

ILLINOIS POLLUTION CONTROL BOARD  
March 27, 1986

INTERSTATE POLLUTION )  
CONTROL, INC., )  
 )  
Petitioner, ) PCB 86-19  
 )  
v. )  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

ORDER OF THE BOARD (by J. Anderson):

This Order considers and disposes of the following pleadings: a) Agency motions of February 10, 1986 to dismiss that portion of the petition challenging a December 27 permit denial letter and to strike a portion of the motion accompanying the petition and IPC's reply thereto of February 25 and the supplemental affidavit of March 3, and b) IPC motions of February 3, 1986 (as renewed March 11) to consolidate this petition with PCB 85-155 and for a stay of the effect of the permit denials (a temporary stay entered February 6 expires today) and the Agency reply thereto of February 21.

In summary, the motion to dismiss is denied, the motion to strike is denied, the motion for stay is granted, and the Board on its own motion reconsiders and grants the motion to consolidate.

Motion to Dismiss

Section 40 of the Act provides that, [i]f the Agency refuses to grant, ... a permit..., the applicant may, within 35 days, petition for a hearing". Procedural Rule 105.102(a) provides that such petition shall be filed "within 35 days of the date of mailing of the Agency's final decision".

The Agency denial letter is dated December 27, 1985; the Agency asserts, supported by the affidavit of Ruth Allen, that the letter was caused to be placed in the U.S. mail that day for delivery via certified mail. Although no evidence of the date of postmark has been placed in this record, the Board will assume for the purposes of this discussion that the mailing date and the postmark date are the same: December 27.

Computing the 35 day appeal period pursuant to Ill. Rev. Stat., 1983, ch. 1, par. 1012 "Time, Computation of", appeal of this denial was due to be filed January 31, 1986. IPC's original certificate of service indicates that a certified copy of the

petition was mailed to the Agency on January 31, 1986; its supplemental certificate of March 3 indicates that a copy was dispatched to the Board on January 31 via Federal Express, and delivered to the Board on February 3, the first business day following Friday, January 31.

The Agency correctly notes that the Board has considered the date of filing to be the date of receipt of a petition by the Board. The Agency therefore asserts that since the petition was received beyond the limits of the 35 day time period, that it is time barred, and that the time limit is a jurisdictional one which cannot be waived. For these reasons, the Agency advocates dismissal.

The relevant portion of IPC's response is that "mailed is filed". IPC asserts that, by implication, in adopting Sections 105.102, 103.122 and 103.123 of the Procedural Rules, the Board has adopted the so-called "mailbox rule" contained in Supreme Court Rule 373. Section 105.122 provides that filings in permit appeals shall be done in accordance with Sections 103.122 and 103.123. These rules, contained in Part 103 "Enforcement Proceedings" speak of commencement of such actions by "service of notice" and initiation of certified mailing. Supreme Court Rule 373 provides in pertinent part that

"Unless received after the due date, the time for filing records, briefs or other paper to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court. If received after the due date, the time of mailing shall be deemed the time of filing...."

The Board rejects IPC's assertion that it has adopted the mailbox rule in Section 105.122 by its cross-reference to the enforcement rules. As there are no statutory deadlines for the initiation of enforcement cases, IPC's assertion that the Board contemplated a "savings clause" to prevent the loss of a cause of action due to the Board's receipt of a filing after expiration of a statutory time period is not persuasive.

Next, as a matter of policy, IPC argues adoption of the mailbox rule on the grounds that "inasmuch as the Board is acting as a reviewing court, it is appropriate that its practice should be consistent with that of the State's other reviewing courts."

On a theoretical level, the Board agrees that there is merit to establishing consistency of rules of practice between the appellate courts and the Board in matters in which the Board acts as a reviewing court. However, on a practical level the Board labors under statutory decision deadlines which do not apply to the courts, deadlines which the Board already finds to be uncomfortably snug. Once the decision timeclock is started, a "mailed is filed" rule can prejudice the Board Members' ability

to deliberate issues, thus, the Board declines to make a wholesale adoption of the mailbox rule.

On the other hand, one of the main purposes of the Act is to assure easy access to the Board for resolution of environmental disputes, a purpose which could be frustrated where delays in the Board's receipt of an initial pleading may occur for reasons beyond a litigant's control. The Board also notes that, in the case of permit appeals, a permittee's 35 day time period for review of an Agency determination and initiation of an appeal is truncated at both start and finish by any delays in mail service.

