

ILLINOIS POLLUTION CONTROL BOARD  
March 16, 1990

NATIONAL ENVIRONMENTAL	)	
SERVICES CORPORATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 89-129
	)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a motion for extension of time filed on February 26, 1990 by National Environmental Services Corporation ("NESC") in connection with a petition filed by NESC to contest permit conditions imposed by the Illinois Environmental Protection Agency ("Agency"). Hearing was held on December 13, 1989, at which time a briefing schedule was entered requiring that the parties' briefs be filed by January 19, 1990 and that reply briefs be filed by February 2, 1990. The Agency filed its brief on January 19, 1990. NESC failed to file its brief on January 19, and failed to file a reply to the Agency's brief on or before February 2. On February 22, 1990 the Board issued an order stating that the Board would dismiss this matter on March 8, 1990 unless NESC filed appropriate and supportable documents by March 6, 1990.

The motion filed by NESC on February 26, 1990 requests an extension of time until March 31, 1990 to file its brief. In support of its request NESC asserts that it had been unable to obtain a copy of the transcript of the hearing. NESC also provided an unqualified waiver of the decision deadline until 120 days after the current deadline of March 31, 1990.

The Agency filed its response to petitioner's motion for extension of time on March 2, 1990, requesting that the Board deny the motion for extension of time. The Agency protests that NESC has not supported its claim concerning the transcript with any documents, correspondence or affidavits and that NESC has not shown that it made a diligent or good faith effort to obtain the transcript. The Agency states that it would be unfairly prejudiced if NESC is permitted to file its brief at this late time, having had the benefit of all of the Agency's legal theories and arguments, when in fact briefs were due simultaneously to prevent any undue advantage.

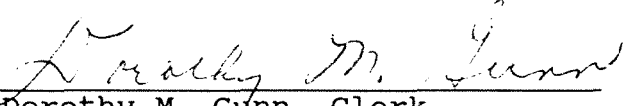
The Board agrees in certain respects with the Agency that NESC has submitted an inadequate basis for its motion for extension of time. The Board also is concerned that NESC may have secured an unfair advantage over the Agency by not submitting its briefs when simultaneously due. However, the Agency requested sanction (denying NESC the right to file a brief) would still leave the Board with the obligation to decide the case, but without the benefit of legal argument from one of the parties. A requirement that the Board correctly decide the case without benefit of informed argument by the parties would punish the Board, not the late filing party.

Further, this case does not present the severity of conduct which would justify severe sanctions. In Modine Manufacturing Company v. PCB, 548 N.E.2d 1145, \_\_\_ Ill. App. 3d \_\_\_, 139 Ill. Dec. 589 (Second District, 1990), the court found that the Board could impose severe sanctions such as dismissal, "...only in those cases where the actions of a party show deliberate, contumacious, or unwarranted disregard of the [Board's] authority." Here, while there was an untimely late filing by NESC, such filing was made by NESC's affirmative conduct (without ignoring repeated requests from the Board) and was accompanied by a motion for extension of time. In this sense, this case presents a substantially different set of facts from those presented in Modine.

Since the decision deadline has been substantially extended by NESC, the Board will grant the motion for extension of time to file its brief. NESC's brief will be due on March 30, 1990. The Agency is given leave to file a reply brief on or before April 30, 1990. No other briefs shall be filed.

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 16<sup>th</sup> day of March, 1990 by a vote of 7-0.

  
 Dorothy M. Gunn, Clerk  
 Illinois Pollution Control Board