ILLINOIS POLLUTION CONTROL BOARD
March 20, 1997

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

OPINION AND 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 its landfill unit in Coffeen, Montgomery County, Illinois is incomplete. White & Brewer has filed an open waiver of the decision deadline in this case.

This opinion and order sets forth the Illinois Pollution Control Board's (Board) rulings on the Agency's motion for summary judgment and related preliminary motions and pleadings. On the preliminary motions and pleadings, the Board grants White & Brewer's motion for leave to file its response in excess of fifteen pages and accepts the response for filing, denies White & Brewer's second motion to supplement the record, and grants White & Brewer's motion to supplement its response to the motion for summary judgment and accepts the supplement for filing. On the motion for summary judgment, the Board finds that White & Brewer's sig mod application is incomplete as a matter of law and that the Agency is not estopped from enforcing the regulations regarding the required content of the application. The Board therefore grants the Agency's motion for summary judgment.

STATEMENT OF UNCONTESTED FACTS AND REGULATORY BACKGROUND

The following statement of uncontested facts is based on the petition (Pet.), the Agency's motion for summary judgment (Mtn.), White & Brewer's response to the motion for summary judgment (Resp.), White & Brewer's supplemental response to the motion for summary judgment (Supp. Resp.), the Agency Record (AR) and the supplement to the Agency Record (AR Supp.). The Agency's motion is supported by the affidavit of Chris Leibman (Leibman) of the Agency (Leibman Aff.), an Agency permit reviewer who reviewed White & Brewer's sig mod application. White & Brewer's response is supported by two affidavits: the affidavit of John Hooker (Hooker) of Hanson Engineers, a firm that White & Brewer has retained to assist with permit and closure-related activities for its landfill (Hooker Aff.), and

the affidavit of Thomas White (White), a shareholder of White & Brewer (White Aff.) The regulatory background is based on the regulations and orders cited herein.

White & Brewer is the owner and operator of a landfill unit, Cell E, located south of Coffeen, Montgomery County, Illinois. (Pet. at 1.) Cell E is a monofill for the disposal of coal ash combustion waste. (Id.) Cell E began receiving waste in September, 1990 under a permit issued pursuant to 35 Ill. Adm. Code 807. (AR at 4, 367.)

The Part 807 regulations were originally adopted as an emergency rule in 1973 and applied to solid waste management sites. (35 Ill. Adm. Code 807.201.) In 1990, the Board adopted Parts 810 through 815 to update and replace the Part 807 regulations. (See In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, (August 17, 1990) R88-7, slip op. 2.)

Under the new regulations, one of the Board's goals was "to bring the State's landfills under the regulations for new landfills as quickly as possible." (Non-Hazardous Waste Landfills, (August 17, 1990) R88-7, slip op. 23.) Part 814 sets forth the procedures for the upgrade or closure of landfills existing at the time R88-7 was adopted. First, within six months of the effective date of the rules adopted under R88-7 on September 18, 1990, Section 814.103 required all existing landfill facilities to notify the Agency of the facility's estimated closure date. Such facilities also were to notify the Agency which of several subparts of Part 814 applied to the facility. The applicability of the various subparts of Part 814 depended on the type of waste received at the landfill and the expected date of closure.

On March 18, 1991, White & Brewer filed with the Agency the notice form required under Section 814.103. (AR at 1; Mtn. at 2). White & Brewer originally indicated that it intended to operate at least some portion of Cell E in excess of seven years and was subject to the requirements of Subpart C of Part 814. (AR at 4; Mtn. at 1-2.) Subpart C of Part 814 establishes standards for existing units accepting chemical or putrescible wastes that may remain open for more than seven years.

Under Section 814.104, all owners or operators of permitted landfills were required to submit an application for significant modification to their permits for existing units unless the unit would close within two years under Subpart E of Part 814. On the form that White & Brewer filed with the Agency in March, 1991, White & Brewer indicated that it would submit a sig mod permit application by September, 1994. (Pet. at 2; Mtn. at 2; AR at 2.) Subpart C of Part 814 set forth specific requirements for that sig mod application. (35 Ill. Adm. Code 814.301.)

On September 3, 1993, the Agency sent White & Brewer a letter regarding the sig mod application. The letter stated:

> Parts 812 and 814 should be used as an outline for preparing your application. The applicable requirements for your particular facility, as outlined in 35 Ill. Adm. Code 814 should be read carefully . . . .

(Mtn. at 2; AR at 6).

White & Brewer states that it filed a sig mod application for Cell E with the Agency pursuant to the requirements of Subpart C of Part 814. (Pet. at 1-2.) However, White & Brewer subsequently withdrew that application and decided that it would close Cell E under Subpart D of Part 814, rather than Subpart C. (Pet. at 2.) Subpart D establishes "Standards for Existing Units Accepting Chemical or Putrescible Wastes that Must Initiate Closure within Seven Years." (Pet. at 2.) Under Section 814.104, White & Brewer remained subject to the requirement to file a sig mod application for Cell E; however, it now was required to the follow the standards for a sig mod application set forth in Subpart D rather than Subpart C.

