

ILLINOIS POLLUTION CONTROL BOARD  
December 3, 1992

SOUTHERN FOOD PARK, INC.,	)	
an Illinois Corporation,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-88
	)	(Underground Storage
ILLINOIS ENVIRONMENTAL	)	Tank Reimbursement)
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by B. Forcade):

On November 30, 1992<sup>1</sup>, the Environmental Protection Agency (Agency) filed a motion to file its final brief in this matter instant. On December 2, 1992, Southern filed a response to the Agency's motion to file instant.

At the completion of hearing on October 7, 1992, the hearing officer determined that petitioner's final brief was due November 10, 1992 and the respondent's brief was due November 17, 1992. The Agency filed its final brief in this matter two weeks after the scheduled due date. The decision deadline in this case is December 22, 1992, therefore this case is to be decided by the Board at its December 17, 1992 meeting.

The Agency indicates that it is late in filing the final brief due to other assigned duties, word processor failure and family illness. In its motion the Agency notes that it is in the best interest of the Board to be fully apprised of the issues and arguments of both parties as set forth in their respective briefs. The Agency also contends that the petitioner has been informed of the delays the Agency has encountered in filing its brief and has raised no objection.

On December 2, 1992, Southern Food Park, Inc. (SFPI) filed a response to the Agency's motion to file instant. SFPI requests that the Board deny the motion to file instant or in the alternative to allow two weeks for petitioner to file a reply brief to mitigate the undue prejudice created by the extra time taken by the Agency to file its brief.

SFPI notes that its final brief was filed in accordance with the briefing schedule set at hearing. In its response, SFPI

<sup>1</sup>This motion was date-stamped on December 1, 1992. However, 35 Ill. Adm. Code 101.102(d) provides that if a document is received after the due date, the date of mailing shall be deemed the date of filing.

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mentions that the attorney for respondent was in contact with its attorney on several occasions informing them of additional delays in filing the brief but had informed them that the brief would be filed by November 25, 1992<sup>2</sup>. SFPI notes that the Agency's motion is not supported by affidavit as required by 35 Ill. Adm. Code 101.242(a). SFPI also contends that the Agency fails to state why the brief was not filed on time. SFPI notes that the incidents that the Agency cites for late filing all occurred after the due date of the brief. SFPI also notes that the Agency does not explain why other attorneys who attended the hearing or other Agency personnel were unable to assist in the completion of the brief in a timely fashion. SFPI questions the Agency's need for a brief when the Agency presented no testimony at hearing. SFPI notes that the Board has previously expressed concern over late filings by the Agency. SFPI notes that the Agency also filed the record in this matter after the scheduled due date. SFPI suggests that the Agency does not believe that it is bound by the Board's procedural rules regarding filing deadlines. SFPI further notes that the Board is under no requirement to consider the Agency's brief in its decision. SFPI notes that the record contains sufficient information for the Board to reach its decision.

The Board is troubled by the lateness of the Agency in filing the final brief. The Board is also concerned over the failure of the Agency to meet scheduled deadlines for filings. However, the Board does not find the requests by SFPI appropriate. The Board does not believe that the petitioner was unduly prejudiced by the Agency's delay in filing. The petitioner was allowed 35 days from the hearing to submit its brief. The Agency was allowed an additional seven days to submit its brief. SFPI has presented no specifics on how the Agency benefitted from the additional two weeks it used to file its brief. SFPI merely makes a general argument that any additional time improved the Agency's brief. SFPI has not asserted that the content of the Agency's brief is inappropriate, nor has SFPI asserted that the content of the brief prejudices their case.

The Agency's delay in filing its brief creates an undue burden on the Board. The Agency's late filing deprived the Board of needed time to reach its decision. SFPI's suggestion to not consider the brief would only serve to further hinder the Board's decision process. The Board would be required to reach its determination in this matter without fully considering the arguments of both parties.

SFPI's request for two weeks to reply in order to mitigate any prejudice is impossible for the Board to grant given the decision deadline in this matter. The current decision deadline

<sup>2</sup>The Board notes that November 25, 1992 was the Wednesday before Thanksgiving, therefore, November 30, 1992 was the next working day.

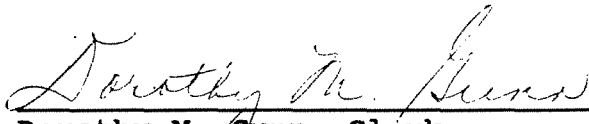
requires the Board to issue a final decision in two weeks. Further, SFPI does not assert that any prejudice is created by its inability to reply to the Agency's brief; SFPI does not present any particular portion of the Agency's brief that would require additional comment.

The Agency's motion to file its brief instanter is granted.

IT IS SO ORDERED.

Board member R. C. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 23rd day of December, 1992, by a vote of 6-1.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

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