

ILLINOIS POLLUTION CONTROL BOARD  
February 7, 1991

FINKS & AUSTMAN, a	)	
partnership,	)	
	)	
Petitioner,	)	
	)	PCB 90-243
v.	)	(Underground Storage Tank
	)	Fund Reimbursement
ILLINOIS ENVIRONMENTAL	)	Determination)
PROTECTION AGENCY	)	
	)	
Respondent.	)	

ORDER OF THE BOARD BY (J. Anderson):

This matter comes before the Board on a January 7, 1991 "Motion to Dismiss" filed by the respondent, Illinois Environmental Protection Agency (Agency). The petitioner, Finks & Austman, filed a "Petition to Contest Decision of Agency" on December 24, 1990. The petition requested a hearing to contest a decision of the Agency to partially reimburse the petitioner for corrective action associated with ownership of underground storage tanks. The petitioner filed a "Response to Motion to Dismiss" on January 15, 1991. For the reasons stated below, the Agency's Motion to Dismiss is granted.

On January 22, 1991, the Agency filed a "Motion for Leave to File Reply" and a "Reply to Petitioner's Response to Motion to Dismiss." In support of its motion for leave to file a reply the Agency stated that the petitioner had misunderstood the case law and law cited, that the Agency's reply would aid the Board and that the Agency's reply would not cause a delay. The Board hereby grants leave to the Agency to file a reply to prevent material prejudice.

In its motion to dismiss the Agency stated that the Board does not have jurisdiction to review this matter because the petition was not timely filed within the 35 day period provided by Section 40(a)(1) of the Illinois Environmental Protection Act (Act) and Section 105.102(a)(2) of the Board's procedural rules. In support of its motion, the Agency filed the affidavit of Cathy Hunter, Office Administrator for the Land Pollution Control Division of the Agency, stating that there was "no reason not to believe that the [denial of reimbursement] letter . . . dated November 2, 1990 was not mailed on November 2, 1990 or on November 5, 1990 at the latest." The Agency stated that the 35 day period, from November 2, 1990, expired on December 7, 1990.

The response of petitioner contained three arguments in support of denial of the motion to dismiss. Petitioner first argued that the respondent had not carried its burden of

establishing the mailing date of the denial letter because no corroborating proof of office custom, proof of service or certificate of mailing was provided. Petitioner cited case law in support of its argument. The Agency reviewed the cases cited by petitioner and maintained that the affidavit of Cathy Hunter and the receipt of the November 2, 1990 letter by the petitioner carried the burden of establishing a mailing date. The Agency also asserts that the corroboration of Cathy Hunter's affidavit is the receipt of the letter by the petitioner and that petitioner has not denied timely receipt. In addition, the Agency had sent prior correspondence to the petitioner without complaints concerning lateness. Upon consideration of these facts and the fact that even if the letter were mailed one week after November 2 the petition would still be late, the Board finds that the petition for review is not timely filed.

The second argument raised by petitioner is that the 35 day requirement does not apply to this matter because the legislature did not include it in 22.18b(g). Section 22.18b(g) provides that the Agency's decision to deny reimbursement or to partially reimburse an owner or operator of underground storage tanks can be reviewed by the Board "in the manner provided for the review of permit decisions in Section 40 of the Act." The petitioner asserts that a comparative reading of Section 22.18b(g) and Section 40(a)(1) of the Act shows that the language is "practically identical" except for the omission of the phrase "within 35 days" in Section 22.18b(g). In addition, petitioner argues that the 35 day limitation in Section 40(a)(1) applies only to review of permit denials because Section 22.18b, unlike Section 39(a), does not require the Agency to notify an owner or operator of a decision. The Agency asserts in its filings that Section 22.18b(g) grants jurisdiction to the Board and states the type of appeal process to be applied. Therefore, once jurisdiction has been established, the Board rules concerning Section 40 permit appeals, which establish the 35 day limit, apply to this matter. (35 Ill. Adm. Code Part 105.) The Board finds that the plain meaning of the statute shows that the 35 day limit of Section 40 is applicable to this matter.

Petitioner's final argument is that under Section 22.18b it is difficult to determine when the 35 day period is to begin. In this matter where a partial reimbursement was authorized, the Agency notified the Comptroller of its decision. The Agency did not notify the petitioner of its decision until after the petitioner wrote to the Agency questioning the partial reimbursement from the Comptroller. The petitioner argues that had the Agency chosen not to respond to petitioner's letter, the 35 day period might have run indefinitely. In reply to petitioner's third argument, the Agency stated that the November 2, 1990 letter was viewed by petitioner as a final decision because it was included in the petition for review. Therefore, the letter started the time period and the petitioner's petition was two weeks late. The Board agrees with the Agency that clear notification of the Agency's decision occurred with the November

2, 1990 letter to the petitioner. Pursuant to Section 105.102(a)(2) of the Board's procedural rules, the 35 day period begins with the date of mailing of the Agency's final decision.

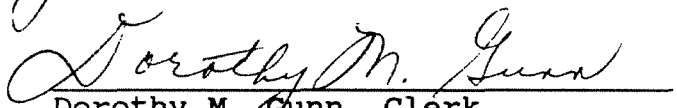
For the reasons stated above, the Board hereby grants the Agency's motion and this matter is dismissed.

The Board notes that the situation presented in this matter could be avoided in the future. The Board, while having no jurisdiction over the Agency procedures, suggests that a letter sent to the owner/operator at the same time the Comptroller is notified would reduce the potential for confusion. Such a letter could follow the requirements for a 39(a) letter and further reduce the potential for confusion. In addition, the Agency might consider sending these letters with proof of service or via certified mail.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

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 February, 1991, by a vote of 6-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board