White & Brewer had a meeting with Agency representatives on July 18, 1995 to determine the requirements for a sig mod application for a facility operating under Subpart D of Part 814. (Pet. at 3.) During the meeting, Leibman informed White & Brewer of the items that would and would not need to be included in the sig mod permit application. (Hooker Aff. at 4.) Leibman stated that the sig mod permit application only needed to include a revised closure and post-closure care plan and financial assurance information, consistent with facility's intended closure in September, 1997. (Hooker Aff. at 2; White Aff. at 2). Leibman stated that if this specific information was supplied, Cell E could be closed under its existing permit. (White Aff. at 2). Leibman also stated that the sig mod application would not have to follow all of the Part 811-814 requirements. (Id.)

Based on that meeting, Hooker 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 Leibman at the meeting. (Pet. at 3.) The Agency never responded to the letter. (Id.)

On November 20, 1995, an additional meeting was held between representatives of White & Brewer, Hanson Engineers and the Agency. (Hooker Aff. at 2; White Aff. at 2.) At that meeting, Leibman reiterated that the sig mod application need only contain the information that he had listed at the July 18, 1995 meeting. (Hooker Aff. at 3; White Aff. at 2.) Leibman further stated that except for changes to the closure, post closure and financial assurance information, Cell E could be closed in accordance with the existing permit. (Hooker Aff. at 3; White Aff. at 2.).

White & Brewer submitted its sig mod application to the Agency on or about December 11, 1995. (Pet. at 2; Hooker Aff. at 3.) On February 22, 1996, the Agency issued a notice of incompleteness letter stating that the application lacked some of the required information. (Pet. at 2; AR at 346-350.) White & Brewer supplemented its application on April 2, 1996, and the Agency issued another notice of incompleteness on May 2, 1996. (Pet. at 2.) That notice is the subject of this appeal. (Id.)

PROCEDURAL HISTORY AND PRELIMINARY MOTIONS

On June 20, 1996, the Board granted the Agency's and White & Brewer's request for a ninety-day extension of the 35-day appeal period on the Agency's May 2, 1996 notice of

incompleteness. On July 30, 1996, White & Brewer filed a petition for review of the Agency's notice of incompleteness.

The Agency filed a motion for summary judgment on September 3, 1996, arguing that the application was incomplete as a matter of law. White & Brewer filed a response opposing the motion for summary judgment on December 6, 1996, along with a motion for leave to file a response in excess of fifteen pages. On February 6, 1997, White & Brewer filed a motion for leave to file a supplemental response to the motion for summary judgment, which included the supplemental response.

While the dispositive motion pending before the Board is the motion for summary judgment, both parties have filed numerous motions and pleadings on related issues. The motions related to discovery, supplementation of the record, the use of certain evidence and briefs on the summary judgment motion. The motions regarding discovery were handled by the hearing officer; the remainder are outlined below, along with the Board's rulings on each.

First Motion to Supplement the Record

On September 5, 1996, White & Brewer filed a motion to supplement the record with "the appropriate State regulations" and "draft instructions" referenced in the letter on pages 6 and 7 of the Agency record. White & Brewer also sought to supplement the record with attendance sheets, Agency notes and Agency documents relating to meetings between representatives of the Agency and White & Brewer that occurred on July 18, 1995 and November 20, 1995. The Agency opposed this motion.

On November 21, 1996, the Board issued an order granting White & Brewer's motion to supplement the record with the "draft instructions" and "appropriate State regulations," and directed the Agency to file these materials with the Clerk of the Board. The Board reserved ruling on the remainder of White & Brewer's motion to supplement the record.

By early January, 1997, the Agency had not filed the materials as ordered by the Board. On January 9, 1997, the Board entered an order directing the Agency to file these materials by January 17, 1997. The Agency filed these materials on January 24, 1997.[1]

The Board now denies White & Brewer's motion to supplement the record with the attendance sheets, Agency notes and Agency documents relating to the July 18, 1995 and November 20, 1995 meetings. Section 105.102 of the Board's rules provide that the Agency must file with the Board "the entire Agency record of the permit application, including: (A) the application; (B) correspondence with the applicant; and (C) the denial." (35 Ill. Adm. Code 105.102.) The documents that White & Brewer seeks to add to the record do not fit into these categories. Furthermore, as explained in the Board's discussion of the motion for

[1] The Agency offered no explanation for its failure to timely comply with the Board's order. The Board reminds the Agency's attorneys that they must seek the leave of the Board if they cannot comply with a Board order; otherwise, the Board may impose sanctions on the Agency. (35 Ill. Adm. Code 101.280.)

summary judgment (see pages 10-12 herein), White & Brewer's estoppel claim depends on the representations that Agency personnel made to White & Brewer, not what is contained in the Agency's internal documents. Supplementing the record with such documents is especially unwarranted given that the Agency has not contested White & Brewer's claims about those representations.

Second Motion to Supplement the Record

White & Brewer filed a second motion to supplement the record (Second Mtn. Supp. Record) on December 6, 1996 pursuant to 35 Ill. Adm. Code 103.140 and 105.102. The two documents that White & Brewer seeks to add are Notices of Incompleteness that the Agency sent to White & Brewer on March 1, 1994 and June 3, 1994. These notices relate to a different application than the one at issue in this case – i.e., the Subpart C sig mod application that White & Brewer filed and then withdrew (see pages 2-3 herein). White & Brewer believes that these documents are necessary to give the Board a complete record. (Second Mtn. Supp. Record at 2, 3.) The Agency has not filed a response to this motion.

