ILLINOIS POLLUTION CONTROL BOARD
December 6, 1991

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| CWM CHEMICAL SERVICES, INC., | ) | |
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| 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. Anderson):

This matter is before the Board on CWM Chemical Services, Inc.'s (CWM) November 7, 1991 motion to remand for correction of procedural defects. CWM filed a supplemental memorandum in support of its motion on November 12, 1991. On November 19, 1991, amicus curiae the 35th District Environmental Task Force (Task Force) filed a response in opposition to CWM's motion. On November 20, 1991, the Attorney General, on behalf of the Agency and the People of the State of Illinois, filed a response in opposition to CWM's motion. That November 20 filing was accompanied by a motion to file the response instanter. The motion to file instanter is granted.

This proceeding is CWM's appeal of the Agency's September 1989 denial of CWM's request for a RCRA Part B permit for its hazardous waste incinerator in Chicago. A brief review of the chronology of events at the Agency level is necessary to understand the motion to remand. CWM (then SCA Chemical Services, Inc.) first filed an application for a Part B permit on August 17, 1983. Another application was filed in March 1985. After numerous reviews, requests for additional information, and submittals by CWM, the Agency issued a draft permit on May 15, 1987. A public hearing was held on July 9, 1987. The Agency then received numerous public comments, including comments from CWM, in 1987. In 1988, CWM advised the Agency that it was involved in negotiations on an enforcement matter. After the enforcement matter was resolved, CWM submitted additional information to the Agency in regards to its Part B permit application. Submittals were made on January 17, 1989, February 3, 1989, and April 28, 1989. The April 28, 1989 correspondence stated "This revised Part B application is intended

to replace the previously submitted documents in entirety."[1] (Rec., Book A, pp. 1448-1450.)[2] On August 8, 1989, the Agency sent CWM a notice of deficiencies. (Rec., Book A, pp. 1672-1698.) CWM sent responses to the Agency on August 28 and August 31, 1989. (Rec., Book A, pp. 1718-1759.) On September 19, 1989, the Agency denied CWM's application, based on 96 denial reasons. (Rec., Book A, pp. 1779-1814.)

Parties' Arguments

In its motion to remand this proceeding to the Agency, CWM contends that the Agency failed to follow crucial regulatory procedures during the Agency's permit review process. Specifically, CWM maintains that the Agency failed to issue a notice of intent to deny the Part B permit. That notice of intent to deny would then trigger the issuance of a fact sheet, public notice of the Agency's tentative decision, notice of the opportunity for a public hearing, and notice of opportunity for public comment. CWM's contentions are based on 35 Ill.Adm.Code 705.141, which states in part:

> a) Once an application is complete, the Agency shall tentatively decide whether to prepare a draft permit or to deny the application.
>
> b) If the Agency tentatively decides to deny the permit application, it shall issue a notice of intent to deny. A notice of intent to deny shall be subject to all of the procedural requirements applicable to draft permits under paragraph (d)...
>
> 35 Ill.Adm.Code 705.141.

CWM argues that the Agency's action in proceeding from a notice of deficiencies (August 8, 1989) to a notice of denial (September xx, 1989) violated the requirement of 35 Ill.Adm.Code 705.141 that the Agency issue either a draft permit or a notice of intent to deny. CWM contends that the Agency's failure to issue a notice of intent to deny denied CWM and the public their right to respond to issues raised by the Agency. CWM maintains that this failure denied it the opportunity to submit evidence which might have persuaded the Agency to issue the permit, and also precluded the Agency from

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[1] On July 11, 1991, the Board denied CWM's attempt to supplement the record with its 1985 and 1987 applications. That denial was based on the Board's finding that the April 28, 1989 application was intended to replace, not supplement, the earlier documents in their entirety.

[2] The phrase "Rec." will be used to denote the administrative record of decision filed with this Board by the Agency.

conforming to the regulatory requirement that the Agency respond to comments raised by the tentative denial. CWM concludes that the Board should remand this matter to the Agency to give the Agency the opportunity to follow the permit application review procedures mandated by the regulations.

Additionally, CWM argues that it has not waived its right to raise this procedural motion at this point in the proceeding. When this motion was raised at the first day of hearing, the hearing officer asked the parties to consider the possible issue of waiver, given the amount of time that has passed between the review process at the Agency level (1989) and the first day of hearing (November 7, 1991) at the Board level. CWM contends that it has not waived its ability to raise the motion. CWM states that in its November 2, 1989 petition for review, it noted that procedural deficiencies occurred. CWM maintains that the Board's rules do not require that motions based on procedural defects at the Agency level be filed within any set time period, or prior to hearing. CWM notes that 35 Ill.Adm.Code 103.140 requires that motions preliminary to hearing and motions based on jurisdictional objections must be filed before hearing. CWM argues that a motion to remand because of procedural defects in the Agency's permit process are not objections to the Board's jurisdiction. Further, CWM asserts that a motion to remand is not preliminary to hearing. CWM notes that the administrative record was filed in March 1991, but contends that the record did not make it clear whether the Agency had not followed regulatory procedures, or whether the procedures were followed but evidence of that had been omitted from the record. CWM argues that testimony and evidence revealed at hearing have made it clear that the record is complete, but that the Agency did not follow required procedures.