The Board notes the Agency's argument that the mailbox rule of Supreme Court Rule 373 may not be used to extend the time for the filing of an appeal. The Agency asserts that the factual situation here is nearly identical "to that in Schneider v. Vine Street Clinic (1979), 77 Ill. App.3d 946, 397 N.E. 2d 194. There, the lower court entered an order of dismissal on December 27, 1978. Therefore, the 30-day period within which a notice of appeal must have been filed pursuant to Supreme Court 303(a) expired on January 26, 1979. On Friday, January 26, 1979 (the last day) the plaintiffs deposited the notice of appeal in the United States mail, addressed to the clerk of the circuit court. The circuit clerk file stamped the notice of appeal on Monday, January 28, 1979. The court dismissed the appeal saying (of Rule 373) that "(n)o rule providing for the use of mail undertakes to modify the mandatory language of Supreme Court Rule 303(a)."

The Board finds this case to be distinguishable from the situation here. The language of Supreme Court Rule 303(a) is specific mandatory, as the notice "must be filed with the clerk of the circuit court". By contrast, Section 40 of the Act provides that an applicant "may, within 35 days, petition for a hearing". The Board believes this language to be capable of interpretation as to what constitutes a timely petition.

Therefore, on balance, the Board believes that adoption of a limited version of the "mailbox rule" is appropriate: as to actions which must be commenced by a person within a statutorily defined time period, the Board will deem the initial pleading to be timely received if the accompanying certificate of service states that service was commenced before the expiration of the statutory period. However, the Board will continue to calculate its own decision period as commencing the day after the Board's actual receipt of the petition.

The Board will deem the February 3 petition as timely received on January 31. The Agency's motion to dismiss is therefore denied.

Motion to Strike and Motion for Stay

The Agency moves to strike, on the grounds that the following assertion made on page 12 of IPC's motion for stay is unsupported by the record or affidavit:

"Apart from evidence to be adduced by IPC's own witnesses, it is anticipated that witnesses for the Rockford Sanitary District who had candidly agreed that IPC's discharge at its present levels of "trace solvents" has no impact on the Rockford Sanitary District." (sic - appears as sentence fragment in the original)

IPC responds that no statements are supported by the record, since the record is not yet filed. The Board notes that this filing is close to a month overdue. IPC further notes that the statement should be in the Agency record, but that in any event the intent was to summarize evidence IPC would present at hearing.

The Agency correctly states the legal principal that evidence in support of a motion should be drawn from the record or supported by affidavit. IPC is correct that it is impossible for the Board to determine what is in an unfiled Agency record. The better practice would have been to support the motion with an affidavit. The motion to strike is granted

As to the merits of the motion for stay, the Agency believes that petitioner has not made an adequate showing that a) it is likely to prevail on the merits of its appeal and b) denial of stay would cause irreparable harm, although the Agency does not assert that grant of a stay will cause harm to the environment. On the issue of harm, the gist of the Agency's argument appears to be that denial of a stay will not irreparably prejudice IPC, since it would not be shutdown, and could continue to operate without permits, subject of course to enforcement liability. Concerning likelihood of success on the merits, the Agency's argument is that a) the operating permit denial was untimely filed--an argument rejected by the Board and b) the supplemental permit renewal applications were filed with the Agency less than 90 days from the date of their expiration, and the Agency has authority to require additional analyses. On this latter point, IPC challenges the reasonableness of the Agency's request, for various reasons.

The motion for stay is granted. The Board reiterates the findings made concerning a similar motion in PCB 85-155:

"In support of its motion for stay of the effect of these denials, IPC asserts that it "will suffer almost complete devastation of [it's] business if not permitted to remain in operating pending the outcome of the proceedings", and that there will be "severe

inconvenience to customers who have made no alternative provisions for waste removal". IPC's petition contains various exhibits, but especially Exh. 15, indicating that concentrations of solvents in its recent water discharge are below 19.2 parts per million. The Board finds that the severe economic harm to IPC and its customers greatly outweighs any apparent harm to the environment, and accordingly grants the stay. Pending resolution of these appeals, IPC shall comply with the conditions of the expired ... permits.

In so ruling, the Board has accepted the accuracy of IPC's exhibits only for this limited purpose, given lack of Agency objection as to IPC's likelihood of prevailing on the merits, the Board finds only that a sufficient showing has been made given its findings concerning the relative economic and environmental harms here asserted."

Motion To Consolidate

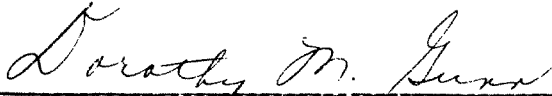
In its February 26 Order, the Board denied the motion to consolidate this case with PCB 85-155, to avoid delaying the start of the hearing in that case which was scheduled for February 27. Unbeknownst to the Board at that time, the hearing was canceled on February 26 and rescheduled for May 15. Pursuant to IPC's motion of March 11, the Board is therefore reconsidering the motion to consolidate, and reverses its earlier ruling. The motion to consolidate is granted.

IT IS SO ORDERED.

R. Flemal concurred.

B. Forcade, J. Marlin and J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 27<sup>th</sup> day of March, 1986, by a vote of 4-3.

  
\_\_\_\_\_  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board