BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

WEI ENTERPRISES, Petitioner,	)	
v.	)	PCB No. 04-23
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	(LUST Appeal)

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Curtis W. Martin
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123 South 10th Street
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Carol Sudman, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue, East
P.O. Box 19274
Springfield, IL 62794-9274

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO MOTION TO RECONSIDER, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
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217/782-5544
217/782-9143 (TDD)
Dated: January 16, 2004

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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RESPONSE TO MOTION TO RECONSIDER

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500(d) and 101.504, hereby requests that the Illinois Pollution Control Board ("Board") deny the Petitioner's motion to reconsider. In support of this response, the Illinois EPA states as follows:

1. On July 16, 2003, the Illinois EPA issued a final decision to the Petitioner. On July 23, 2003, the Petitioner made a written request to the Illinois EPA for an extension of time by which to file a petition for review, asking the Illinois EPA join in requesting that the Board extend the thirty-five day period for filing a petition to ninety days. The Petitioner did not represent when the final decision was received.

2. On August 20, 2003, the Illinois EPA mailed a request to the Board on behalf of both the Petitioner and the Illinois EPA, asking that the Board grant an extension of time to November 18, 2003, to the Petitioner to file a formal petition as allowed for pursuant to Section 40(a)(1) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/40(a)(1)). The stated purpose of the request was to allow the parties additional time to discuss the matter and either resolve the issues without need of a hearing or to limit the scope of any hearing that may be necessary to resolve this matter.

3. The Illinois EPA clearly stated in the request for additional time that it was counting from the date of the subject final decision, and not the date of service, since the Petitioner did not identify the date upon which the decision was received. The Illinois EPA served a copy of the request for the extension of time upon the Petitioner.

4. On September 4, 2003, the Board issued an order stating that the Illinois EPA's request was timely filed and was approved. Accordingly, the Board ordered that the Petitioner must file a formal petition by no later than November 18, 2003, otherwise the right to appeal the subject final decision would lapse and the Board would dismiss the case.

5. Section 40(a)(1) of the Act and Section 105.406 of the Board's procedural rules (35 Ill. Adm. Code 105.406) was relied upon by the Board in granting the extension. Both those provisions state that an extension of time to file a formal petition may be granted, upon joint request by the parties, for a "period of time not to exceed 90 days." Though the Illinois EPA does not have a written record of the Board's service of the September 4, 2003 order, presumably that order (as are all such orders) was served upon both the Illinois EPA and the Petitioner.

6. On November 19, 2003, the Petitioner sent a formal petition seeking to challenge the subject final decision. On December 4, 2003, the Board issued an order dismissing the case. The Board ruled that, pursuant to its order dated September 4, 2003, the Petitioner did not meet the filing deadline set forth.

7. On December 30, 2003, the Petitioner filed a Motion to Reconsider ("motion") with the Board, asking that the Board reverse its December 4, 2003 order and reinstate the case. The Illinois EPA received service of the motion on January 2, 2004.

8. In its motion, the Petitioner argues that it did not receive a copy of the Board's September 4, 2003 order, setting forth the filing deadline of November 18, 2003. The Petitioner

also argues that, based upon an affidavit included with the motion, the subject final decision was not received by the Petitioner until July 17, 2003. The Petitioner then argues that for computation purposes, the Board should begin counting from July 18, 2003, to determine what the 125th day after the date of service should be. That calculation would result in November 20, 2003, as being the appropriate date for timely filing a petition.

9. The Petitioner's arguments are not compelling. The Petitioner is basing its arguments on the notion that it did not receive service of the September 4, 2003 order, and therefore was not aware of the date selected by the Board. However, the Petitioner did not claim that it did not receive the Illinois EPA's request for the extension of time, in which the date sought for the extension was clearly put forth as November 18, 2003. No objection to that request was raised by the Petitioner.

10. Further, the Board surely followed all necessary and appropriate steps to serve a copy of the September 4, 2003 order upon the Petitioner. The order was received by the Illinois EPA, and therefore there is no reason to believe it was not so received by the Petitioner. Also, it is incumbent upon the Petitioner to follow up on any such request to ascertain whether in fact it did receive an extension of time to file its petition. Even without benefit of a copy of the Board's written order, this could have been done through the Board's website resources.

11. Finally, the method of calculation proposed by the Petitioner is wrong. The Petitioner would have the Board adopt a method such that the 125 days of time would begin counting from the day *after* the date of service, not beginning with the date of service. The Petitioner's method would actually allow for 126 days after the date of service, which is not allowed for.

12. The Petitioner failed to raise any timely objection or concern regarding the content of the Board's September 4, 2003 order, such that the Petitioner is arguing that it never bothered to learn whether it did in fact receive an extension of time to file a petition. Further, the Board's order is clear and sets forth a date no longer than 90 days from the date of service of the final decision; notably, the language of Section 40(a)(1) of the Act and Section 105.406 allows for an extension to a date up to, and possibly less than, 90 days from the date of service. The extension simply cannot be for a longer period of time.

13. The Petitioner's failure to follow up on the Board's September 4, 2003 order and untimely presentation of arguments should be disregarded. The Board should affirm its order entered on December 4, 2003.

WHEREFORE, for the reasons stated above, the Illinois EPA respectfully requests that the Board deny the Petitioner's motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John T. Kim
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Special Assistant Attorney General
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1021 North Grand Avenue, East
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217/782-5544
217/782-9143 (TDD)
Dated: January 16, 2004

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on January 16, 2004, I served true and correct copies of a RESPONSE TO MOTION TO RECONSIDER, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
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