ILLINOIS POLLUTION CONTROL BOARD
December 20, 2001

OZINGA TRANSPORTATION SERVICES,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 00-188
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

This matter is before the Board on cross motions for summary judgment. On August 20, 2001, the Illinois Environmental Protection Agency (Agency) filed a motion for summary judgment. On September 6, 2001, Ozinga Transportation Services (Ozinga) filed a response to the Agency's motion as well as a cross-motion for summary judgment and a supporting memorandum. The Agency filed a response to Ozinga's motion for summary judgment and a motion to strike portions of Ozinga's memorandum in support of its motion for summary judgment on September 28, 2001. On October 11, 2001, the assigned Board hearing officer granted Ozinga an extension of time to file a reply to the Agency's response, and a response to the Agency's motion to strike. Ozinga filed both pleadings on October 25, 2001. On November 2, 2001, the Agency filed a surreply, accompanied by a motion for leave to file. Ozinga filed no response to either the surreply or the motion for leave to file.

For the reasons outlined below, the Board grants the Agency's motion for summary judgment, and denies Ozinga's cross motion for summary judgment. The Board also grants the Agency's motion to strike and motion for leave to file a surreply.

BACKGROUND

On June 29, 2000, Ozinga filed a petition seeking to review an April 3, 2000, final Agency decision denying $89,367.82 in reimbursement costs. Pet. at 1.[1] The reimbursement costs arise from a release that occurred at Ozinga's facility located at 21900 South Central Avenue in Matteson. On May 22, 1998, the Illinois Emergency Management Agency (IEMA)

[1] The petition for review will be referred to as "Pet. at __." The Administrative record will be referred to as "AR at __." The Agency's motion for summary judgment will be referred to as "Ag. mot. at __." Ozinga's motion for summary judgment will be referred to as "Oz. mot. at __." The Agency response will be referred to as "Ag. resp. at __." Ozinga's reply will be referred to as "Oz. rep. at __." The Agency's surreply will be referred to as "Ag. surr. at __." The Agency's motion to strike will be referred to as "Ag. mot. to strike at __." Ozinga's response to the motion to strike will be referred to as "Oz. resp. at __." The Agency's motion for leave to file will be referred to as "Ag. mot. for leave at __."

was notified of a release at Ozinga's facility. AR at 97. On June 24, 1998, the Office of the State Fire Marshal (OSFM) received an application to remove underground storage tanks (USTs) owned by Ozinga and located at the site in question. AR at 81. The removal application granting permission to remove tanks from July 24, 1998 until January 1, 1999, was approved on July 21, 1998. Id.

From November 16, 1998 to November 20, 1998, Ozinga performed activities and incurred related costs in response to the release. AR at 13-83, 96-185. On August 3, 1999, a reimbursement billing package dated March 8, 1999 was received by the Agency. AR at 96. In response to Agency comments on the initial package, a revised claim was submitted to the Agency on December 6, 1999.

The Agency denied the requested reimbursement on April 3, 2000. In the denial letter, the Agency denied reimbursement because the costs were for activities not completed within 45 days from the date that the release was reported to IEMA. The Agency determined the completion date to be July 6, 1998, and noted that no early action extension was requested. The Agency also noted that the costs exceeded the minimum requirements of the Act, were conducted after the 20 and 45-day reporting requirements of 35 Ill. Adm. Code 732.303(c), 732.202(e), 731.162(b) and 731.163(b), and were not approved in a budget. AR at 3.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

ARGUMENTS

The Board next addresses each party's motion for summary judgment and respective response, as well as the Agency's motion to strike.

