

ILLINOIS POLLUTION CONTROL BOARD

November 21, 1996

WHITE & BREWER TRUCKING, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 96-250
)	(Permit Appeal - Land)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by K.M. Hennessey):

In this case, petitioner White & Brewer Trucking, Inc. (White & Brewer or petitioner) seeks a review of the Illinois Environmental Protection Agency's (Agency) determination that petitioner's significant modification (sig mod) application for a landfill unit is incomplete. Petitioner has filed a waiver of the decision deadline in this case.

Now pending before the Board are a series of procedural motions and responses. As more specifically described below, one set of motions and responses concerns the content of the record; another concerns the Agency's motion for summary judgment; and another concerns the Agency's motion in limine. The Board shall address each category of pleadings in turn.

As set forth below, with respect to the record, the Board allows the Agency leave to file the record and grants in part petitioner's motion to supplement the record. The Board reserves ruling on the remainder of the petitioner's motion to supplement the record. With respect to the motion for summary judgment, the Board denies the Agency's motion for expedited review of its motion for summary judgment and grants in part the petitioner's motion for extension of time to respond to the motion for summary judgment.

Petitioner and the Agency also have filed a series of pleadings and motions regarding discovery. However, on October 23, 1996, the hearing officer stayed discovery pending the Board's decision on the motion for summary judgment, which resolved those motions and pleadings. The Agency and the petitioner also have filed a series of pleadings and motions regarding the Agency's motion in limine, filed on October 4, 1996, which seeks to preclude petitioner from introducing certain evidence at the hearing on this matter. The Board reserves ruling on these motions and pleadings pending its decision on the Agency's motion for summary judgment.

Facts Alleged in Petition

In order to set the stage for what follows, the Board will briefly summarize some of the pertinent facts alleged in the petition (Pet.).

Petitioner alleges that it is the owner and operator of a landfill unit, Cell E, located south of Coffeen, Montgomery County, Illinois. (Pet. at 1.) Petitioner alleges that Cell E is a monofill for the disposal of coal ash combustion waste.

Petitioner also alleges that it decided that it must initiate closure of Cell E pursuant to Subpart D of 35 Ill. Adm. Code 814. (Pet. at 2.) Petitioner further alleges that it had a meeting with Agency representatives to determine the requirements for a sig mod application for this facility. (Pet. at 3.) Petitioner alleges that based on that meeting, John Hooker of Hanson Engineers (apparently one of petitioner's consultants) sent a letter to the Agency on July 20, 1995, which outlined his understanding of the requirements for a sig mod application as outlined by Chris Leibman of the Agency at the meeting. (Pet. at 3.) Petitioner alleges that the Agency never responded to the letter, and that petitioner filed its application on December 11, 1995. (Id.)

Petitioner alleges that it submitted its sig mod application to the Agency on December 11, 1995. (Pet. at 2.) Petitioner alleges that on February 22, 1996, the Agency issued a determination letter that the application lacked some of the required information. (Pet. at 2.) Petitioner alleges that it supplemented its application on April 2, 1996, and that the Agency issued another determination of incompleteness on May 2, 1996. (Pet. at 2.) That determination is the subject of this appeal. (Id.)

In its petition, petitioner alleges that its sig mod application sets forth information that the Agency advised would be required under the Agency's regulations. (Pet. at 4.) White & Brewer alleges that it detrimentally relied upon the Agency's concurrence with Hanson's understanding of the requirements for a sig mod application. (Pet. at 4.)

Motions to File and Supplement the Record

On September 3, 1996, the Agency filed a motion to file the record instant, and petitioner has not objected to that motion. The Board grants the motion to file the record instant.¹

Petitioner filed a motion to supplement the record on September 5, 1996. The Agency objected to the motion in a response filed on September 12, 1996. On September 30, 1996, petitioner filed a motion for leave to reply to the Agency's objection, along with the reply and a motion for leave to file a reply in excess of 15 pages. The Agency's response raised new issues to which a reply from petitioner was appropriate. The Board grants petitioner leave to file the reply in excess of 15 pages in order to prevent material prejudice. (35 Ill. Adm. Code 101.241(c).)