As noted earlier, Section 105.102 of the Board's rules sets forth the documents required to be included in the Agency record. There is no basis in this rule for requiring that the Agency record include correspondence relating to other permit applications, and including such information could confuse the record. Accordingly, the Board denies White & Brewer's second motion to supplement the record.

Motion In Limine

On October 15, 1996, the Agency filed a motion in limine seeking to preclude White & Brewer from introducing into evidence at hearing the attendance sheets, Agency notes and records relating to the July 18, 1995 and November 20, 1995 meetings between representatives of the Agency and White & Brewer. White & Brewer opposed this motion. In its November 21, 1996 order, the Board reserved ruling on this motion pending its resolution of the summary judgment motion.

The Board's grant of the Agency's motion for summary judgment moots the Agency's motion in limine. Accordingly, the Board denies the motion in limine.

Motions Regarding Briefs

White & Brewer filed a response to the motion for summary judgment on December 6, 1996. With that response, White & Brewer also filed a motion for leave to file a response in excess of fifteen pages. The Agency did not file a response to this motion. The Board grants that motion pursuant to 35 Ill. Adm. Code 101.104.

On February 6, 1997, White & Brewer filed a "Motion to Supplement Response to Motion for Summary Judgment," which included the supplement. The supplement sets forth additional arguments based on the documents that the Agency added to the record on January 24, 1997, pursuant to the Board's January 9, 1997 order. Pursuant to that order, White & Brewer supported this motion with the affidavit of LaDonna Driver, in which she states under

oath that neither White & Brewer nor its attorneys or consultants had in their files a copy of the "draft instructions" that the Agency added to the record on January 24, 1997. As a result, White & Brewer could not address these documents in its December 6, 1996 response to the motion for summary judgment. In light of that affidavit, the Board grants White & Brewer's motion to supplement its response to the motion for summary judgment and accepts the supplement for filing.

MOTION FOR SUMMARY JUDGMENT

In its motion for summary judgment, the Agency asserts that White & Brewer bears the burden of proving that the application is complete and that the permit requested would not violate the Illinois Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1994)) or the Board's regulations. (Citing Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2d District 1989) and John Sexton Contractors Company v. Illinois (Feb. 23, 1989), PCB 88-139, slip op.)) The Agency asserts that White & Brewer's sig mod application did not contain all of the information required to be submitted. As a matter of law, the Agency argues, the application is incomplete and therefore White & Brewer cannot meet its burden. (Mtn. at 1, 15).

White & Brewer has several arguments in opposition to the motion for summary judgment. Its primary argument is that White & Brewer relied on the statements of Leibman as to what must be included in the sig mod application and submitted its application in accordance with those instructions. As a result, White & Brewer argues, the Agency is estopped from asserting that the application is incomplete. In support of this argument, White & Brewer relies on several cases in which the courts or the Board estopped the Agency. (Resp. at 10-12, citing In the Matter of Pielet Brothers Trading (July 13, 1989), AC 88-51, slip op.; IEPA v. Jack Wright (August 30, 1990), AC 89-227, slip op.; Earl R. Bradd v. IEPA (May 9, 1991), PCB 99-173, slip op.; Wachta v. PCB, 8 Ill. App. 3d 436, 289 N.E. 2d 484 (2d Dist. 1971); Jack Pease v. IEPA (July 20, 1995), PCB 95-118, slip op.)

Alternatively, White & Brewer claims that the affidavits of Hooker and White raise a genuine issue of material fact as to the requirements for its sig mod application. On that ground, White & Brewer argues that the motion for summary judgment should be denied. (Resp. at 14.) Lastly, White & Brewer claims that its application included the information required under Parts 811-814.

DISCUSSION

Summary judgment is appropriate when the pleadings, depositions and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. (See Purtill v. Hess, 111 Ill. 2d 229, 240-41, 489 N.E.2d 867, 871-72 (1986).)

In deciding the Agency's motion for summary judgment, the Board first addresses the information that the relevant regulations require to be included in White & Brewer's sig mod application. The Board then addresses White & Brewer's estoppel argument. Finally, the

Board addresses White & Brewer's argument that the Hooker and White affidavits raise a genuine issue of material fact as to the completeness of the sig mod application, and determines whether the sig mod application was incomplete for the reasons that the Agency cited in its notice of incompleteness.

Information Required in White & Brewer's Sig Mod Application

The Regulatory Scheme. Both parties agree that White & Brewer was required to apply for a sig mod permit under 35 Ill. Adm. Code 814.104(a). That section provides:

> All owners or operators of landfills permitted pursuant to Section 21(d) of the Environmental Protection Act . . . shall file an application for a significant modification to their permits for existing units, unless the units will be closed pursuant to Subpart E within two years of the effective date of this part.

As noted earlier, White & Brewer determined that it would not close within two years of the effective date of this part (i.e., January 13, 1994), but instead would close by September, 1997. Therefore, it was required to file a sig mod application under Section 814.104(a).

Section 814.104(b) addresses the required content of that sig mod application. It provides that "[t]he owner or operator of an existing unit shall submit information required by 35 Ill. Adm. Code 812 to demonstrate compliance with Subpart B, Subpart C or Subpart D of this Part, whichever is applicable." In White & Brewer's case, White & Brewer ultimately elected to demonstrate compliance with Subpart D, which establishes standards for existing units accepting chemical or putrescible wastes that must initiate closure within seven years.

