1, and page 76 will be the first reference.

17 And just a little bit of background here.
18 At some point, the general review of the record will
19 show that there were some discussion between the agency
20 and Mineral Solutions, Inc. a few different times during
21 the permit review.

22 On July 26, 2002, RAPPS Engineering, a
23 consultant for Mineral Solutions, Inc., requested a
24 meeting with the agency. And specifically the second

1 paragraph of that letter states we respectfully request
2 that you convene this meeting at your office. It is
3 very important that Bill Child be in attendance, since
4 he is familiar with the legislative intent of the 39C
5 provision at issue. And 39C is the basis for denial of
6 the permit in this case.

7 A few days later, there was a large brief
8 in the file, which I guess has my name on it. It starts
9 at page 78. It goes for a good length.

10 On page 89 of Group Exhibit 1, reference is
11 made to the deposition of William Child with respect to
12 the legislative history. Specifically a statement is
13 made that William Child will later testify that the
14 purpose of this amendment was to terminate permits of
15 Brockman Landfill and one or two other closed dormant
16 landfills. See Child's deposition from Brockman v.
17 IEPA, Number 3-94-075.

18 HEARING OFFICER CROWLEY: Please excuse
19 me. That page again was?

20 MR. SHAW: Page 89.

21 HEARING OFFICER CROWLEY: Thank you.

22 MR. SHAW: It's in the last full
23 paragraph.

24 HEARING OFFICER CROWLEY: Thank you.

1 MR. SHAW: Two other items in the record.
2 Page 74 of Group Exhibit 1 shows that Illinois EPA
3 meeting sign-in sheet in which Bill Child signed is
4 present -- his presence at that meeting. For the
5 record, I was present at that meeting as well.

6 The following page of Group Exhibit 1, page
7 75, indicates that the history of section 39C in the Act
8 was discussed. Although details of that discussion are
9 not set forth.

10 The scope of this review is the agency's
11 record. The agency's record -- I think we need to
12 distinguish two different items. One is a bureaucratic
13 or administrative record that the Illinois Environmental
14 Protection Agency keeps for any permit it reviews or any
15 item under its review. It does not duplicate other
16 permit files. It doesn't put in everything in that
17 record that it has somewhere else that it reviewed.

18 If you look through this record or probably
19 any other record, you could see that the agency, in
20 reviewing any permit application, reviewing other
21 permits for that facility reviews other documents. It
22 doesn't copy them and place them into a new file.

23 So what we have here is a distinction
24 between an agency administrative record and what was in

1 the agency's purview, thoughts, insight, knowledge at
2 the time the decision was made.

3 At the time the decision was made,
4 Environmental Protection Agency had a deposition of
5 William Child that had been taken in a previous
6 proceeding. Let's see. That deposition was dated
7 1993. It was not something that they reviewed out of
8 their own course. I don't think there's anything in the
9 record to indicate that their permit reviewer would have
10 looked at another facility's record. They could have.
11 It's certainly up to them. But it was referenced in
12 materials submitted by permit applicant with respect to
13 a legal argument that was being made about the purpose
14 of this provision.

15 I'd also note that this document, I
16 believe, is in the Pollution Control Board's record,
17 because I believe it was submitted in the Brockman v.
18 IEPA PCB decision from several years ago. I haven't
19 personally reviewed that or sought to determine whether
20 or not it's still there. But my records show it was
21 submitted to the board in that case. So this document
22 is actually before the board or in the board's records
23 also.

24 I believe that this document constitutes

1 what we considered the agency record. I don't think
2 that it is unfair to present something that was given to
3 them and given the agency opportunity to look at.
4 Whether or not they looked at it themselves, I think is
5 somewhat besides the course. They were put on notice
6 that this deposition is something that we found to be
7 important enough to reference in a legal document to say
8 look at it if you want. And also to request that Bill
9 Child be present at the meeting so they can talk about
10 this provision.

11 So we would just respectfully ask that the
12 deposition be admitted into the record. Unless there
13 are any questions, I'll let John respond.

14 HEARING OFFICER CROWLEY: If I may ask just
15 one question. Was the deposition submitted to the
16 agency along with your brief?

17 MR. SHAW: No, it was not.

18 MR. KIM: Thank you.

19 In response, I'm probably going to repeat
20 back the statements that Mr. Shaw just made, because
21 actually I think they support the agency's contention
22 that this document should not be included as part of the
23 record.

24 He noted that, first of all, Mr. Child, who

1 is the deponent in the transcript that he's seeking to
2 supplement, Mr. Child was asked to be in attendance at a
3 meeting related to Mineral Solutions. Well, that
4 meeting took place in 2002. The deposition was taken in
5 1993. So some nine years have passed.

6 There's no indication or there's no
7 evidence presented or before the board that what was
8 testified to in the deposition transcript, which was a
9 discovery deposition, not an evidentiary deposition, was
10 in any way, shape or form parroted back or repeated or
11 reiterated in the meeting in 2002. There's no evidence,
12 as a matter of fact, as to what Mr. Child said at all
13 during that meeting.

