

ILLINOIS POLLUTION CONTROL BOARD
April 15, 2010

ZERVOS THREE, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 10-54
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by A.S. Moore):

Petitioner Zervos Three, Inc. (Zervos Three) appeals a determination by the Illinois Environmental Protection Agency (Agency) to deny a request for reimbursement from the Illinois Underground Storage Tank Fund (UST Fund). Zervos Three’s request concerns a site known as the Schiller Park Clark Service Station 1516, located in Schiller Park, Cook County. Zervos Three moves to have the Board either enter a default judgment in its favor and against Agency or impose sanctions against the Agency. For the reasons described below, the Board denies Zervos Three’s motion and directs the hearing officer to proceed to hearing.

Below, the Board first reviews the procedural history before summarizing Zervos Three’s motion. The Board then provides the applicable regulatory authority before discussing the issues and reaching its conclusion.

PROCEDURAL HISTORY

On January 25, 2010, Zervos Three filed a petition for review (Pet.) of the Agency’s December 21, 2009 determination to deny Zervos Three’s request for reimbursement of corrective action costs in the amount of \$97,049.28 from the UST Fund.

In an order dated February 4, 2010, the Board accepted the petition for hearing. That order stated that, “[u]nless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by February 24, 2010, which is 30 days after the Board received Zervos Three’s petition.” Zervos Three, Inc. v. EPA, PCB 10-54, slip op. at 2 (Feb. 4, 2010). The order further stated that, “[i]f the Agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed.” *Id.* In addition, the order noted that the decision deadline, which only Zervos Three may extend through a waiver, was May 25, 2010. *Id.*

On March 4, 2010, Zervos Three filed a “Motion for Default Judgment and, in the Alternative, for Sanctions” (Mot.).

On March 18, 2010, the hearing officer conducted a status conference in which all parties participated. Zervos Three, Inc. v. EPA, PCB 10-54, slip op. at 1 (Mar. 19, 2010). During that status conference, “[t]he attorney for the respondent represented that she has not yet been appointed by the Illinois Attorney General’s Office.” *Id.* Also during that conference, Zervos Three indicated that “it will file a 60-day additional waiver of the statutory decision deadline” and that that it would in the meantime “attempt to secure the record and review.” *Id.*

On March 19, 2010, Zervos Three filed a waiver extending the statutory decision deadline 60 days to July 24, 2010.

On March 25, 2010, the Agency filed the administrative record.

MOTION FOR DEFAULT JUDGMENT OR SANCTIONS

Zervos Three states that it timely filed a petition for review of the Agency’s December 21, 2009 determination. Mot. at 1. Zervos Three further states that, in accepting the petition for hearing on February 4, 2010, the Board determined that the petition satisfied content requirements. *Id.*, citing 35 Ill. Adm. Code 105.408. Zervos Three notes that that Board’s order required the Agency to file its entire administrative record by February 24, 2010. Mot. at 2, citing Mot., Exh. A (Board order); *see* 35 Ill. Adm. Code 105.116, 105.410 (Record Filing and Agency Record).

Zervos Three argues that “Respondent has not filed the administrative record with the Board, nor has Respondent served a copy thereof on Petitioner.” Mot. at 2. Zervos Three further argues that “Respondent has made no filings with respect to the Petition.” *Id.*, citing *id.*, Exh. C (docket of case activity).

Zervos Three claims that the Board’s procedural rules provide for sanctions for failing to comply with regulations and orders. Mot. at 2, citing 35 Ill. Adm. Code 101.800. Zervos Three argues that the Agency failed to comply with the Board’s Procedural Rules including 35 Ill. Adm. Code 105.410 and failed to comply with the Board’s Order of February 4, 2010.” Mot. at 2.

Zervos Three requests that the Board adopt an order finding that the Agency “is in default of the Board’s Order of February 4, 2010 and the Board’s Procedural Rules” and that the Agency “failed to produce an Administrative Record for review in this cause.” Mot. at 2.