Section 814.402(a) sets forth the applicable standards for units regulated under Subpart D. It provides that "[a]ll of the requirements for new units described in 35 Ill. Adm. Code 811 shall apply to units regulated under this Subpart except" certain sections of Part 811 specifically listed. Part 811 generally sets forth standards for new solid waste landfills. Section 814.402(b) also imposes additional standards on units regulated under Subpart D, including groundwater standards.

In addition, as noted earlier, under Section 814.104(b), White & Brewer must submit the information required by Part 812, which addresses "Information to be Submitted in a Permit Application." Two subparts of Part 812 are relevant to White & Brewer's application: Subpart A of Part 812, which sets forth "General Information Required for All Landfills," and Subpart C, which sets forth "Additional Information Required for Putrescible and Chemical Waste Landfills."

Part 813 is also relevant to White & Brewer's sig mod application. Section 814.104(d) provides that sig mod applications "shall be made pursuant to the procedures of 35 Ill. Adm. Code 813." Part 813 sets forth general procedures for applications, additional procedures for modifications or significant modifications, renewals of permits, closure and reports to be filed with the Agency. Section 813.202 provides that the applicant "shall submit all information

required by 35 Ill. Adm. Code 812 that will be changed from that in the original or most recent approved permit."

The Effect of the Regulations. The Agency and White & Brewer differ over what these regulations required for White & Brewer's sig mod application. The Agency argues that White & Brewer's sig mod application must demonstrate compliance with all of those sections of Part 811 that apply to new units, except as specifically stated in Section 814.402(a). The Agency also argues that the application must demonstrate compliance with the other requirements imposed in Section 814.402 and must meet the requirements of Part 812. (Mtn. at 9-10.)

By contrast, White & Brewer argues that under Section 813.202, it must submit only the information required by Part 812 that would be changed from the original or most recently approved permit. In White & Brewer's view, the only parts of its Part 807 permit that "would be in conflict" with the requirements of Part 812 are those regarding closure, post-closure care and financial assurance. Thus, White & Brewer argues that its sig mod application must contain the information required by Part 812 only as it relates to closure, post-closure care and financial assurance. (Resp. at 10.) White & Brewer argues that the Subpart D instructions support this view because they "do not discuss any particular informational requirements for a Subpart D application, other than those pertaining to groundwater and post-closure care periods." (Supp. Resp. at 11.) In correspondence with the Agency, White & Brewer also argued that Part 811 is inapplicable, and that any portion of Part 812 referencing Part 811 is likewise inapplicable. (AR at 366-367.)

In the motion for summary judgment, the Agency argued that Section 813.202, which requires only the submission of information that has changed from the original or most recently approved permit, does not apply here. First, the Agency notes that Section 807.105(c) states that Parts 810 through 815 and 817 supersede the requirements of Part 807, and that units regulated under Parts 810 through 815 and 817 are not subject to Part 807. Thus, the Agency reasons, a Part 807 permit becomes a nullity when a Part 814 permit is issued. Because the Part 807 permit no longer exists once a Part 814 permit is issued, a Part 814 permit may not incorporate or reference a Part 807 permit. The Agency argues that Section 813.202 would only come into play if White & Brewer already had a Part 814 permit. (Mtn. at 10-11.) The Agency further notes that Part 812 requires information that had not been required under Part 807 and therefore was never a part of a White & Brewer's Part 807 permit. (Mtn. at 11.)

As a result, the Agency argues, a sig mod permit application for a unit regulated under Subpart D of Part 814 must contain all of the information required by Part 811, unless specifically excepted by Section 814.402(a), plus all of the information required by Part 812 and all of the information required by Section 814.402(b).

The Board agrees that White & Brewer's reading of Section 813.202 is overbroad and strained. In addition to the reasons put forth by the Agency, the Board notes that Section 814.402(a) expressly states that the units regulated under Subpart D shall meet "all of the requirements for new units described in 35 Ill. Adm. Code Part 811" unless specifically

excepted. White & Brewer's reading of Section 813.202, under which White & Brewer argues nothing in Part 811 applies, does not square with the plain language of Section 814.402(a).

The Board's opinion and order in R88-7 also supports the Agency's interpretation of the regulations. It provides in relevant part as follows:

> An existing facility accepting chemical and putrescible wastes is subject to Subpart D, if it remains open beyond 2 years but no longer than 7 years after the effective date of the Part and is able to meet the following:
>
> * * *
>
> 2) *The requirements for new units specified in 35 Ill. Adm. Code 811 except for the exemptions specified in 35 Ill. Adm. Code 814.402(a).*

(Nonhazardous Waste Landfills (August 17, 1990), R88-7, slip op. 22 (emphasis supplied).)

The Board is not persuaded otherwise by White & Brewer's arguments regarding the instructions for Subpart D. While the instructions for Subpart D are less detailed than those for Subpart C, the introduction to the Subpart D instructions specifically states that the form required for permitting new units under Part 811, LPC-PA2, should be used for existing units filing a sig mod application:

> The purpose of these instructions is to explain how to prepare the initial Significant Modification for an existing unit accepting chemical or putrescible wastes that did not initiate closure prior to September 18, 1992 and which must initiate closure by September 18, 1997. LPC-PA2 and its appendices were designed to be used in permitting new units [under Part 811]. However, the LPC-PA2 form, the instructions to it, and instructions to its appendices should also be used in preparing this type of Significant Modification. These instructions are intended to provide information on how to apply for the first significant modification and explain how the provisions of 35 IAC 814 apply with regard to the exemptions from 35 IAC 811. Also included are general information discussions related to interpreting portions of the rules.