Agency's Motion for Summary Judgment

In its motion for summary judgment, the Agency argues that Ozinga failed to complete their early action activities in a timely manner so as to be eligible to recover reimbursement for

the associated costs. Ag. mot. at 6. The Agency states that Ozinga had the legal responsibility to notify IEMA of the suspected release, and then to take timely action to confirm release. Ag. mot. at 6-7. According to the Agency, the first step in deciding whether or not actions are reimbursable is to determine the release confirmation date, and that this date essentially acts as the starting point as described in 35 Ill. Adm. Code 735.202. Ag. mot. at 4. The Agency asserts that pursuant to OSFM regulations suspected releases must be confirmed within seven days of the notification to IEMA. Ag. mot. at 7. Ozinga, notes the Agency, did not apply for a removal permit until over one month from the date of release, and waited almost four months after the removal permit was approved before removing the tanks and beginning to incur the "early action" costs in question. Ag. mot. at 7, quotation marks added by Agency.

The Agency stresses that approximately six months passed between the date that the release was first discovered (May 22, 1998) and the date Ozinga began incurring early action costs (November 16, 1998), and that Ozinga did not confirm the suspected release within seven days as required by the OSFM regulations. Ag. mot. at 7. Further, argues the Agency, Ozinga did not provide the Agency any reasons for the delay in ultimately performing tank removal activities or seek an extension of time to complete the early action activities. Ag. mot. at 7-8.

Here, argues the Agency, no facts dictate deviating from the clear regulatory requirement that the release must be confirmed within seven days of the date of the notification given to IEMA. Ag. mot. at 8. Therefore, the Agency asserts that May 29, 1998 is the date by which Ozinga had to confirm the release, and any early action and free product removal activities were required to be completed no later than 45 days from that date pursuant to 35 Ill. Adm. Code 732.202 and 732.203. Ag. mot. at 9. Since no extension of time was received or approved by the Agency, any work characterized as early action or free product removal during the time period identified by Ozinga is not reimbursable.

The Agency acknowledges that the Board's recent decision in Broderick Teaming v. IEPA, PCB 00-187 (Apr. 5, 2001) allowed reimbursement for activities that were taken more than 45 days from the date of confirmation. Ag. mot. at 5. But, the Agency argues that Broderick is distinguishable from the instant case in that the Board focused on unique and very specific facts in Broderick when reaching its decision. Ag. mot. at 5.

Finally, the Agency argues that Board should heed its own words in Broderick, and bear in mind that the decision made in that case was found not to frustrate the intent of the LUST program. Ag. mot. at 7. The Agency asserts that if the Board decides the Ozinga is entitled to be reimbursed in this case, the Board will have stretched the time allowed for release confirmation from seven days to six months. Ag. mot. at 7. The Agency maintains that this is a prime example of a 'slippery slope,' and that no facts contained within the reimbursement application submitted to the Agency warrant reimbursement of the costs incurred beginning on November 16, 1998, under the guise of early action. *Id.* Therefore, the Agency requests that the Board grant its motion for summary judgment and affirm the Agency's final decision dated April 3, 2000.

Ozinga's Cross Motion for Summary Judgment and Response to Agency's Motion for Summary Judgment

Ozinga asserts that the undisputed facts reveal that it did complete its early action activities within 45 days of confirmation of the release, and that, as such, the activities should be completely reimbursed. Oz. mot. at 1. Ozinga argues that the Board has determined that the 45-day early action period begins upon actual confirmation of a release from a UST, and that actual confirmation occurs only when the UST is pulled and an agent from the OSFM renders an opinion that a release has occurred. Oz. mot. at 1, 5.

Ozinga maintains that in Broderick the Board has already expressly rejected the Agency's position that the 45-day period begins to run upon notification of a suspected release. Oz. mot. at 5. Ozinga argues that a tank may be removed only when the OSFM is present, and that only the OSFM can confirm whether a release has occurred. Oz. mot. at 6, referring to 415 ILCS 57.5(c) (2000).

Ozinga notes that the Agency made the same argument in Broderick as they do here: that the 45-day period began to run when the suspected release was reported to IEMA. However, Ozinga maintains, the Board has made clear that the appropriate date on which to start the 45-day clock running is the date of actual confirmation, and here, the OSFM inspector confirmed the release on November 17, 1998, when the tanks were excavated and the inspector confirmed the release. Oz. mot. at 6. The activity for which Ozinga seeks reimbursement concluded on November 20, 1998 – only three days after actual confirmation, and well within the 45-day statutory period. Oz. mot. at 7.

