

ILLINOIS POLLUTION CONTROL BOARD  
January 9, 1992

O'BRIEN TIRE AND BATTERY )  
SERVICE, )  
 )  
Petitioner, )  
 )  
v. ) PCB 91-212  
 ) (Underground Storage Tank Fund  
 ) Reimbursement Determination)  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
 )  
Respondent. )

ORDER OF THE BOARD (by B. Forcade):

On November 6, 1991, O'Brien Tire and Battery Service filed a letter with attachments which purports to be an appeal of an August 1, 1991 Agency underground storage tank fund reimbursement determination. The letter was not accompanied by the \$75.00 filing fee specified in Section 101.120(b) of the Board's procedural rules and 7.2 of the Act.

On November 13, 1991, the Agency filed a motion to dismiss this appeal on the grounds that it was untimely filed.

Due to alleged confusion surrounding the November 6 filing, by Order of November 21, 1991 the Board granted O'Brien 30 days in which to file an amended petition and the filing fee, as well as to address timeliness issues raised in the Agency's November 13 motion. Consistent with the November 21 Order, on December 18, 1991 O'Brien filed an amended petition as well as a response to the Agency's motion to dismiss.

For the reasons outlined below, the Agency's motion to dismiss this action as untimely filed is hereby granted.

As the Agency correctly notes, the statutory basis for commencement of this action is Section 22.18b(g) of the Act which provides for appeals of Agency Underground Storage Tank (UST) Fund Reimbursement determinations "in the manner provided for the review of permit decisions in Section 40"; Section 40 states in pertinent that "the applicant may, within 35 days, petition for a hearing". Ill. Rev. Stat., ch. 111 1/2, pars. 22.18b(g) and 40(a)(1). It is undisputed that the Agency made its UST determination in a letter dated August 1, 1991 addressed to Mr. Earl Buenger. The Agency determined that some costs were reimbursable, but that others were not. The reimbursable amount was determined to be \$132,404.80,

less a \$10,000 deductible. Ineligible costs were determined to be \$14,742.82. This letter, mailed August 2, 1991, clearly stated that:

As a result of the Agency's review, a voucher for \$107,661.98 has been prepared for submission to the Comptrollers Office for payment. This constitutes the Agency's final action with regard to the above invoices. An underground storage tank owner or operator may appeal this decision to the Illinois Pollution Control Board (Board) pursuant to Ill. Rev. Stat. 1989, Chap. 111 1/2, Para. 1022.18B(g) and 1040. An owner or operator who seeks to appeal the Agency decision shall file a petition for a hearing before the Board within 35 days of the date of mailing of the Agency's final decision (35 Ill. Adm. Code 105.102(a)(2)).

Any appeal of this decision was accordingly due to be filed with the Board on or before September 6, 1991. No such appeal was filed.

However, by letter dated September 10, 1991, to the Agency's Ms. Angela Tin, O'Brien's environmental consultant, Joseph C. Welsch expressed disagreement with the Agency's cost computations. Ms. Tin responded to this letter by a letter of September 18 addressed to Mr. Buenger. The Agency's letter noted its receipt of the September 10 letter (from Mr. Welsch) "requesting a reconsideration" of the reimbursement amount and restated its determination made in the August 1 letter that the reimbursement amount was \$107,661.98. The letter went on to say that:

In the same letter, you were notified of your right to appeal the Agency's decision. Appeals must be made to the Illinois Pollution Control Board. Please refer to the August 1, 1991, letter if you wish to file an appeal.

On September 25, 1991, Mr. Welsch sent a letter addressed to:

Illinois Environmental Protection Agency  
Illinois Pollution Control Board  
P.O. Box 19276  
Springfield, IL 62794-9276

In this letter, Mr. Welsch expressed O'Brien's wish "to appeal the reimbursement amount" and requested advice as to the forms and procedure necessary to "formally appeal" the determination.

The Board has no record of receipt of the September 18, 1991 letter.