¹ This ruling moots the Agency's August 8, 1996 motion for an extension of time to file the record.

The petitioner seeks to supplement the record with the following documents. First, petitioner claims that the record should be supplemented with “the appropriate State regulations” and “draft instructions” referenced in the letter on pages 6 and 7 of the record. Second, petitioner seeks to add documents relating to meetings between petitioner and the Agency on July 20, 1995 and November 20, 1995, including the attendance sheet, Agency personnel meeting notes, log entries or any other Agency documentation from the meetings.

The Board will grant petitioner’s motion to supplement the record with the materials referenced in the letter on pages 6 and 7 of the record. The Agency has opposed this portion of petitioner’s motion on the grounds that the Board may take judicial notice of the regulations and on the grounds that its draft instructions are merely a guidance that is not a binding rule. These arguments go to the weight to be assigned to these documents, however, not whether they should be included in the record. The Board’s rules require that the record include all correspondence, and in order to be complete, the attachments to that correspondence should be included in the record. (35 Ill. Adm. Code 105.102.) The Agency is directed to supplement the record with these materials.

The Board reserves ruling on petitioner’s motion to supplement the record with the attendance sheets, Agency notes and Agency documents relating to the July 20, 1995 and November 20, 1995 meetings pending resolution of the motion for summary judgment. Petitioner’s attempt to obtain these documents through discovery has been stayed, and petitioner has not demonstrated that these documents are necessary to the resolution of the motion for summary judgment.² Therefore, the Board will address this motion after ruling on the motion for summary judgment.

Motion for Expedited Review of Motion For Summary Judgment

On September 3, 1996, the Agency filed a motion for summary judgment. In this motion, the Agency claims that as a matter of law, petitioner’s sig mod application was incomplete and judgment should be granted to the Agency. On the same day, the Agency filed a motion for expedited review of its motion for summary judgment (Mtn. for Expedited Review), on the grounds of the relationship between this appeal and other cases pending against petitioner, and on the grounds that the Agency’s motion only involves issues of law. On September 4, 1996, petitioner filed a response opposing the Agency’s motion for expedited review.

The Agency claims that two citizens suits are pending which involve White & Brewer. However, as petitioner points out, the Agency has failed to demonstrate a relationship between these cases and the instant case and has failed to demonstrate why these cases require an expedited decision. The Agency states that the Attorney General has filed a lawsuit against White & Brewer before the Board, PCB 97-11, and the Agency states that it “is unable to discuss these overlapping matters while this appeal is pending.” (Mtn. for Expedited Review

² If petitioner believes that discovery of these or other documents are needed for its response to the motion for summary judgment, petitioner should demonstrate that need through an affidavit with its response that meets the requirements of Illinois Supreme Court Rule 191(b).

at para. 1, 3). However, the Agency has failed to demonstrate how or why this matter precludes it from discussing its enforcement case or the other cases pending against White & Brewer. Accordingly, the Board denies the Agency's motion for expedited review of its motion for summary judgment.

Motion for Extension of Time to Respond

On September 15, 1996, Petitioner filed a motion for extension of time of at least 30 days to prepare a response to the motion for summary judgment. In its response, filed on September 12, 1996, the Agency stated that it prepared the motion for summary judgment in 15 days and has no objection to allowing petitioner an equal amount of time to prepare a response. Petitioner filed a Motion for Leave to File Reply to Response to Motion for Extension of Time and a Reply to Response to Motion for Extension of Time on September 16, 1996. The Board grants petitioner's motion for leave to file the reply in order to prevent material prejudice and accepts the reply as filed.

The Board grants petitioner an extension of time to file a response to the motion for summary judgment. The Board finds that a 15 day response period is appropriate and therefore grants petitioner until December 6, 1996 to file a response to the motion for summary judgment.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board