Ozinga maintains that any delay between the reporting of the release and the activity in question was caused by a backlog of requests to the OSFM and was not due to any delay or fault on its part. Oz. mot. at 7. Ozinga attaches an affidavit by Daniel M. Caplice to support this claim, and notes that the Agency did not request for any explanation prior to the filing a its motion for summary judgment. *Id.* In fact, Ozinga argues that it was prohibited from removing the tanks to confirm a release because only a representative from the OSFM can confirm a release. Oz. mot. at 8. Ozinga asserts that the instant fact pattern is on point with that of Broderick in that a delay beyond the petitioner's control is present in both cases. Oz. mot. at 8.

Finally, Ozinga asserts the Agency's other bases for denial depend on the Agency's erroneous conclusion that the 45-day early action period had run when Ozinga performed its activities, and that this misreading of the law and should also be reversed. Oz. mot. at 9.

Response to Ozinga's motion for summary judgment

In its response, the Agency argues that it has no obligation to assist an owner/operator with its application for reimbursement, and that the Agency's role is only to review applications as submitted, consider the information, and render a timely decision. Ag. resp. at 2. The Agency next addresses Ozinga's explanation for the delay in taking action as follows: That the first time the Agency was provided with an explanation for Ozinga's delay in taking action was the Caplice affidavit that is entirely outside of the record presented to the Agency prior to the decision at hand. That if the affidavit is not considered, as is proper, then there is no information within the reimbursement application that documents or explains the extended

delays in responding to the release. That, without any such explanation, the Agency had no basis for concluding the delays experienced in responding were justified. And, finally, that because Ozinga did not confirm the release until almost 6 months after the report of the release, the removal activities are not reimbursable as early action. Ag. resp. at 3.

The Agency postulates that if the Board adopts Ozinga's arguments, then parties could receive reimbursement for "early action" costs incurred one or two years after a reported release, and that this would be entirely inconsistent with the intent of requiring early action activities to be completed in a timely fashion, within a 45-day period after confirmation. Ag. resp. at 3 and 5.

The Agency next argues that the delays in this case are longer and undocumented as compared to the facts considered by the Board in Broderick. Ag. resp. at 3. Furthermore, the Agency notes that in Broderick, the Board did not state that as a rule of law the 45-day clock begins at actual confirmation. Rather, the Board stated that pursuant to OSFM regulations, release confirmation steps must be performed within 7 days of reporting a release, and that given the unique and specific facts in Broderick, the board departed from the general rule and decided that the date on which the OSFM-delegated inspector visually confirmed the release would start the 45-day clock. Ag. resp. at 5.

The Agency maintains that the OSFM regulations do not contain any reference to 'actual confirmation" by an inspector to substitute for the obligation for the owner/operator to investigate and confirm the release. Ag. resp. at 6. The Agency argues that Ozinga's interpretation would remove the time element for performing release confirmation leading to a situation where it does not matter how long it takes to confirm a suspected release, so long as the release is eventually confirmed, and that this would frustrate the intent of the LUST program. Ag. resp. at 5-6.

Ozinga's Reply Memorandum

Ozinga asserts that the Agency's written response to the request for reimbursement expressly stated that their request was denied because Ozinga failed to complete its early action activities within 45 days from the date that the release was reported to IEMA. Ozinga argues that the Agency applied the incorrect legal standard because the 45-day period for early action begins not on the date the release is reported but upon actual confirmation of the release. Oz. rep. at 2. Further, Ozinga maintains that the Agency's denial letter does not mention confirmation and instead ties all relevant action to the reporting of the release. Oz. rep at 2, 4. Ozinga argues that the Agency should not be able to raise the issue of Ozinga's alleged failure to timely confirm the release because they did not do so in the denial letter. Oz. rep. at 4.