14 Mr. Shaw stated that his memo that's part
15 of the agreed -- that's part of the administrative
16 record does make reference to the deposition, but as the
17 hearing officer just pointed out, that deposition
18 transcript was not included as an attachment to the
19 memo. There's no presence of that transcript in any
20 document that was submitted by Mineral Solutions to the
21 agency as part of this -- part of the permit application
22 that led to the decision that's under dispute.

23 The scope of review in this case is limited
24 to the administrative record. The administrative record

1 that the agency provided and that we have agreed to
2 supplement contains documents solely related to Mineral
3 Solutions and solely documents that were relied upon or
4 reviewed by the agency permit reviewer in making the
5 decision at issue.

6 As Mr. Shaw stated, there's no evidence
7 that the permit reviewer reviewed the deposition
8 transcript. In fact, if they in that deposition
9 transcript had been reviewed or relied upon in some
10 fashion, it would have been included as part of the
11 administrative record. It was not.

12 The fact that this document may or may not
13 exist in some file before the board really is of no
14 consequence, because, again, just because a document
15 exists in some fashion in a separate file in a board
16 proceeding doesn't mean that it's automatically
17 qualified to be admitted as a document here.

18 What it comes down to is, this document
19 does not meet the standard, and it does not meet the
20 definition of a document that should be included as part
21 of the administrative record. It was not relied upon.
22 It was not reviewed. And as a result, it should not be
23 considered by the Board. And reviewing the agency's
24 decision to do so would be unfair, because it's taking

1 into account something which was never considered as
2 part of the decision making process.

3 HEARING OFFICER CROWLEY: Mr. Shaw, any
4 response?

5 MR. SHAW: Well, I respond that the
6 standard that the agency would like to see established
7 here is the only information they relied upon. It's a
8 one-sided standard as to consider what they want to
9 consider, and don't consider what they don't want to
10 consider, and don't have to answer to the board or
11 anyone else. They considered or relied upon what they
12 wanted to rely upon, and that's fair enough.

13 We also asked them to look at this or
14 consider this, and they chose not to. That's fine.
15 It's a lengthy document. I don't think that their
16 decision not to rely upon it, to elect not to look at it
17 should be binding on the board or anybody else.

18 I think that these arguments that we made
19 are good. And I have a feeling that down the road, the
20 board may want to look at the deposition to fully
21 consider what was referenced there in the record.

22 I'd also say that I think it would be an
23 unfortunate standard that the deposition would need to
24 be physically attached to something given to the

1 agency. And I can understand if the agency wasn't able
2 to come up with the document if it's something that is
3 not in their possession or their knowledge.

4 But as you can tell here, this is
5 a -- well, 51-page document. We've got a lot of
6 environmental practices before the board and the agency
7 which are intended to reduce paper load, but there's a
8 lot of paperwork in this line of business, and right now
9 I think there's a docket open to try to get even less
10 paper.

11 The procedural requirement of putting a
12 document and attaching it, which is already in the
13 possession of the agency, would seem to be poor
14 environmental sense and not very practical.

15 They elected not to rely upon this document
16 and review it. I think that's fine. That doesn't mean
17 I don't think it should not be admitted into the
18 record.

19 What was stated in Joliet Sand and Gravel
20 Company Case, PCB 86-159, was to the extent that the
21 agency has relied upon information beyond what was
22 contained in the application, such information must be
23 included in the permit record filed with the board. If
24 it is not, the applicant may properly submit such

1 information to the board during the course of the
2 board's hearing.

3 And additionally, if there was information
4 in the agency's possession, upon which it reasonably
5 should have relied, the applicant may also submit such
6 information to the board for the board's consideration.

7 I know from our previous conversations,
8 there's probably other pollution control board cases
9 that go the other way. There's a fairly gray area here
10 in which a lot of effort has been put forth to grapple
11 with what was in the knowledge of the agency, what is
12 that intangible item. I think this one clearly should
13 fall into the category of something that is easily
14 obtainable to be included in the record.

15 So I would again request that the motion to
16 supplement the record be granted.

17 MR. KIM: I just have a very short response
18 just on one specific point.

19 Mr. Shaw stated that this is something that
20 the agency should have reviewed because it was made
21 reference to in his memo. And I think that when you're
22 speaking of unfair standards, I think that creates a
23 very difficult problem for the agency. Just because
24 someone makes reference to a document or a treatise or a

1 publication of some kind, or what have you, and what is
2 essentially an offhanded manual without including a
3 citation to it or without including a copy of it, I
4 don't think that that means it is incumbent upon the
5 agency to track down that document to make it a part of
6 the record and to review that document to see if there's
7 anything that should or should not be considered.

8 By way of example -- and I think, actually,
9 Ms. Crowley, you might have been the hearing officer on
10 this case. There was a case that I was involved with
11 where there was a reference made to a textbook as part
12 of a technical document. That was submitted to the
13 board. And much issue was made about that book.

14 In preparation for hearing, the agency
15 attempted to try to find a copy of this textbook that
16 was referenced. As it turned out, I think there was
17 only one copy of that book in downstate Illinois that we
18 could find that was in a library. And we had to pull a
19 lot of strings just to borrow the book for a little
20 while so that we could read and see what it was, before
21 we could even make any kind of response of argument at
22 hearing.

