

ILLINOIS POLLUTION CONTROL BOARD
January 11, 1995

MONTGOMERY WARD & CO.,)	
INCORPORATED,)	
)	
Petitioner,)	
)	
v.)	PCB 94-289
)	(UST Fund)
ILLINOIS ENVIRONMENTAL,)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by C. A. Manning):

On October 11, 1994, Montgomery Ward & Co., Incorporated (Montgomery Ward) filed by personal delivery a petition for review of an Illinois Environmental Protection Agency (Agency) final reimbursement determination from the Underground Storage Tank Fund (UST). The Board on October 20, 1994 dismissed this matter for lack of jurisdiction, finding that Montgomery Ward failed to appeal the Agency determination within the 35-day statutory period to appeal pursuant to Section 40 of the Environmental Protection Act (Act). (415 ILCS 5/40 (1992).) On November 9, 1994 Montgomery Ward filed a motion for reconsideration of that order.

Montgomery Ward argued in its motion that in addition to the language in the state voucher, which is the Agency's final determination on a UST Fund reimbursement, that states "[f]or the purposes of appeal, this voucher constitutes the Agency's final decision as of the date the check was issued by the Comptroller", "Attachment A" to the state voucher contains the following language:

The attached invoice constitutes the Agency's final decision on your leaking underground storage tank bill. You may appeal this decision to the Illinois Pollution Control Board (Board) pursuant to Section 22.18(b)(g) and Section 40 of the Illinois Environmental Protection Act. You have 35 Calendar days from the date the Comptroller mails the accompanying check to file a petition for a hearing with the Board ((35 Ill. Adm. Code 105.102(a)(2)).

Montgomery Ward contends that it contacted the Warrant Distribution Section of the Comptroller's office and ascertained that the check was mailed on September 6, 1994. Montgomery Ward argues that, following the Board's procedural rules the 35-day period began on September 7, 1994 and ended on October 12, 1994

thus making Montgomery Ward's appeal timely.

The Agency filed a response to Montgomery Ward's motion for reconsideration on November 23, 1994. The Agency response reiterated the Board's procedural rules on the computation of time and argues that the appeal is untimely. The Agency also points to previous Board decisions where the Board calculated the 35-day period for time to appeal from the date of issuance of the Comptroller's check. However, the Agency does not respond to the conflicting statements made in its final determination letter.

However, Montgomery Ward failed to supply the Board with an affidavit attesting to the facts alleged, i.e., that the Comptroller mailed the check on September 6, 1994. Therefore, instead of ruling on the motion, the Board directed Montgomery Ward to file the appropriate affidavit within 21 days from the date of the December 1, 1994 order together with a waiver of the decision deadline or alternatively a 120-day extension of such deadline. On December 19, 1994 Montgomery Ward filed the supporting affidavit and a 120-day extension of the decision deadline. For the reasons stated below we grant Montgomery Ward's motion for reconsideration and set this matter for hearing.

The Board's procedural rule at 35 Ill. Adm. Code 105.102(a)(2) concerning permit appeals provides that such a petition for hearing shall be filed with the Board "within 35 days of the date of mailing of the Agency's final decision."¹ The Board has in the past determined that "date of mailing" is the date of issuance of the Comptroller's check. (David Geuther and Fehr-Graham & Associates v. Illinois Environmental Protection Agency, (February 3, 1994), PCB 93-232 and PCB 94-53 cons.) However, the Board has also determined that petitioner may demonstrate that the "date of mailing" actually occurred after the date of the Comptroller's check. (City of Elgin v. Illinois Environmental Protection Agency, (February 3, 1994) PCB 93-246.) In Geuther, the Board noted reservations that the Agency's obligation to make a final determination, which cannot be amended, is extended while the invoice voucher is awaiting payment by the Comptroller. (David Geuther and Fehr-Graham & Associates v. Illinois Environmental Protection Agency, (February 3, 1994), PCB 93-232 and PCB 94-53 cons.) We are equally concerned that the petitioner's statutory appeal period may be

¹Section 22.18b(g) of the Act (415 ILCS 5/22.18b(g) (1992)) provides that appeals of Agency reimbursement decisions are governed by Section 40 of the Act. (415 ILCS 5/40 (1992)) Section 40 of the Act sets forth the procedure by which a permit applicant may appeal to the Board the Agency's determination of the applicant's permit.

shortened as the result of the Comptroller's office delaying the mailing of the check after its issuance date. Therefore, the issuance date of the Comptroller's check is the "date of mailing" for the purposes of calculating the 35-day statutory period, unless petitioner demonstrates otherwise as Montgomery Ward has here.

Thus, the Agency's final determination was made on September 6, 1994, the date the Comptroller's office mailed the final decision. The Board's procedural rule at 35 Ill. Adm. Code 101.109 states:

Computation of any period of time prescribed by this Chapter or the Act shall begin with the first calendar day following the day on which the act, event or development occurs and shall run until the end of the last day, or the next business day if the last day is a Saturday, Sunday or national or state legal holiday.

Therefore, the 35-day period for Montgomery to file an appeal with the Board began on September 7, 1994 and ended on October 11, 1994. Montgomery filed by personal service on October 11, 1994, thus making this appeal timely. The Board accordingly vacates its order of October 20, 1994.

This matter is accepted for hearing. The hearing must be scheduled and completed in a timely manner, consistent with Board practices and the applicable statutory decision deadline, or the decision deadline as extended by a waiver. (Petitioner may file a waiver of the statutory decision deadline pursuant to 35 Ill. Adm. Code 101.105). The hearing officer shall assign a hearing officer to conduct hearings. The Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

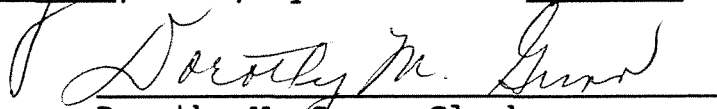
The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. Any briefing schedule shall provide for final filings as expeditiously as possible and, in time-limited cases, no later than 30 days prior to the decision due date, which is the final regularly scheduled Board meeting date on or before the statutory or deferred decision deadline. In this case, the statutory decision deadline is July 14, 1995.²

²We note that petitioners filed an extension of the decision deadline in this case when it filed its affidavit in support of

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible. The Board notes that Board rules (35 Ill. Adm. Code 105.102) require the Agency to file the entire Agency record of the permit application within 14 days of notice of the petition.

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 17th day of January, 1995, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

its motion for reconsideration. Montgomery Ward provided the Board with a 120-day extension of the decision deadline, which was March 16, 1995, now making the decision deadline July 14, 1995. The decision due date for this case will be the regularly scheduled Board meeting preceding July 14, 1995.