

ILLINOIS POLLUTION CONTROL BOARD
November 21, 1991

CWM CHEMICAL SERVICES, INC.,)
)
 Petitioner,)
)
 v.)
)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY and)
PEOPLE OF THE STATE)
OF ILLINOIS,)
)
 Respondents.)

PCB 89-177
(Permit Appeal)

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

This matter is before the Board on CWM Chemical Services, Inc.'s (CWM) November 7, 1991 emergency motion for stay of hearings. CWM asks that hearings in this matter, which are currently proceeding, be stayed pending resolution of its motion to remand the case to the Illinois Environmental Protection Agency (Agency).¹ On November 8, 1991, the Attorney General, on behalf of the People of the State of Illinois and the Agency, filed its response to the motion for stay of hearings. Also on November 8, amicus curiae the 35th District Environmental Task Force (Task Force) filed a motion for leave to file its response to CWM's motion instantner. That motion is granted. The Task Force filed a supplemental response on November 13, 1991, and the Attorney General filed a supplemental response on November 14, 1991. On November 20, 1991, CWM filed a motion for leave to file instantner a supplement to its previous filings on the motion to stay. That motion to file instantner is granted.

This proceeding is CWM's appeal of the Agency's 1989 denial of CWM's request for a RCRA Part B permit. In its motion for stay of hearings, CWM notes that its motion to remand contends that the

¹ The Board notes that CWM's motion to stay asks the Board to stay the hearings pending the hearing officer's resolution of the motion to remand. However, the hearing officer has no authority to rule on a motion to remand. See Sections 103.200, 101.220, and 101.247 of the Board's procedural rules. CWM has not formally filed its motion to remand with the Board, although a copy of that motion to remand is included as an attachment to its motion to stay hearings. However, the Board will consider the motion to remand as if it had been properly filed with the Board itself.

Agency failed to follow crucial regulatory procedures which denied CWM and the public their right to participate in the permit process. CWM originally presented its motion to stay to the hearing officer on the morning of the first day of hearing. The hearing officer denied the motion to stay the hearings, and CWM asks the Board to review that ruling. CWM maintains that the remand of the proceeding to the Agency will produce a new and more complete record, and may decrease the number of issues in the case. CWM argues that continuing the hearing on this "incomplete" record further denies CWM and the public their right to full and fair participation in the hearing process, and that continuing the hearing would be a waste of the resources of the Board and the parties. Finally, CWM asserts that this motion is timely, since the record in this matter was not filed with the Board or otherwise available to CWM until March 1991. CWM states that it also bases its motion on the testimony of its witnesses, presented at the first day of hearing, as well as the expected testimony of Agency officials. Thus, CWM asks that the Board stay the hearings in this proceeding, pending the resolution of its motion to remand the proceedings.

On November 8, the Attorney General filed a response in support of CWM's motion to stay the hearings. The Attorney General stated that if CWM prevails on its motion to remand, the hearing need not go forward at this time, that any hearing held prior to the ruling on the motion to remand was wasteful in terms of resources, and that a stay of hearing is warranted so that the Attorney General can devote its full resources to its response to the motion to remand.² On November 14, the Attorney General filed a supplemental response, clarifying that the People and the Agency believed that a stay of hearings was appropriate only until the Board ruled on the motion to remand. The Attorney General stated that it assumed that the Board would decide the motion to remand in December, and that it objected to any stay of hearings which continues beyond December 19 (the date of the Board's second meeting in December).

The Task Force also filed a response and a supplemental response. The Task Force contends that the emergency motion to stay is without merit, and that there is no emergency. The Task Force maintains that CWM's attorney conceded to the hearing officer that CWM could have filed its motion to remand long ago but chose not to for tactical reasons. Therefore, the Task Force argues that CWM cannot claim that its own delay in filing the motion now creates an emergency that requires a stay of hearing. The Task Force also notes that CWM has twice moved for, and been granted, continuances of previously scheduled hearings, and that the hearing officer's latest orders stated that the November 1991 hearings

² The Board notes that the Attorney General filed its response to the motion to remand on November 20, 1991.

would begin and continue as scheduled, "barring extraordinary emergency such as death, earthquake, or war..." (Hearing Officer Order, October 4, 1991, p. 3.) The Task Force asks that the Board deny CWM's motion for stay.

CWM's motion for stay of hearings is denied. The Board does not yet have the transcript of the November 7 hearing,³ and so cannot verify the Task Force's statement that CWM's counsel admitted that the motion to remand was not filed earlier for tactical reasons. If this is indeed the case, the Board disagrees with CWM's characterization of the situation as an emergency. In any event, CWM has failed to demonstrate, or even allege, that a grant of its motion to remand will dispose of the entire case. CWM's motion to stay does not allege that hearings on the merits of this proceeding are unnecessary, but simply that the number of issues may be reduced.⁴ Although CWM makes the bare allegation that continuing hearings in this matter on the basis of an "incomplete" record denies it and the public their right to full participation, CWM has not supported that statement with any indication of what is missing in the record which leads to a denial of its right to fully participate. Additionally, the Board is bothered by CWM's assertion that this motion is timely because it did not have access to the record until March 1991. The Board points out that the instant motion was not filed until November 7, 1991, approximately eight months after the record was filed. In the absence of any further explanation, the Board believes that eight months is a sufficient amount of time to examine a record, even one as voluminous as the record in this case. Finally, the Board cannot ignore the fact that the motion to stay was filed on the morning of the first day of hearing, after the hearing officer had made it clear that he intended that the hearings would proceed barring extraordinary circumstances. The Board also notes that at the October 8, 1991 pre-hearing conference in this matter, counsel for CWM indicated that there was no reason why the November hearings could not go forward. (October 8, 1991 transcript, p. 8.) In sum, the Board finds that there is no emergency which would necessitate a stay of the scheduled hearings pending a ruling on the motion to remand.

Finally, the Board emphasizes that today it rules only on the motion to stay, and reserves ruling on the motion to remand. The

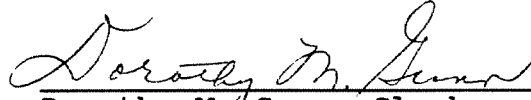
³ That transcript is expected in Board offices on November 25, 1991.

⁴ The Board notes that CWM's November 20 supplement does assert that the motion to remand is potentially conclusive. However, the Board finds that this bare assertion, made two weeks after the motion to stay hearing was filed, and after six days of hearing have been held, is insufficient to result in a stay of hearings at this late date.

Board anticipates ruling on the motion to remand at its December 5, 1991 meeting, and may revisit the issue of a stay at that time.

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 21st day of November, 1991, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board