

ILLINOIS POLLUTION CONTROL BOARD  
May 9, 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) reaffirms the Board's April 24 Order granting sanctions against the Illinois Environmental Protection Agency (Agency) relating to inspection of the Joliet Army Arsenal groundwater documents, 2) grants Celotex' April 28 motion for sanctions against the Agency relating to failure to produce witnesses for deposition and 3) reserves ruling on the nature of sanctions pending receipt of briefs from the parties and a recommendation from the Hearing Officer concerning inter-relationship of the subject matters involved in the areas of sanction and suggested appropriate sanctions.

On April 24, 1986 the Board issued an Order granting Celotex' April 10 renewed motions for sanctions. The basis for the motion was the failure of the Agency to comply with a November 11, 1985 Hearing Officer Order providing for inspection by Celotex of documents relating to groundwater facts at the Joliet Army Arsenal; an inspection of documents in a "working file" at the Agency's Maywood office scheduled for April 10 and confirmed on April 8 was cancelled by the Agency on April 9 because the file was "incomplete". The Agency refused to allow inspection of the "incomplete" file in Maywood on April 10, although it offered to allow inspection of the complete, master file in Springfield (where the file is located) on one of two suggested dates in mid-May. While the Board's April 24 Order granted sanctions, the ruling on the nature of the sanction was reserved, the parties being directed to submit briefs on or before May 7 concerning the appropriateness of three Board-suggested alternatives.

On April 28, the Agency filed a request for a special Board meeting to reconsider the April 24 Order, and a motion to stay the Order requiring briefs on May 7. Celotex filed a response in opposition to this motion on May 2. Finally, each party filed

briefs on May 7 in response to the April 24 Order, mootng the motion for stay.

The Board did not schedule a special meeting concerning the Agency's motion, as the motion did not set forth sufficiently pressing reasons to justify the request. Special Board meetings among seven Board Members are logistically difficult to arrange and are held only in the event of compelling necessity.

The motion for reconsideration of the granting of sanctions is granted. The Board reaffirms its April 24 Order. The only new information contained in that motion is that the Assistant Attorney General appearing on behalf of the Agency did not discover that "important documents were not contained in this [Maywood] file...until the morning preceding the inspection". This does not explain the failure to make this determination at some point between November and April--and certainly prior to the April 8 confirmation of the April 10 visit, or the subsequent failure to make a good faith partial compliance by allowing the Maywood inspection to proceed.

The Board must continue to reserve ruling on the nature of the sanction for the reasons expressed below.

Celotex again moved for sanctions on April 18 based on the Agency's failure to produce Kenneth Bechely and Monte Nienkirk for continuation of their depositions. As to Bechely, Celotex asserts that the deposition commenced on October 12, 1984. The witness did not appear at a scheduled continuation session on November 19, 1984; the witness attended sessions on July 12 and August 21, 1985; scheduled continuation dates were cancelled by the Agency on October 15, 1985, and again on January 10, March 12 and April 16, 1986. The Board notes that the scheduling of these 1985-1986 dates was accomplished only after entry of three Hearing Officer Orders, and further notes that the April 16 date was contemplated by the Hearing Officer and agreed to by the parties as being "a firm date...short of death or serious illness". The Agency's April 24 response in opposition describes Bechely "as a mere fact witness for complainant", states that "generally...if a deposition was cancelled [this] was based on genuine unforeseeable events", asserts that the Agency has no objection to the taking of the deposition, and invites Celotex to tender dates in May or June subsequent to inspection of the groundwater documents which are the subject of the April 24 sanction Order.

This pattern of sluggish response to, and/or disregard of, Hearing Officer Orders and repeated and sometimes abrupt cancellation of, or non-attendance at, deposition sessions is unacceptable, and a justification/explanation based on a general allegation of "unforeseeable events" will not lie. The Board sees no useful purpose in establishing yet another "firm" date.

The motion for sanctions is granted, a ruling on the form thereof being reserved.

As to the continuation of the Nienkirk deposition, Celotex asserts that by Order of April 4 the Hearing Officer ordered a response by April 11 as to the availability of the witness on two specific dates, and also ordered that two alternative dates be provided in the case of unavailability. On April 15, in response to an April 14 Celotex request for an answer, the Agency stated the witness was not available on the specified dates. The Agency response to the April 4 Order for alternative dates as well as an April 15 Celotex request was contained in the Agency's April 24 response to this motion for sanctions. In explanation, the Agency states that "any failure...is purely inadvertent" as both the witness and counsel "have been extremely busy handling other Agency matters".

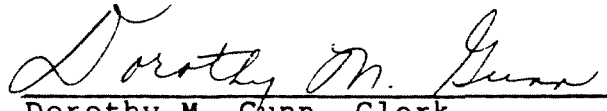
This conduct must be viewed in light of the pattern of disregard of deadlines set in Hearing Officer Orders and failure to request extensions thereof in advance of default. The motion for sanctions is granted, a ruling on the form of the sanctions being reserved.

The April 24 groundwater documents sanctions order sets forth three possible sanctions options upon which the parties have commented. Paragraph 23 of Celotex April 18 deposition sanctions motion sets forth three sanctions options. The sought-for information involved in both deposition and documents sanctions would appear to deal with some of the same issues, and the Board is therefore not inclined to impose sanctions until any inter-relationship is addressed. Additionally, Celotex has generally requested that the complaint be stricken; the Board wishes the parties to specify which, if any, portions of the complaint might appropriately be stricken as a sanction in response to either/both sanctions order(s). Briefs addressing the appropriate sanctions to be imposed by reason of the document and discovery sanctions findings shall be filed on or before May 20. Given the course and nature of this action, the Board believes it appropriate under these circumstances to solicit a recommendation from the Hearing Officer on the nature of the sanctions to be imposed. The Board requests the Hearing Officer to file this recommendation on or before May 28. The parties may file responses thereto on or before June 3.

IT IS SO ORDERED.

R. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 9<sup>th</sup> day of May, 1986, by a vote of 6-1.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board