Any delay in confirmation, argues Ozinga, was beyond their control because the OSFM could not be present at a tank removal until October 19, 1998, due to a deadline for tank upgrades that occupied the OSFM inspectors during that timeframe. Oz. rep. at 5. As stated, Ozinga has outlined the cause of the delay in the Caplice affidavit. Ozinga maintains that all of the activities for which it seeks reimbursement were completed by November 20, 1998, less than 3 days after confirmation of the release. Oz. rep. at 2. Ozinga reiterates that the Board

has made clear that confirmation occurs when the tank is removed and the OSFM inspector confirms the release. Oz. rep. at 5. Ozinga concludes that this matter is very simple, and that because the early action activities were completed within 45 days of actual confirmation of the release reimbursement is appropriate. Oz. rep. at 5.

Agency Surreply to Ozinga's Reply Memorandum and Motion for Leave to File

In the motion for leave to file, the Agency asserts that, because of certain allegations and arguments raised in the reply, the Agency must be allowed to file a surreply to prevent material prejudice, and that the failure of the Board to accept the surreply would create a misleading and false impression. Mot. for leave at 1.

The Agency argues that Ozinga is inappropriately attempting to raise an argument for the first time in its reply brief that has not been raised in any other pleading in this matter. Ag. surr. at 1. This new argument, maintains the Agency, is not in Ozinga's petition for appeal or motion for summary judgment, and was not raised in the Agency response to the motion for summary judgment. Ag. surr. at 2. The Agency notes that Ozinga is and has been aware of the reasons for denial and has not challenged an aspect of the wording of the final decision except in the reply brief. Ag. surr. at 2.

The Agency asserts that it would have been impossible for its final decision in this case to reflect any aspects of the Board's decision in Broderick as Ozinga feels is necessary because the final Agency decision was issued prior to the Broderick decision. Ag. surr. at 3. Finally, the Agency reiterates that the period of delay found in Broderick was not so long or unexplained as the delay in the current matter. Ag. surr. at 3.

Agency Motion to Strike Portions of Ozinga's Memorandum

The Agency asserts that the affidavit of Daniel M. Caplice provides new or additional information not included within any documents submitted to the Agency prior to April 3, 2001 – the date of the final decision – and that the contents of the affidavit are cited to repeatedly in the memorandum supporting Ozinga's motion for summary judgment. Ag. mot. to strike at 2. The Agency argues that the Board has made clear that it will not consider new or additional information unavailable to the Agency at the time of its decision. *Id.*

Accordingly, the Agency, urges the Board to strike the affidavit and any portions of the memorandum that also make reference to the affidavit . *Id.*

Ozinga's Response to Motion to Strike

Ozinga asserts that the Agency failed to raise the fact that the delay in scheduling an inspector to be present for removal of a tank required denial of Ozinga's application for reimbursement until its motion for summary judgment. Oz. resp. at 1. Ozinga maintains that, in response to the new Agency argument, it submitted the Caplice affidavit to explain that any delays in scheduling an inspector were due to circumstances beyond Ozinga's control. *Id.*

Ozinga notes that the reason given for the denial of the claim in the Agency's denial letter was that the early action activities must be completed within 45 days from the date the release was reported to IEMA, and that the Agency is now contending that what it really meant was that Ozinga's failure to confirm the release within 7 days and then complete the early action within the ensuing 45 days resulted in the request being denied. Oz. resp. at 3. Ozinga concluded that it would be manifestly unfair to allow the Agency to make new arguments in its summary judgment motion and not allow Ozinga the opportunity to respond in kind. Oz. resp. at 4.

DISCUSSION

The Board will first address the preliminary motions, and then proceed with both motions for summary judgment.

Preliminary Motions

Motion to Strike

The Board has long held that in reviewing a final Agency decision, the consideration of information not before the Agency at the time of the final decision is inappropriate. *See* Salyer v. IEPA, PCB 98-156 (Nov. 19, 1998) The Caplice affidavit clearly provides information not before the Agency at the time it reached its decision. Ozinga does not dispute this fact, but instead argues that the inclusion of the new information was made necessary because the Agency's motion for summary judgment included a new contention that Ozinga felt it must address.