23 It's an unfair standard to set up. And if
24 a petitioner wants to make something a part of the

1 record, if they want to have us rely upon it, and almost
2 every instance that I can think of, they won't include a
3 copy of what they're referring to. And I'm sure in this
4 case, there have been, you know, photographs and other
5 documents that were submitted by Mineral Solutions in
6 support of their permit application.

7 If someone just says, "Well, we know that
8 you can get a hold of that, it's in a case that is
9 admittedly not in this case, but it's in a case that's
10 nine years old, and you can track it down, and you can
11 now make it part of the record," that's an undue burden
12 upon us. We don't have the time to try to track down
13 all those documents, and to the point that we are going
14 to be penalized if we fail to do so.

15 So I think that certainly on that point
16 alone, that it's an unfair burden to place on the agency
17 and is not something that should be relied upon in
18 making the decision on this document.

19 HEARING OFFICER CROWLEY: Thank you for the
20 record.

21 The case Mr. Kim was just referring to was
22 I believe Selial (sp) versus the IEPA. I do not recall
23 the docket number. I believe it was an underground
24 storage tank reimbursement case, for whatever it may be

1 worth.

2 Mr. Shaw, I'm going to deny the motion.
3 Had the document been submitted to the agency along with
4 your brief, it clearly would have been part of the
5 agency record.

6 Given that this was a deposition given in
7 an unrelated case some 10 years before, given the fact
8 that you did not submit a copy of the document, I do not
9 believe that it is properly part of the agency record.

10 However, given the fact that this is a case
11 with a decision deadline, a very tight decision
12 deadline, and given the fact that we can't go back and
13 have another hearing should the board believe that this
14 should have been a part of the record, I am willing to
15 accept it as an offer of proof.

16 MR. SHAW: We would appreciate that. Thank
17 you.

18 HEARING OFFICER CROWLEY: So to keep the
19 record clear, we'll mark this as -- we'll mark it as
20 Group Exhibit 3. It's been offered, and it's accepted
21 as an offer of proof, but it is not accepted as an
22 exhibit.

23 [Group Exhibit Number 3 was marked for
24 identification.]

1 MR. SHAW: That is all the information or
2 matters we wish to address from the petitioner's side of
3 the aisle.

4 MR. KIM: We didn't have anything else, I
5 think, other than just the administrative matter of
6 setting up the briefing schedule.

7 And Mr. Shaw and I discussed this. I
8 believe -- I'm sure he will correct me if I misstate
9 this.

10 MR. SHAW: I forgot my calendar.

11 MR. KIM: What we discussed was submitting
12 post-hearing briefs concurrently on December 16th. And
13 I would ask that the board allow fax filing of that
14 document, given the expedited -- --.

15 HEARING OFFICER CROWLEY: I have authority
16 to allow fax filing.

17 MR. KIM: Thank you. And then we would
18 also then in turn file the current response briefs on
19 December the 23rd, again, taking advantage of fax
20 filing.

21 HEARING OFFICER CROWLEY: Yes.

22 MR. KIM: Okay.

23 HEARING OFFICER CROWLEY: So am I correct
24 that you're waiving both any opening or closing remarks,

1 that you're saving it all for the briefs?

2 MR. SHAW: Yes.

3 MR. KIM: Yes.

4 HEARING OFFICER CROWLEY: At this point, I
5 will ask whether any members of the public wish to make
6 statements. If you wish to make statements today, those
7 statements would have to be made under oath and would be
8 subject to cross examination.

9 If you care to alternatively, you
10 could -- or additionally, you can file written
11 comments. The written public comments would have to be
12 received by the board also no later than December 23rd.

13 So I will ask while we're on the record,
14 would any of you gentlemen care to make a statement
15 today? I'm seeing negative nods.

16 That would appear to be all of the business
17 that we have today. There have been no witnesses, so
18 there are no credibility issues.

19 I'm looking forward to reading some
20 fascinating briefs. Thank you very much.

21 [End of hearing.]

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COURT REPORTER'S CERTIFICATION

I, Ann Marie Hollo, Certified Shorthand Reporter, Registered Professional Reporter, Registered Merit Reporter of the State of Illinois and Notary Public, do hereby certify that said hearing before the Illinois Pollution Control Board and Illinois Pollution Control Board Hearing Officer Kathleen Crowley, took place on the 9th day of December A.D., 2002, and held at the Illinois Pollution Control Board Room, 600 South Second Street, Room 403, Springfield, Illinois.

I do hereby certify that I did take stenographic notes of the proceedings and that said notes were reduced to typewritten form under my direction and supervision.

I do further certify that the attached and foregoing is a true, correct and complete copy of my notes and that said testimony is now herewith returned.

I do further certify that I am not related in any way to any of the parties involved in this action and have no interest in the outcome thereof.

Dated at Litchfield, Illinois, this 9th day of December, A.D. 2002 and given under my hand and seal. My commission expires April 5, 2006.

Ann Marie Hollo, CSR, RPR, RMR