(AR Supp. at 124.) Thus, the instructions for Subpart D reflect the Agency's reading of the Board's regulations; i.e., an owner of an existing unit must submit all of the information that would be required for a new unit under Part 811, unless specifically exempted from that requirement under 35 Ill. Adm. Code 814.402(a).

The Board emphasizes that its reading of the regulations does not prohibit a sig mod applicant from expressly incorporating by reference material previously submitted in a permit application for a Part 807 permit. Data required to obtain a Part 807 permit application, for example, need not be re-generated if the same data are required under Part 814 and the data are otherwise valid. However, the data must be expressly incorporated, and the permit applicant must specify in its sig mod application exactly which requirements it seeks to meet through the incorporation. White & Brewer did not do so.

Accordingly, the Board rejects White & Brewer's claims that its sig mod application need not include any information required by Part 811 and need include only the information required by Part 812 that would be changed from the original or most recently approved permit.

Estoppel

The Board next addresses White & Brewer's estoppel argument. As noted above, White & Brewer claims that the Agency's permit reviewer, Leibman, informed White & Brewer that the sig mod application need only contain information on closure, post-closure and financial assurance. White & Brewer claims that it submitted its sig mod application in reliance on Leibman's statements and that the Agency then changed its position and rejected the application as incomplete. White & Brewer argues that the Agency should be estopped from rejecting the application as incomplete. (Resp. at 4-14.)

The Agency did not contest White & Brewer's assertions in its motion for summary judgment, and did not seek to file a reply to White & Brewer's response to the motion for summary judgment. Accordingly, the Board will presume that White & Brewer's assertions are true for the purposes of this motion – i.e., that Leibman told White & Brewer that its sig mod application need contain only information on closure, post-closure care and financial assurance.

The doctrine of equitable estoppel may be applied when a party reasonably and detrimentally relies on the words or conduct of another. (See Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996).) However, the doctrine "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." (Gorgees v. Daley, 256 Ill. App. 3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993).) As the Illinois Supreme Court has explained, "[t]his court's reluctance to apply the doctrine of estoppel against the State has been motivated by the concern that doing so 'may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials.'" (Brown's Furniture, 171 Ill. 2d at 431-432, 665 N.E.2d at 806 (quoting Hickey v. Illinois Central R.R. Co., 35 Ill. 2d 427, 447-448, 220 N.E.2d 415, 426 (1966)); see also Tri-County Landfill Company v. Pollution Control Board, 41 Ill. App. 3d 249, 353 N.E.2d 316 (2d Dist. 1976) (refusing to estop the Agency from enforcing the Act against various landfills that it had previously approved on the grounds that to do so would violate public policy).)

Consistent with this reluctance, the courts have established several hurdles to estoppel of the State or its agencies. Like all parties seeking to rely on estoppel, those seeking to estop the government must demonstrate that their reliance was reasonable and that they incurred some substantial loss as a result of the reliance. A party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue. (See Medical Disposal Services, Inc. v. Pollution Control Board, No. 1-95-2908/2892, slip op. 14 (Ill. App. Ct. 1st Dist. March 6, 1997.) Finally, before estopping the government, the courts require that there be some affirmative act on the

part of the public body, rather than the unauthorized or mistaken act of a ministerial officer. "Generally, a public body cannot be estopped by an act of its agent beyond the authority expressly conferred upon that official, or made in derogation of a statutory provision." (Gorgees, 256 Ill. App. 3d at 147, 628 N.E.2d at 725; see also Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806 ("The State is not estopped by the mistakes made or misinformation given by the Department's [of Revenue] employees with respect to tax liabilities.")).

White & Brewer's estoppel claim fails on several grounds. First, its reliance on Leibman's statements was not reasonable. As discussed above, the regulations themselves make clear that a sig mod application for an existing unit regulated under Subpart D of Part 814 must include the information required of new units under Part 811, unless specifically excepted by Section 814.402(a). The instructions to Subpart D reinforced this reading of the plain language of the regulations.

Second, the uncontested facts, even when construed most favorably to White & Brewer, do not show any deliberate misrepresentation on the part of the Agency or Leibman. At most, they show that the Agency changed its position about the interpretation of the regulations. Such a change in position does not give rise to estoppel. In Medical Disposal Services, for example, the Agency had issued a letter stating that a local siting approval for a medical waste treatment facility granted to one party, Industrial Fuels, was valid for a party that later purchased the site, Medical Disposal Services (MDS). However, the Agency later denied a permit to MDS to construct a medical waste treatment facility on the site. MDS then sued the Agency, arguing in part that MDS had detrimentally relied on the Agency's letter and that the Agency should be estopped from denying the construction permit.

The Board disagreed and the Illinois Appellate Court upheld the Board. The court noted, "As the letter gave the agency's interpretation of the statute and its policy at the time, there were no misrepresentations made. The agency changed its policy after the letter was written." (Medical Disposal Services, slip op. at 14-15.) Similarly here, the Agency's or Leibman's apparent change in interpretation of the regulations does not estop the Agency.

