

ILLINOIS POLLUTION CONTROL BOARD  
February 1, 1996

WEST SUBURBAN RECYCLING	)	
AND ENERGY CENTER, L.P.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 95-119, 95-125
	)	Consolidated
ILLINOIS ENVIRONMENTAL	)	(Permit Appeal - Land & Air)
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by R.C. Flemal):

On January 23, 1996 the Illinois Environmental Protection Agency (Agency) filed a Motion for Summary Judgment. The Agency requests that the Board grant summary judgment in its favor against petitioner, West Suburban Recycling and Energy Center, L.P. (West Suburban).

On January 31, 1996 West Suburban filed a Motion to File Instanter Response to Respondent's Motion for Summary Judgment and said Response. The Board grants West Suburban's motion to file response instanter.

Summary judgment will be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. (Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Williams Adhesives, Inc., v. IEPA (August 22, 1991), PCB 91-112.)

First, the Agency alleges that West Suburban failed to file its petition for review within the statutory appeal period. On April 2, 1995 both West Suburban and the Agency, pursuant to Section 40(a)(1) of the Illinois Environmental Protection Act (Act), filed a notice of extension of the thirty-five day appeal period for the land permit denial<sup>1</sup>. (415 ILCS 5/40(a)(1) 1994.) The Board granted the appeal extension period until July 2, 1995, 125 days after the Agency's denials dated February 27, 1995. July 2, 1995 was a Sunday and West Suburban filed the permit appeals on Monday, July 3, 1995.

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<sup>1</sup> On April 6, 1995 the Agency filed a clarification of its' April 2nd filing which indicated that the April 2nd filing was intended to also include the air permit denial.

According to Board procedural rule 101.109, the relevant computation of time runs until the next business day if the last day is a Sunday. (35 Ill. Adm. Code 101.109.) Therefore the Board correctly accepted West Suburban's permit appeals and accordingly rejects the Agency's argument for summary judgment based upon the July 3, 1995 filing.

Additionally, the Agency argues that the Board's acceptance of this matter is void for want of authority because the Board lacks subject matter jurisdiction over the dispute. According to the Agency the Board had no jurisdiction to extend the appeal period beyond a total of 90 days, hence the Board could only extend West Suburban's permit appeal filing time until May 28, 1995, not until July 2, 1995.

The Board acknowledges that it has revised its interpretation of the date from which the 90-day extension period is to be calculated. Prior to October 19, 1995 (see Land & Lakes #3 v. IEPA (October 19, 1995), PCB 96-77) the Board, with the Agency's concurrence, had held that the 90-day period was to begin 35 days after the date of the Agency's denial action, providing for a total of 125 days between the denial action and the last permissible date to file an appeal of the denial. In Land and Lakes #3, however, the Board revisited the issue and found that the more consistent interpretation was that the 90-day period should be counted as beginning with the date of denial, thus allowing for a total of only 90 days between the denial action and the last permissible date to file an appeal of the denial action.

In making its determination in Land & Lakes #3, the Board fully envisioned the situation presented by the instant case, noting that "in the future, the Board will grant extensions allowing for appeal no later than 90 days from the date of the Agency final determination at issue" (emphasis added). Therefore the revised interpretation was to be understood as prospective in application, not retrospective. The Board will not here alter that decision.

The Board also can not help but observe that it was upon the motion of the Agency itself that the 125-day (35 + 90) extension was originally granted in the instant proceedings. The actual language of the Agency request was "the 35-day period for petitioning for a hearing on a permit denial decision issued by the Agency on February 27, 1995, will be extended for period of 90 days" (Agency filing of April 2, 1995 at p. 1). This was most clearly a request for a 35 + 90 day extension, as was understood by the Agency, by the Board, and by West Suburban, and upon which all relied.

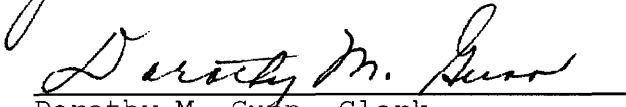
We find it disingenuous on the part of the Agency that it now reverses itself to contend that only a 90-day extension should have been allowed. The Board will not be party to this hypocrisy. The Agency's motion for summary judgment with regards to subject matter jurisdiction is accordingly denied.

The Agency raises several other arguments upon which it contends summary judgment is warranted. The Board finds that with each of these arguments there are genuine issues of material fact that mitigate against summary judgment at this time. The Agency's motion for summary judgment on all remaining issues before the Board is accordingly denied.

The Board would also note that on January 26, 1996 the hearing officer denied the Agency's January 25, 1996 Emergency Motion to Reconsider Ruling on Agency's Motion to Quash Notice to Appear at Deposition [of Bharat Mathur] and Emergency Motion for Stay Pending Order on this Motion. This motion has been ruled upon by the hearing officer. The Board will not disturb the hearing officer's ruling.

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 1st day of February, 1996, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board