The Board is not convinced by this argument. As stated, information not before the Agency at the time of its decision may not be considered by the Board on appeal of that decision. Accordingly, the motion to strike the affidavit and those portions of the memorandum in support of summary judgment is granted. Ozinga is correct in noting that the Agency's denial letter does not comport exactly with the reasons for denial articulated in its motion for summary judgment. Regardless, the appropriate remedy in this situation is not the consideration of information not before the Agency at the time of the decision.

Motion for Leave to File Surreply

The Board grants the Agency's motion for leave to file a surreply. Ozinga did not object to the motion, and the Board finds, in this instance, that the surreply would help to provide a complete briefing of the pending issues.

Motions for Summary Judgment

The Agency's final decision frames the issues for appeal. Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990). As noted, Ozinga argues that the Agency's reason for denial stated in the motion for summary judgment is different than that contained in its final decision. A review of the record reveals that the language in the

denial letter is different than that currently espoused by the Agency. Specifically, the denial letter states, in part, that early activities "must be completed within 45 days from the date that the release was reported to the Illinois Emergency Management Agency." AR at 3. However, the Agency now contends that the release should have been confirmed within seven days of the date of IEMA notification, and that Ozinga had 45 days after the seven day confirmation period had passed to perform early action activities; essentially allowing 52 days for early action.

Although a dichotomy does exist between the language of the denial letter and the Agency's current argument, any error in this context is harmless. The Agency has not attempted to modify the issues that are the subject to this appeal. The Board has found that the proper remedy for a denial letter that failed to frame the regulatory and statutory issues on review is to remand to the Agency for the issuance of a new denial letter. *See* Centralia Environmental Services, Inc. v. IEPA, PCB 89-170 (May 10, 1990); Pulitzer, PCB 90-142. A denial letter that gives Ozinga an extra seven days to perform its early action activities would in no way alter the context of this case; the activities in question would still have occurred approximately six months after the date of IEMA notification. In addition, it appears from the record that Ozinga has had actual notice of the Agency's position from the time of the final decision. The Board is not persuaded by Ozinga's argument that the Agency is precluded from raising the issue of Ozinga's alleged failure to timely confirm the release because they did not do so in the denial letter. This has been the Agency's position throughout this proceeding, and any error resulting from the inartfully drafted denial letter is harmless.

The parties agree on the pertinent facts in this case: That on May 22, 1998, IEMA was notified of a release at Ozinga's facility. That on June 24, 1998, the OSFM received an application to remove USTs owned by Ozinga and located at the site in question. That the removal application granting permission to remove tanks from July 24, 1998 until January 1, 1999, was approved on July 21, 1998. That the activities in question were performed from November 16, 1998 to November 20, 1998. And, that no early action extension was requested. No genuine issues of material facts exist in this matter, and it is appropriate for summary judgment.

Section 57.5(c) of the Act provides in part that:

> The owner of operator shall determine whether or not a release has occurred in conformance with the regulations adopted by the Board and the OSFM. 415 ILCS 5/57.5(c) (2000).

Section 170.580 of the OSFM's regulations establishes the procedures an owner or operator must utilize following a reported release to IEMA, and provides in part:

> Unless corrective action is initiated in accordance with Sections 170.600 and 170.610, owners or operators shall investigate and confirm all suspected releases of regulated substances requiring reporting under Section 170.560 within seven days, using the following procedures . . . 41 Ill. Adm. Code 170.580.

Section 732.202(g) of the Board's regulation addresses early action, and provides in part:

> For purposes of reimbursement, the activities set forth in subsection (f) of this Section shall be performed within 45 days after confirmation of a release, unless special circumstances, approved by the Agency in writing, warrant continuing such activities beyond 45 days. The owner or operator shall notify the Agency in writing within 45 days of confirmation of a release of such circumstances. . . 35 Ill. Adm. Code 732.202(g).