On these bases, Zervos Three requests that the Board enter judgment in its favor and against the Agency by reversing the Agency’s December 21, 2009 determination, ordering the Agency to reimburse the contested amount of \$97,049.28, and ordering the Agency to reimburse reasonable attorney fees. Mot. at 3. Zervos Three also requests that the Board, in addition or as an alternative order

such other and further relief as the Board deems proper, including sanctions pursuant to 35 Ill. Adm. Code 101.800 barring Respondent from filing any pleading or other document and barring Respondent from maintaining any claim,

counterclaim, third-party claim or defense relating to its Final Decision; and barring Respondent from presenting testimony or other evidence concerning its Final Decision. *Id.*

REGULATORY AUTHORITY

Section 101.800 of the Board's procedural rules addresses sanctions and provides in its entirety that

- a) If any person unreasonably fails to comply with any provision of 35 Ill. Adm. Code 101 through 130 or any order entered by the Board or the hearing officer, including any subpoena issued by the Board, the Board may order sanctions. The Board may order sanctions on its own motion, or in response to a motion by a party.
- b) Sanctions include the following:
 - 1) Further proceedings may be stayed until the order or rules are complied with, except in proceedings with a statutory decision deadline. Proceedings with a statutory decision deadline may be dismissed prior to the date on which decision is due;
 - 2) The offending person may be barred from filing any other pleading or other document relating to any issue to which the refusal or failure relates;
 - 3) The offending person may be barred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;
 - 4) As to claims or defenses asserted in any pleading or other document to which that issue is material, a judgment by default may be entered against the offending person or the proceeding may be dismissed with or without prejudice;
 - 5) Any portion of the offending person's pleadings or other documents relating to that issue may be stricken and, if appropriate, judgment may be entered as to that issue; and
 - 6) The witness may be barred from testifying concerning that issue.
- c) In deciding what sanction to impose the Board will consider factors including: the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person. 35 Ill. Adm. Code 101.800.

Section 105.116 of the Board's procedural regulations provides in its entirety that

[t]he State agency must file with the Board the entire record of its decision within 30 days after the filing of the petition for review, unless this Part provides otherwise, or the Board or hearing officer orders a different filing date. If the State agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. 35 Ill. Adm. Code 105.116.

Section 105.118 of the Board's procedural regulations provides in its entirety that, "[i]f the State agency unreasonably fails to timely file the record on or before the date required under this Part, the Board may sanction the State agency in accordance with 35 Ill. Adm. Code 101.Subpart H." 35 Ill. Adm. Code 105.118.

Section 105.410 of the Board's procedural rules provides in its entirety that

- a) The Agency must file the entire record of its decision with the Board in accordance with Section 105.116 of this Part.
- b) The record must include:
 - 1) The plan or budget submittal or other request that requires an Agency decision;
 - 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the plan or budget submittal or other request;
 - 3) The final determination letter; and
 - 4) Any other information the Agency relied upon in making its determination. 35 Ill. Adm. Code 105.410.

DISCUSSION

Section 101.500(d) of the Board's procedural rules provides in pertinent that, "[w]ithin 14 days after service of a motion a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion." 35 Ill. Adm. Code 101.500(d). The Agency has not responded to Zervos Three's motion and is deemed to have waived objection to granting it. Nonetheless, as the Agency's waiver of objection is not binding on it, the Board proceeds below to address the substance of the motion.

Zervos Three states that the Agency's administrative record was due by February 24, 2010. Zervos Three further states that, as of March 4, 2010, the Agency had filed neither the

record itself nor a motion for extension of time to do so. Zervos Three concludes that the Agency has failed to comply with the requirements of the Board's procedural rules and the Board's February 4, 2010 order.