Finally, in advising White & Brewer that it could ignore the plain language of the regulations, Leibman acted beyond his authority, and such acts cannot estop the Agency. In Metromedia, Inc. v. Kramer et al., 152 Ill. App. 3d 459, 467, 504 N.E.2d 884, 889 (1st Dist. 1987), for example, plaintiff Foster & Kleiser (F&K) sued various officers of the department of transportation on the grounds that the department had wrongfully revoked certain sign permits. The permits were revoked because applications did not have executed lease agreements for the sign sites attached, as the regulations required. F&K argued that the department previously had accepted such applications and that the department was estopped from revoking the permits. The court found that the "arrangement" under which employees of the department had accepted applications without executed lease agreements was "nothing more than an unauthorized, mutual disregard for the regulations by F&K and certain employees of the signboard section." (Metromedia, 152 Ill. App. 3d at 468, 504 N.E.2d at 890.) The court held that "this is hardly the type of affirmative act or conduct by a government body necessary" to estop a government agency. (Id.)

In this case as well, any mistaken advice that Leibman gave, while regrettable, cannot estop the Agency. Leibman is not the Agency and the Agency took no official action until it issued the first denial letter to White & Brewer on February 22, 1996. This fact also distinguishes this case from Wachta v. PCB, 8 Ill. App. 3d 436, 289 N.E.2d 484 (2d Dist. 1971), upon which White & Brewer relies. In Wachta, the Board and the Agency were estopped from withdrawing permission for sewer connections after the plaintiff had expended substantial sums in reliance on that permission. (See Wachta, 8 Ill. App. 3d at 440, 289 N.E.2d at 487-88.) In that case, however, the original permission was granted through official action of the predecessor of the Board and the Agency. (Id.) In this case, as noted above, Leibman's mistaken advice did not constitute any official action of the Agency.

The Board also finds the other cases relied upon by White & Brewer distinguishable. In the Matter of Pielet Brothers Trading (July 13, 1989), AC 88-51, slip op. and IEPA v. Jack Wright (August 30, 1990), AC 89-227, slip op., were enforcement cases in which the Agency had indicated that certain conduct would not subject the respondent to enforcement, but then pursued enforcement cases against the respondents. (See Pielet Brothers, AC 88-51, slip op. 9-10; Wright, AC 89-227, slip op. 5-6.) Enforcement is committed to the Agency's discretion, and in those cases it was reasonable for the respondent to act upon the Agency's representation as to how it would exercise that discretion, and for the Board to estop the Agency from pursuing enforcement. That is not the case here, where the Agency is bound by regulation to require that certain information be included in a sig mod application.

In Earl R. Bradd v. IEPA (May 9, 1991), PCB 91-173, slip op. and Jack Pease v. IEPA (July 20, 1995), PCB 95-118, slip op., it was not clear that the information upon which the Agency refused to issue a permit (e.g., in Pease, PCB 95-118, slip op. 19-20), or rejected an affidavit of closure (e.g., in Bradd, PCB 91-173, slip op. 11-13), was actually required by the regulations upon which the Agency relied. Again, when the regulations allow the Agency some discretion as to what will be required, the Agency can be estopped if it misleads the applicant as to what will be required. (See also West Suburban Recycling and Energy Center, L.P. v. IEPA (October 17, 1996), PCB 95-119 and 95-125, slip op. 45 (distinguishing Pease when application found incomplete because information clearly required under regulations was not included).)

The Board concludes that the Agency is not estopped from rejecting White & Brewer's sig mod application as incomplete.

Notice of Incompleteness

Given the requirements of Parts 811 through 814, the Board now turns to whether the application was incomplete. White & Brewer argues that the completeness of the application is a factual question that the Board can only determine after hearing. (Resp. at 21.) The Board disagrees. Whether an application is complete must be determined from the application itself. (See Centralia Environmental Services, Inc. v. IEPA (May 10, 1990), PCB 89-179, slip op. 6.)

The following is a point-by-point analysis of each of the items of the application that the Agency claims are incomplete. If the application is materially incomplete on any single item, that alone would support the Agency's determination; however, the Board reviews all of the items cited by the Agency in the event that this case is appealed. The items in the sig mod application that the Agency found incomplete in its May 22, 1996 determination (AR 19-23) are set forth in *italics*, followed in each instance by the Board's conclusion.

I. GENERAL INFORMATION REQUIRED FOR ALL LANDFILLS

A. Required Signatures

1. Operator's (Notarized) Signature -- 812.104(b)

The Board finds that the sig mod application does not include this information. (AR at 245.)

2. Property Owner's (Notarized) Signature -- 812.104(b)

The Board finds that the sig mod application does not include this information. (AR at 245.)

B. Site Plan Map -- 812.107 (large scale map, no smaller than 1" = 200' with a 2' contour interval)

The Board notes that the sig mod application includes a site plan map on which 1" = 200', but the contour interval is 5' rather than 2'. (See, e.g., AR at 269-270.) Accordingly, the Board finds the application does not include all of the information required by Section 812. 107.