In response, the Attorney General argues that the Agency did not commit any procedural error in its review and processing of the permit application and that therefore no remand of the matter to the Agency is necessary. The Attorney General maintains that CWM's arguments ignore the six years of procedural history between the initial submittal of an application in August 1983 and the denial of the application in 1989. The Attorney General points to the Agency's May 15, 1987 draft permit, and the subsequent hearing and public comments, in support of its contention that it conformed to the regulatory requirements. The Attorney General argues that CWM's April 28, 1989 application did not wipe out everything which had occurred prior to that point, but simply limited the information which the Agency considered in making its decision. The Attorney General contends that the Agency need not "start over" with all procedural requirements because the applicant submits new

information as a "revision" to the original application.[3] The Attorney General argues that the RCRA permitting process would be "devastated" if an applicant were able to force a totally new review procedure by submitting revised information. In sum, the Attorney General maintains that there is no regulatory requirement that the Agency redo the entire draft permit (or notice of intent to deny) and public notice procedures where CWM submitted revisions to its application.

Amicus curiae Task Force also filed a response in opposition to CWM's motion to remand. The Task Force contends that the motion is untimely, arguing alternatively that CWM has waived its right to raise the procedural claims at this point, or that CWM is equitably estopped from raising the alleged procedural defects by the doctrine of laches. The Task Force also maintains that CWM's motion is without merit, because the Agency followed both the letter and the spirit of the regulations. Finally, the Task Force argues that even if the Board finds that the Agency's procedures were flawed, any defect was harmless and does not affect the validity of the permit denial.

## Board Conclusions

Initially, the Board must determine whether CWM's motion to remand is timely, or whether CWM waived its right to make its motion. After a review of its procedural rules, the Board concludes that this motion to remand is untimely under 35 Ill.Adm.Code 103.140(a). That rule requires that all motions "preliminary to hearing" be presented to the Board or the hearing officer at least 14 days prior to the date of hearing. The Board finds that in the context of this proceeding, the motion to remand is a motion preliminary to hearing which should have been raised at least 14 days prior to hearing. Instead, this motion was filed on November 7, 1991, which was the first day of hearing. CWM cannot characterize this motion as not a motion preliminary to hearing when the relief sought is a remand of the matter to the Agency, thus staying (or mooting) any hearing at the Board level. The Board is bothered by CWM's assertion that "testimony and evidence revealed at hearing" showed that the record was complete, but that the Agency did not follow the procedural requirements. This motion was filed at the beginning of the hearing, before any testimony or evidence was presented. Obviously CWM did know before hearing that the record was complete, or the written motion could not have been prepared prior to hearing. The Board further notes that CWM's attorney stated at the first hearing that CWM was aware of the alleged procedural defect, but chose not to raise it because "it's been our hope all along that some other resolution of this

[3] The Attorney General points to language in CWM's April 28, 1989 correspondence which twice refers to that April submission as a "revised" application. (Rec., Book A, pp. 1448-1450.)

matter would be reached." (Tr. 30-31; see also 41-43.) For CWM to argue in its written filings that the motion is timely because "it is made in light of new information" (motion to remand at 4), while stating on the record at hearing that it had chosen not to raise the issue earlier is, at the least, inconsistent. The Board finds that this motion, which seeks a remand of the proceeding to the Agency, thus halting hearings at the Board level, is a motion "preliminary to hearing" which was to have been filed at least 14 days prior to hearing. The Board finds that the motion is therefore untimely filed.

Even if the motion was timely, the Board finds that no remand is necessary in this case. The Board agrees with the Attorney General that the Part 705 procedural requirements are not retriggered every time an applicant submits additional information or a "revised" application. The Board has found no language in Part 705 which requires such a result. To hold that the Agency must "start over again" after every revision would indeed throw the RCRA permitting process into an uproar. The Board is also persuaded that CWM's April 1989 submission was a "revision" of its application.[4] CWM twice characterized the submission as a "revised" application in the cover letter accompanying the application. (Rec., Book A, pp. 1448-1450.) CWM's statement that the April 1989 application was intended to replace the previously submitted documents goes only to the actual documents which it wished the Agency to consider in making its permitting decision. After the lengthy history of the application, with numerous submittals, it makes sense that CWM wished to present all of its information to the Agency in one submittal. CWM never indicated that it wished to terminate the earlier proceedings and start anew. Because the Board finds no requirement that the Agency revisit the Part 705 procedural requirements after a revision of an application, and because the Board finds that CWM's April 1989 submittal was a revision, the Board finds that the Agency properly followed the regulatory requirements in this case.

In sum, the Board finds that CWM's motion to remand is untimely pursuant to 35 Ill.Adm.Code 103.140(a). Even if the

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[4] This result is consistent with the Board's July 11, 1991 ruling that CWM could not supplement the record with the 1985 and 1987 applications. The issue in supplementing a record is whether the information which is sought to be added was information which the Agency considered, or should have considered, in making its decision. The 1989 application superseded the previous applications, and therefore those earlier applications were not part of the Agency's decision in terms of the merits of the application. The Board further notes that CWM argued in its June 17, 1991 filing that the permit application process began prior to the April 1989 submittal. CWM cannot not now allege that the April 1989 application was the start of the process.

motion were timely, the Board finds that the Agency followed the Part 705 procedural requirements. Therefore, CWM's motion to remand is denied.

IT IS SO ORDERED.

R. Flemal, J. Theodore Meyer, and M. Nardulli dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 6th day of December, 1991, by a vote of 4-3.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board