On November 6, 1991, the Board received a letter directed to the Clerk from Mr. Welsch. The letter referenced the above described correspondence, and noted that an Agency attorney had

telephoned late during the week of October 28 in response to the September 25 letter, advising:

that the ICPB was located in Chicago, that I should contact Ms. Adeline Hogan for further more specific information on appeals, and that O'Brien was probably too late to register their appeal.

This is why I am writing to you. I believe that a good faith effort was made to meet the time limits specified for appeals, and thus our attempt to appeal should be permitted.

In its motion to dismiss, the Agency argues that this appeal is time-barred. The Agency notes that:

It is well settled that a party seeking review of an administrative decision must act within the time allotted by the particular statute. An identical time period of thirty-five days is provided for the commencement of actions under Section 3-103 of the Administrative Review Act. The case law is clear that this limit is a jurisdictional requirement and cannot be waived. See e.g., Fredman Brothers Furniture Co., Inc. v. Illinois Department of Revenue, 129 Ill. App. 3d 38, 471 N.E. 2d 1037, (1984); Matter of Crotty, 115 Ill. App. 3d 248, 450 N.E. 2d 399, (1983); Robinson v. Regional Board of School Trustees, Randolph County, 130 Ill. App. 3d 509, 474 N.E. 2d 1356, (1985).

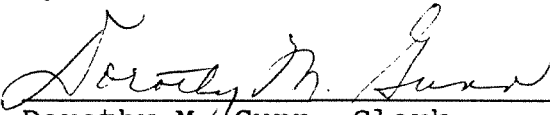
In response, O'Brien argues through its attorney that this is not an appeal of a permit, that Section 22.18b(g) and 40(a)(1) of the Act refer only to permit appeals, that there are no regulations governing the "procedure for negotiating conflicting opinions as to reasonability or necessity of agency requirements and determinations", and that the file in the matter reflected a good faith attempt by O'Brien's project matter to resolve this matter with the Agency. O'Brien asserts that it is "totally understandable how a non-lawyer could be confused and that there would be a substantial passage of time", given the efforts the attorney made in his first attempt to solve the matter in terms of locating the Board and requesting information from the Board and the Agency. In support of its claim that this case should proceed, O'Brien further cites Wildwood Ind. v. Ill. Human Rights Comm., 162 Ill. Dec. 546, 580 N.E. 2d 172 (1991) as holding that the limitation for filing a complaint was directory only and not mandatory. O'Brien concludes that "petitioner should not be deprived of due process based strictly on a technicality".

The Board is not persuaded by O'Brien's arguments. Contrary to O'Brien's assertion, Section 22.18b(g) specifically states that if, as here, the Agency authorized only a partial reimbursement (as was the case here), the owner or operator may petition the Board for a hearing "in the manner provided for review of permit

decisions in Section 40"; the Board's permit appeal procedural rules have been on file with the Secretary of State since 1978. The Wildwood case cited by O'Brien for the proposition that the 35 day appeal period of Section 40 is directory and not mandatory is inapposite to the instant case. While a 300 day filing deadline was ruled directory in Wildwood, the statute being construed was determined to be ambiguous, having been twice amended in response to rulings by both the Illinois and United States Supreme Courts. The court made extensive use of legislative history in attempting to construe the statute. 580 N.E. 2d at 175-177. In contrast, the 35 day filing deadline of Section 40(a)(1) has remained unchanged since the adoption of the Act. Petitioner was advised of that deadline in the Agency's letter of August 1. O'Brien did not even file its September 10 letter with the Agency during the 35 day period.<sup>1</sup> Under these circumstances, the Board has no choice but to dismiss the petition as untimely filed.

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 7<sup>th</sup> day of January, 1992, by a vote of 6-0.

  
 Dorothy M. Gunn, Clerk  
 Illinois Pollution Control Board

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<sup>1</sup> The Agency has no statutory authority to reconsider permit decisions. Reichold Chemicals v. PCB, 204 Ill. App. 3d 674, 561 N.E. 2d 1343 (1990). When the Agency denies an application, the applicant's only options are to start over with a new application to the Agency or to petition the Board for review.