C. Narrative Description of Facility's Operating Plans and Procedures -- 812.108

The Agency found that the sig mod application does not include a written description of operating procedures with documentation, as required by Section 812.108. (AR at 243-345.) Hooker stated that in his professional opinion, the operating plan for the existing permit meets the intent of Section 812.108 for the purposes of a completeness review. (Hooker Aff. at 4.) However, White & Brewer did not incorporate the operating plan for the facility's existing permit in its sig mod application, and it is not included in the Agency record. Furthermore, White & Brewer has not explained how the operating plan for its existing permit meets the

requirements of Section 812.108; for example, it has provided no detailed comparison of its existing operating plan to the requirements of Section 812.108. Accordingly, the Board cannot find that the operating plan for the existing permit meets the requirements of Section 812.108.

D. Location Standards

1. Demonstration of Compliance with Wild and Scenic Rivers Act -- 812.109(a) and 811.102(a)

The Board finds that this information is not included in the sig mod application.

2. Determination that Facility Is Outside of 100-Year Floodplain or Demonstration that Facility Will Not Impair the 100-Year Floodplain -- 812.109(b) and 811.102(b)

The Board finds that this information is not included in the sig mod application.

3. Documentation from State Historic Preservation Officer that Facility Will Not Threaten a Historic or Archaeological Site -- 812.109 and 811.102(c)

The Board finds that this information is not included in the sig mod application.

4. Documentation from Illinois Nature Preserves Commission that Facility Complies with Illinois Natural Area Preservation Act -- 812.109(d) and 811.102(c)

The Board finds that this information is not included in the sig mod application.

5. Documentation from Illinois Department of Conservation that Facility Will Not Threaten Endangered Species -- 812.109(e) and 811.102(d)

The Board finds that this information is not included in the sig mod application.

6. Documentation (from U.S. Army Corps of Engineers) that Facility Will Not Violate Section 404 of the Clean Water Act (wetlands) -- 812.109(f) and 811.102(e)

The Board finds that this information is not included in the sig mod application.

7. Documentation (from IEPA's Division of Water Pollution Control) that Facility Will Not Violate Section 208 of the Clean Water Act (nonpoint source pollution) -- 812.109(g) and 811.102(f)

The Board finds that this information is not included in the sig mod application.

E. Surface Water Control Plan -- 812.110(b-d)

White & Brewer argues that this section requires information on site structures, and that because there are no site structures, or structures that will be impacted by surface water, this section is therefore inapplicable. (Resp. at 21; Hooker Aff. at 4; Supp. Resp. at 12 n.17.)

The Board notes, however, that Section 812.110 requires that a permit application contain a "plan for controlling surface water that demonstrates compliance with 35 Ill. Adm. Code 811.103," in addition to the information specifically requested in subsections (b) through (d), and Section 811.103 is not limited to a description of "structures." Furthermore, the application itself shows that there are "structures" on the site; for example, it discusses drainage ditches and berms as "structures" for erosion control. (AR at 278, 309, 317.) Such features are also considered "structures" under Subpart E of Part 811, which sets forth requirements for a construction quality assurance program "structures necessary to comply with the requirements of this Part." (35 Ill. Adm. Code 811.501.) Section 811.503, which sets forth required inspection activities, specifically mentions "ponds, ditches, lagoons and berms," confirming that those features are "structures."

While the application does contain some information on surface water control, the Board finds that this information is incomplete and does not fully meet the requirements of Section 812.110, or the sections that Section 812.110 incorporates by reference.

F. Description of Daily Cover -- 812.111

The Board finds that this information is not included in the sig mod application.

G. *Prior Conduct Certification -- 812.113*

The Board finds that this information is not included in the sig mod application.

H. Quality Assurance Programs For Construction Surface Water Control Structures -- 811.503(a)(8) and 811.504(b)

As it argued with respect to Section 812.110, White & Brewer argues that there are no structures on the site and therefore this section does not apply. The Board rejects that argument for the same reasons that it rejected those arguments with respect to Section 812.110. Furthermore, the Board finds that while the sig mod application contains some of the information required by these sections, it does not provide all of the information required and is therefore incomplete.

II. ADDITIONAL INFORMATION REQUIRED FOR PUTRESCIBLE AND CHEMICAL WASTE LANDFILLS

A. Waste analysis showing that all waste entering the unit meet the definition of chemical waste, are compatible, and will not react to form a gas or hazardous substance -- 812.302

The Board finds that this information is not included in the sig mod application.

B. Site Location

Documentation (including a map showing structures and areas within 1 mile of the facility) that the facility is not within 1,200' of sole source aquifer of 500' of any public road (unless its operations will be screened from view by plants or devices at least 8' in height) -- 812.303, 811.302 and 814.302(a)(1)

The Board finds that this information is not included in the sig mod application. However, the Board notes that only subsection (b) of Section 811.302 applies; the remainder of Section 811.302 is inapplicable under Section 814.402(a).

C. Description of Intermediate Cover -- 812.312

The Board finds that this information is not included in the sig mod application.

D. Description of Hydrogeology

Background Groundwater Quality Evaluation Based on One Year of Sampling and Analysis as Per the Instruction -- 811.315(b)(1), 811.315(d)(2)(D), 811.315(e)(1)(G), 811.319(a)(2), 811.219(a)(3) and 811.320(d)

The Agency concedes that the provisions of Section 811.315 do not apply because that section is specifically excluded by Section 814.402(a). (Mtn. at 13.) However, the Agency still argues that White & Brewer's application does not meet the requirements of Section 811.319(a)(2), 811.319(a)(3) and 811.320(d). In particular, the Agency argues that while Table 4.1 of the sig mod application lists 25 constituents for which White & Brewer will monitor, Section 811.319(a)(2) requires White & Brewer to sample for all constituents in or expected to be in leachate. The IEPA has a list of approximately 150 constituents that it expects to be in leachate, and White & Brewer's Table 4.1 does not include all of those constituents. (AR at 296-298; Supp. AR at 173-175.)

