

ILLINOIS POLLUTION CONTROL BOARD
July 11, 1991

CWM CHEMICAL SERVICES, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 89-177
)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY and)	
PEOPLE OF THE STATE)	
OF ILLINOIS,)	
)	
Respondents.)	

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on CWM Chemical Services, Inc.'s (CWM) June 3, 1991 supplement to the record. Although there was no motion with the June 3 filing, CWM seeks to supplement the record submitted by the Illinois Environmental Protection Agency (Agency). On June 11, 1991, the Attorney General, on behalf of the Agency and the People of the State of Illinois, filed a response to CWM's supplement. CWM filed a "response" to the Attorney General's filing on June 17, 1991.¹

It is well-settled that the Agency record in a permit appeal consists only of the information which the Agency considered or should have considered in making its permitting decision. (Alton Packaging Corp. v. Pollution Control Board (5th Dist. 1987), 162 Ill.App.3d 731, 516 N.E.2d 275,280, 114 Ill.Dec. 120; Joliet Sand & Gravel v. Pollution Control Board (3d Dist.1987), 163 Ill.App.3d 830, 516 N.E.2d 955, 114 Ill.Dec. 800.) CWM seeks to supplement the Agency record with its March 1985 RCRA Part B permit application for the Chicago incinerator (1985 application), its April 1987 RCRA Part B draft permit application for the Chicago incinerator (1987 application), and with 1987 revisions to the RCRA

¹ Although captioned a "response", CWM's June 17 filing is really a reply to the Attorney General's response. The Board notes that Section 101.241(c) of our procedural rules states that there is no right to reply to a response, except as allowed by the Board or hearing officer. CWM did not submit a motion for leave to file a reply. Ordinarily the Board would not allow the reply in the absence of a motion. However, because CWM did not articulate its reasons for the supplement in the initial filing, the Board will accept the reply so that it may make a fully informed decision.

Part B draft permit application (1987 revisions). The Attorney General objects to the inclusion of all but one of the documents which CWM seeks to add to the record. The Attorney General notes that on April 28, 1989, CWM submitted a revised Part B permit application (1989 application) to the Agency. In the cover letter to that application, CWM stated "This revised Part B application is intended to replace the previously submitted documents in entirety." (Ex. A to Attorney General response; also included in the record at Book A, Volume 8, pp. 1448-1450.) The Attorney General states that the Agency, at CWM's request in the April 28, 1989 letter, did not consider the information which pre-dates the April 1989 application. Therefore, the Attorney General argues that most of the documents which CWM seeks to add to the record (including the 1985 and 1987 applications, and most of the documents which make up the 1987 revisions) were not considered by the Agency, since it pre-dated the 1989 application, and therefore should not be part of the record. The Attorney General objects to the inclusion of an August 11, 1989 letter from a CWM consultant to Gary Westefer at the United States Environmental Protection Agency (USEPA) on the grounds that this correspondence is not in Agency files, that there is no indication that the Agency was copied, and that the correspondence was not considered in the Agency's permit decision. There are several documents in the 1987 revisions which the Attorney General states are already in the Agency record, and one document (addenda and errata to August 25, 1989 NOD responses) to which the Attorney General does not object.

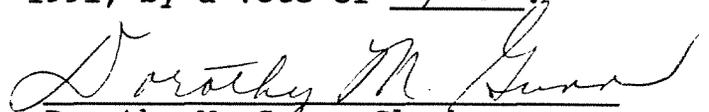
In its reply, CWM argues that the documents at issue constitute part of the RCRA permit appeal process and are therefore proper supplements to the record. CWM states that the permit application process which ended in the September 1989 denial of the permit (the decision which has been appealed to the Board) began prior to the April 1989 application. CWM contends that the earlier submittals, in combination with the 1989 application, document the overall decisionmaking process. Therefore, CWM maintains that the earlier documents should be a part of the record.

After a review of the documents submitted by CWM and consideration of the arguments made by the parties, the Board denies CWM's request to supplement the record with the 1985 and 1987 applications, and the 1987 revisions. The only exception is the August 25, 1989 addenda and errata sheet. The Board finds that because CWM stated in its April 28, 1989 letter to the Agency that the 1989 application was intended to replace the earlier documents in entirety, CWM cannot now claim that the Agency did consider or should have considered the earlier documents in making its permitting decision. CWM's contention that the earlier documents are part of a continuing process might carry weight in the absence of CWM's clearly stated intention to, in effect, withdraw the earlier applications. This is not a situation where the applicant simply amended its application. The language of the 1989 letter clearly states that the 1989 application will replace the

previously submitted documents, making the 1989 application in effect an entirely new application. CWM's request to supplement the record is denied, with the exception of the August 25, 1989 addenda and errata sheet.

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 11th day of July, 1991, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board