

ILLINOIS POLLUTION CONTROL BOARD

January 9, 1997

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) seeks a review of the Illinois Environmental Protection Agency's (Agency) determination that White & Brewer's significant modification (sig mod) application for a landfill unit is incomplete. By this order, the Board grants White & Brewer's request that the Board enforce a portion of the Board's November 21, 1996 order, and denies White & Brewer's request to supplement its response to the Agency's motion for summary judgment.

The relevant procedural history is as follows. On September 3, 1996, the Agency filed a motion for summary judgment. In response, White & Brewer filed a motion to supplement the record (and other pleadings) on September 5, 1996. On September 17, 1996, the Agency filed a brief opposing the motion to supplement. On September 30, 1996, White & Brewer filed for leave to file a reply to Agency's brief opposing the motion to supplement.

By order dated November 21, 1996, the Board granted White & Brewer leave to file a reply to the Agency's brief. The Board also granted in part White & Brewer's motion to supplement the record. In particular, the Board ordered the Agency to supplement the record with documents referenced as attachments to a letter at pages 6 and 7 of the Agency record; specifically, "the appropriate state regulations, 35 Ill. Adm. Code Parts 810-815" and the "draft instructions" for certain application forms.

In the November 21, 1996 order, the Board also ordered White & Brewer to file a response to the motion for summary judgment on December 6, 1996. White & Brewer did so, and in its response (Response) points out that the Agency has not supplemented the record as the Board has directed. White & Brewer asks that the Board direct the Agency to supplement the record with these documents by a date certain. (Response at 19.) White & Brewer also requests that it be granted a

reasonable amount of time to develop an appropriate response to the motion for summary judgment based on this information. (Id.)

The Board grants White & Brewer's request to order the Agency to supplement the record by a date certain. The Agency is hereby ordered to supplement the record with "the appropriate state regulations, 35 Ill. Adm. Code Parts 810-815," and the "draft instructions" included with the application forms, by filing these documents with the Clerk of the Board no later than January 17, 1997.

At this time, the Board will not grant White & Brewer's request to supplement its response to the motion for summary judgment based on the Agency's failure to supplement the record with these documents. First, the "appropriate state regulations, 35 Ill. Adm. Code Parts 810-815," are readily available in the Illinois Register and a variety of other sources; indeed, White & Brewer cited portions of those regulations in its Response. (See, e.g., Response at 15-17 and 21-22.) Thus, White & Brewer has already had an opportunity to address these regulations. Second, the record reflects that the "draft instructions" were sent to White & Brewer on September 3, 1993. Accordingly, White & Brewer could have and should have already addressed the draft instructions in its Response.¹ If White & Brewer (or its consultants or attorneys) did not in fact have the draft instructions in its possession when it filed its Response, it should file a motion to supplement its Response supported by an affidavit to that effect. That motion also should demonstrate the relevance of the draft instructions to White & Brewer's Response to the motion for summary judgment. The Board will allow White & Brewer until February 4, 1997 to file this motion to supplement its response if White & Brewer wishes to do so.

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 _____, 1997, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

¹ The Board notes that White & Brewer's Response attached and relied upon other documents that have not yet been added to the record by Board order; White & Brewer has filed a second motion to supplement the record with these documents, which the Board will address in its ruling on the motion for summary judgment. (White & Brewer Resp., Ex. C, D.)