In addition, the Agency argues that Section 811.319(a)(3) requires monitoring of 51 organic constituents in 40 CFR 141.40, and the application did not propose that White & Brewer would monitor for all of those constituents. (Mtn. at 13.) Furthermore, the Agency argues that White & Brewer did not include the information required under Section 811.320(d) regarding the establishment of background concentrations. (Id.)

In its response to the motion for summary judgment, White & Brewer argues that its consultant has stated that in his professional opinion, the information submitted meets the intent of Section 814.402(b)(3)(A) and (C) for the purposes of a completeness review. (Resp. at 22, Supp. Resp. at 12 n.17.) White & Brewer also states that the Agency admitted that it had not reviewed the hydrogeological investigation when it met with the Agency on June 24, 1996. White & Brewer therefore questions the basis for the Agency's conclusion. (Resp. at 22, Supp. Resp. at 12 n.17.)

The Board notes that the sections at issue are 811.319(a) and 811.320(d), not 814.402(b). After reviewing the application, the Board finds that it does not include the information required under Section 811.319(a)(2) and (3) and Section 811.320(d).

E. Groundwater Monitoring Program

1. Well Locations Justified by Hypothetical Line Failure and Contaminant Plume Dimensions -- 811.318(a) and 811.318(b)

In correspondence with the Agency, White & Brewer argued that well locations are shown in the materials that it submitted with its application. (AR at 369.) The Agency argues that while well locations are shown, White & Brewer has provided no justification for well locations. (Mtn. at 14.)

The Board notes that the regulations upon which the Agency relies do not expressly require that well locations be justified by hypothetical line failure and contaminant plume dimensions. While these regulations do impose certain requirements regarding well locations, the Agency did not cite those requirements in its determination. The Board finds that White & Brewer has supplied sufficient information under Sections 811.318(a) and (b) for the purposes of a completeness review.

2. Criteria for Choosing Constituents to be Monitored -- 811.319(a)(2)

As noted above in its discussion of hydrogeological information, the Board finds that this information is not fully included in the sig mod application.

3. Description of the Preservation Techniques or Methods -- 812.317(h) and 811.318(e)(4)

The Board notes that some discussion of preservation techniques is included in the sig mod application (AR at 300). The Board finds that White & Brewer has supplied sufficient information under Sections 811.318(e)(4) and 812.317(h) for the purposes of a completeness review.

4. Description of Laboratory Analysis, Procedures, QA/QC and Error Tolerance -- 812.317(j) and 811.318(e)(3)

The Board notes that some discussion of laboratory analysis procedures, QA/QC and error tolerance is included in the application (AR at 303). The Board finds that White & Brewer has supplied sufficient information under Sections 812.317(j) and 811.318(e)(3) for the purposes of a completeness review.

5. Description of the Statistical Analysis Methods and Techniques -- 812.317(k), 812.317(m) and 811.320(e)

The Board finds that this information is not included in the sig mod application.

F. Operating Plans -- 812.318

1. Description of Load Checking Program -- 811.323 and 811.406

The Board finds that this information is not included in the sig mod application.

2. Description of Procedures for Managing Special Wastes (required only for landfills proposing to dispose special wastes)

a. Sign at Entrance notifying generators and transporters that hazardous waste is prohibited and special wastes must be accompanied by manifests -- 811.402

The Board finds that this information is not included in the sig mod application.

b. Description of Manifesting and Generator Identification Record Procedures -- 811.403 and 811.404

The Board finds that this information is not included in the sig mod application.

c. Description of Recordkeeping Procedures -- 811.405

The Board finds that this information is not included in the sig mod application.

The Agency observed the following technical deficiency during the completeness review, Pursuant to 35 IAC 814.402(b)(3), the application should include a demonstration that the facility has not contaminated the groundwater relative to the standards of 35 IAC 302.304. The application includes an evaluation of only a few 302.304 constituents. All 302.304 constituents must be samples and evaluated in all down-gradient wells.

The Board finds that this information is not included in the sig mod application.

CONCLUSION

The Board grants the Agency's September 3, 1996 motion for summary judgment. In so doing, the Board finds that White & Brewer's sig mod application is incomplete as a matter of law and that the Agency is not estopped from enforcing the regulations that application is required to meet. This opinion constitutes the Board's findings of fact and conclusions of law in this matter. This docket is closed.

ORDER

The Board orders as follows:

1. The Board grants White & Brewer's motion for leave to file a response in excess of fifteen pages.

2. The Board grants White & Brewer's motion to supplement its response to the motion for summary judgment.

3. The Board denies White & Brewer's first motion to supplement the record to the extent that White & Brewer seeks to add the attendance sheets and Agency notes and documents regarding the July 18, 1995 and November 20, 1995 meetings between representatives of White & Brewer and the Agency.

4. The Board denies White & Brewer's second motion to supplement the record.

5. The Board denies the Agency's motion in limine as moot.

6. The Board grants the Agency's motion for summary judgment. This docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the _____ day of _____, 1997, by a vote of _____.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board