Section 57.5(c) clearly states that the owner or operator has the burden of confirming the release in accordance with the OSFM and Board regulations. Section 170.580 of the OSFM's regulations requires that all suspected releases be confirmed within seven days after reporting it to IEMA. Section 732.202(g) states that, absent special circumstances approved in writing, early action activities must be performed 45 days after the release is confirmed in order to be reimbursed. The OSFM regulations do not require that an OSFM inspector be present for confirmation of a leak. Rather, the specific procedures necessary to investigate and confirm the release enumerated in Section 170.580 all refer solely to the owner or operator. See 41 Ill Adm. Code 170.580.

Both parties refer extensively to the Board's decision in Broderick. In Broderick, the Board found that the owner or operator bears the statutory burden of determining whether or not a release has occurred in conformance with the regulations adopted by the Board and the OSFM. Broderick, PCB 00-187, slip op. at 5, citing 415 ILCS 5/57.5(c) (1998). The Board also found no error in a previous holding that the petitioner in that case should have investigated and confirmed the release within 7 days after first suspecting the release and reporting it to IEMA. *Id*. The Board found, however, that when applying the unique facts of that case, it would be an error to start the 45-day early action period on that date. Instead, the Board found that it is appropriate to start the 45-day clock on the date of actual confirmation. *Id*. Finally, the Board stated that Broderick's misinterpretation of the confirmation requirements did not frustrate the intent of the LUST program and was the type of delay the Agency testified would justify an extension had a written extension been requested. Broderick, PCB 00-187, slip op. at 6.

The Board did not intend the holding in Broderick to universally extend the time for confirmation expressly required by the OSFM regulations. Nowhere in the Broderick opinion does the Board state that an OSFM inspector must be present to confirm a suspected release. On the contrary, the Board clearly stated that the owner or operator bears the statutory burden of determining whether or not a release has occurred. *Id*. Further, the Board limited the applicability of Broderick to the unique facts therein. The facts presented by Ozinga do not mandate a similar extension of the confirmation period.

First, in Broderick, the petitioner applied for a removal permit the same day it first suspected the release and reported it to IEMA. Broderick, PCB 00-187, slip op. at 5. Ozinga did not apply for a tank removal permit until over one month from the date of the release. In Broderick, the Agency testified that the delay was the of the type that would justify an extension

had one been requested. Here, no such evidence is present before the Board. In Broderick, the activities that the petitioner sought reimbursement for occurred approximately two months after the reporting of the release to IEMA. Broderick, PCB 00-187, slip op at 5. Here, approximately six months elapsed between the date of reporting and the activities for which Ozinga is seeking reimbursement as early action.

The rationale for extending the time for confirmation of the release that was present in Broderick is not present here. Any extension of the confirmation date in this matter would frustrate the intent of early action. For example, with no limit on the time for confirmation, owners or operators could conceivably be reimbursed for confirmation and subsequent early action activities two or three years after the release is first suspected. This result is clearly not what is intended by early action.

Therefore, Ozinga was required to confirm the release within seven days of the reporting of the release to IEMA – May 29, 1998. Early action activities were required to be performed within 45 days of that date – July 13, 1998. Ozinga did not complete the activities in question until November 20, 1998. Therefore, the activities are not reimbursable as early action.

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). The record in this matter clearly shows that no genuine issue of material fact exists. As noted above, the activities in question are not reimbursable as early action. Thus, the Agency is entitled to judgment as a matter of law.

The Agency's decision finding that the costs in questions did not qualify as early action activities was correct. The finding that Ozinga failed to complete all early action and free product removal activities within the time allowed for the submission of the 20 and 45 day reports was consistent with the facts presented and the applicable law.

ORDER

The Board finds that summary judgment in favor of the Agency is appropriate in this case. Accordingly, the Board grants the Agency's motion for summary judgment, and denies Ozinga's cross motion for summary judgment. The Board affirms the Agency's April 3, 2000 denial of Ozinga's claim for reimbursement.

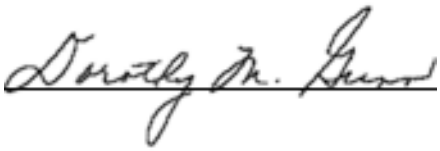
IT IS SO ORDERED.

Board Member M. Tristano abstained.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The

Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 20, 2001, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board