Zervos Three argues that the Board may impose sanction on persons who unreasonably fail to comply with Board orders or procedural rules. Zervos Three requests that the Board enter a default judgment against the Agency as a sanction for late filing of the record. Mot. at 2-3. Zervos Three also requests that, in addition or in the alternative, the Board impose sanctions upon the Agency. *Id.* at 3. Zervos Three suggests that late filing of the record may justify the following sanctions: barring the Agency from filing a pleading or document; barring the Agency from maintaining any claim, counterclaim, third-party claim, or defense; and barring the Agency from presenting testimony or other evidence. *Id.* at 3; *see* 35 Ill. Adm. Code 101.800.

The Board notes that, under its procedural rules, it may sanction parties for unreasonably failing to comply with Board or hearing officer orders or the Board's procedural rules. 35 Ill. Adm. Code 101.800(a); *see* 35 Ill. Adm. Code 105.118 (Sanction for Untimely Filing of Record). Potentials sanctions include entry of a default judgment. *See* 35 Ill. Adm. Code 101.800(b)(4); *see also* E & L Trucking Co. v. EPA, PCB 02-53, slip op. at 4-5 (Apr. 18, 2002) (addressing potential sanctions for late-filed Agency records).

The record clearly establishes that the Agency's record was due to be filed with the Board no later than February 24, 2010, 30 days after the Board received Zervos Three's petition for review. The record also clearly establishes that the Agency by that date had filed neither the record itself nor a motion for an extension of the filing deadline. However, the Agency filed its record with the Board on March 25, 2010.

"The Board has broad discretion in determining the imposition of sanctions." Prime Location Properties, LLC v. EPA, PCB 09-67, slip op. at 3 (Aug. 20, 2009) (citations omitted). The Board's procedural rules list factors for the Board to consider in determining which sanction to impose: "the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person." 35 Ill. Adm. Code 101.800(c).

The Board in Prime Location Properties stated that its "concerns about late-filed records are heightened when the record is not filed sufficiently in advance of hearing to allow for reasonable hearing preparation." Prime Location Properties, LLC v. EPA, PCB 09-67, slip op. at 3 (Aug. 20, 2009). Although the Board cannot condone the Agency's 29-day delay in filing the record in this case, the Agency filed its record before a hearing in this matter had been scheduled. The Board cannot conclude that the Agency's delay in filing the record has severely compromised Zervos Three's ability to prepare for hearing and thus weighs this factor against imposing the requested sanctions.

Second, the history of this proceeding does not indicate that the Agency has shown any pattern of failure to comply with the Board's regulations or with the orders of the Board and the hearing officer, and the Board also weighs this factor against imposing the sanctions requested by Zervos Three.

Third, the Board addresses “the degree to which the proceeding has been delayed or prejudiced.” Although it did so only after a 29-day delay, the Agency has now filed the record. In addition, the Board notes that Zervos Three has exercised the ability that it alone possesses to extend the statutory decision deadline. As a result of the waiver filed by Zervos Three, the Board’s decision is now due on or before July 24, 2010. The Board cannot conclude under these circumstances and deadlines that “the degree to which the proceeding has been delayed or prejudiced” weighs in favor of the sanctions requested by Zervos Three.

Fourth, although the Board recognizes that the Agency’s late filing does affect the petitioner, the record does not reveal evidence of bad faith in the Agency’s delay, and the Board weighs this factor against imposing the sanctions sought by Zervos Three.

Having weighed these factors, the Board cannot conclude that the nature and consequences of the Agency’s delay in filing the record justify the imposition of the sanctions requested by Zervos Three. Consequently, the “Motion for Default Judgment and, in the Alternative, for Sanctions” is denied. The Board directs the hearing officer to proceed expeditiously to hearing consistent with Board’s statutory decision deadline.

CONCLUSION

For the reasons stated above, the Board denies Zervos Three’s motion for default judgment and, in the alternative, for sanctions. The Board directs the hearing officer to proceed expeditiously to hearing consistent with Board’s statutory decision deadline.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 15, 2010, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board