

ILLINOIS POLLUTION CONTROL BOARD

February 19, 2004

WEI ENTERPRISES,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 04-23
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

This matter is before the Board on a January 5, 2003 motion to reconsider filed by Wei Enterprises (Wei). On December 4, 2003, the Board issued an order that dismissed this case and closed the docket after finding that the Board lacked jurisdiction in this matter because the appeal was filed after the end of the extension period specified in a September 4, 2003 order.

For the reasons articulated below, the Board grants Wei's motion to reconsider, but affirms its December 4, 2003 decision.

**BACKGROUND**

On August 27, 2003, the parties filed a joint request for an extension of the appeal period, asking the Board to extend the appeal period to November 18, 2003. On September 4, 2003, the Board granted the parties' joint request, and extended until November 18, 2003, the time period within which Wei could appeal a July 16, 2003 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2002); 35 Ill. Adm. Code 105.406. At issue is the Agency's approval of the high priority site investigation corrective action plan, with modifications, for Wei's leaking underground petroleum storage tank facility located at 529 Maple Street, Shiloh, St. Clair County.

On November 19, 2003, Wei sent a petition and the requisite number of copies via the U.S. mail for filing and service. The Board received the petition on November 21, 2003. On December 4, 2003, the Board found that it lacked the jurisdiction to consider an appeal filed after the time specified in Section 40(a)(1) of the Environmental Protection Act (Act). Wei v. IEPA, PCB 04-23 (Dec. 4, 2003), slip op. at 1, *citing* Naperville Radiator Services v. IEPA, PCB 01-4 (Sept. 7, 2000); Panhandle Eastern Pipe Line Company v. IEPA, Ill. App. 3d, 2000 (4th Dist. June 5, 2000). The Board dismissed the case and closed the docket.

On January 5, 2004, Wei filed the instant motion. The Agency filed its response on January 20, 2004.

### **MOTION TO RECONSIDER**

Wei asserts that it was not notified of the September 4, 2003 Board order that extended the appeal period to November 18, 2003. Mot. at 1. Wei argues that 35 Ill. Adm. Code 105.406 provides that a joint request to extend the 35 day period within which to file an appeal extends the appeal period to a period not exceeding 125 days from the date of service of the Agency's final decision. Mot. at 2.

Wei asserts that service by registered or certified mail is deemed complete on the date specified on the mail receipt, but that such presumption can be rebutted by proper proof. Mot. at 2. Wei further asserts that the computation of any period of time prescribed in the rules of the Board will begin with the first calendar day following the day on which the act, event or development occurs and will run until the close of business on the last day. *Id.*

Wei contends that it received the Agency's final decision on July 17, 2003, and that, pursuant to the applicable Board regulations, it had until November 20, 2003, being the 125th day from July 18, 2003, within which to file its appeal. Mot. at 3. Wei argues that since Wei's petition must be deemed to have been timely filed on November 19, 2003, the Board has jurisdiction in this matter, that the Board's order of September 4, 2003, was in contravention of the regulations, and that the Board should reconsider its dismissal of Wei's petition. *Id.*

### **AGENCY'S RESPONSE**

The Agency asserts that it mailed a request to the Board on behalf of itself and Wei asking the Board to grant an extension of time allowing Wei until November 18, 2003, to file a formal petition in this matter. Resp. at 1. The Agency notes that the request clearly states it was counting from the date of the final decision and not the date of service because Wei had not identified the date upon which the decision was received. Resp. at 2. The Agency asserts it served a copy of the request for extension of time on Wei. *Id.*

The Agency contends the Board relied on Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2002)) and 35 Ill. Adm. Code 105.406 in granting the extension, and that both provisions state that an extension of time may be granted upon joint request for a period of time not to exceed 90 days. Resp. at 2.

The Agency argues that Wei's arguments for reconsideration are not compelling. The Agency asserts that although Wei is arguing that it did not receive the Board's September 4, 2003 order and was not therefore aware of the date selected by the Board, Wei did receive the initial request for extension of time in which the date was clearly put forth. Resp. at 3. The Agency asserts that Wei did not raise any objection to the request. *Id.*

The Agency contends that it did receive the September 4, 2003 order, and there is no reason to believe that Wei did not also receive the order. Resp. at 4. The Agency further argues that it is incumbent upon Wei to follow up on any such request to ascertain whether in fact it did receive an extension. *Id.* The Agency notes that even if the Board's order was not received by Wei, this could have been done on the Board's website. *Id.*

The Agency concludes that Wei failed to raise any timely objection regarding the contents of the September 4, 2003 order and never bothered to learn whether it did, in fact, receive an extension of time to file the petition. Resp. at 4. The Agency contends the provisions governing the extension allow for an extension up to, and possibly less than, 90 days. *Id.*

Finally, the Agency concludes that Wei's untimely presentation of arguments and failure to follow up on the September 4, 2003 order should be disregarded and the Board should affirm its December 4, 2003 order. Resp. at 4.

### **DISCUSSION**

In ruling upon a motion for reconsideration, the Board is to consider factors including, but not limited to, error in the previous decision and facts in the record which were overlooked. 35 Ill. Adm. Code 101.246(d). In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (Mar. 11, 1993), the Board stated that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly-discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's previous application of the existing law." Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 572 N.E. 2d 1154 (1st Dist. 1992).

Wei has asserted that it did not receive the Board's September 4, 2003 order extending the filing period in this matter until November 18, 2003. The order in question was sent to Wei and the Agency via first class mail, and neither order was returned to the Board. In addition, the Board notes that Wei has not indicated it has not received any other order in this case. However, in light of Wei's assertion that it did not receive a copy of the Board's September 4, 2003 order, the Board grants the motion to reconsider its December 4, 2003 decision.

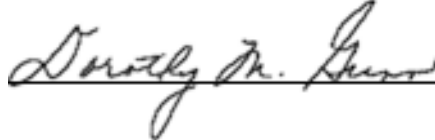
Extensions of the filing period for petitions to review are addressed by section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2002)) and section 105.406 of the Board's procedural rules. 35 Ill. Adm. Code 105.406. Initially, the language of each provision clearly refers to a joint request for extension. The Board notes that each provision is permissive in that it allows to Board to extend the filing period for a maximum of 125 days after the date of service in response to a joint request for extension. In this instance, the parties jointly requested an extension until November 18, 2003. Thus, the Board is not persuaded by Wei's argument that any extension must be granted to a date 125 days after the date of service or by any related arguments concerning how the period of time was calculated.

Further, as the request for extension must be by statute and regulation "jointly filed," the petitioner must necessarily be held accountable for the specifics of the request itself – including the date to which an extension is granted. Thus, the Board agrees with the Agency's assertion that Wei should have some accountability in this matter. Specifically, Wei has the duty to determine whether or not an extension was granted as a result of the joint request. Moreover, if Wei, as alleged, did not receive the September 4, 2003 Board order, it should take the responsibility to inform the Board it did not receive the order at some point prior to the running of the maximum period of extension allowable under the law.

After reconsideration, the Board finds that the September 4, 2003 order was not, as argued by Wei, in contravention of the regulations. Accordingly, the Board affirms its December 4, 2003 decision.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 19, 2004, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board