

ILLINOIS POLLUTION CONTROL BOARD  
May 11, 1989

IN THE MATTER OF )  
 )  
ESG WATTS, INC. ) AC 89-38  
 )  
Respondent. )

ORDER OF THE BOARD (By J. Marlin):

This matter comes before the Board upon an April 21, 1989 filing of a Motion to Vacate Default Order and Dismiss Action by the Illinois Environmental Protection Agency (Agency). In its motion, the Agency states that it previously filed a different administrative citation action against Respondent for its facility in Mercer County, PCB docket No. AC 89-63 (Mercer County). Later, the Agency filed another administrative citation against Respondent for its facility in Rock Island County, PCB docket No. AC 89-38 (Rock Island County)\*.

Subsequent to filing both actions, the Agency had a telephone conversation with counsel for Respondent for Rock Island County. During this conversation, the Agency inadvertently gave counsel for Respondent the wrong Mercer County docket number, AC 89-63, instead of the correct Rock Island County docket number, AC 89-38. The Agency states that presumably, counsel for Respondent had no prior knowledge of the Mercer County action, AC 89-63. Counsel for Respondent used the incorrect Board docket number in his Petition for Review caption. Due to the absence of a Petition for Review for Rock Island County, AC 89-38, the Board entered an Order on April 6, 1989 finding Respondent in violation upon default.

Believing the Agency may have prejudiced Respondent's case, the Agency is making this motion to request the Board to vacate the April 6, 1989 Default Order for Rock Island County, AC 89-38, and dismiss this cause.

In addition to the facts stated in the Agency's motion, the Board notes the following facts. Although the Petition for Review caption contained the incorrect Board docket number, the caption contained the correct Agency docket number for Rock Island, IEPA NO. 9472-AC. The Board also notes that Counsel for Respondent mailed the Petition for Review intended for Rock Island, AC 89-38 on April 3, the default date for AC 89-38. Pursuant to the mailbox rule, the Petition for Review was timely

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\* The Board merely notes that AC 89-63 was not filed before AC 89-38 because Board docketing is done chronologically. A case with a number 38 would have been filed before a case with a number 63.

filed. See, Interstate Pollution Control Board, PCB 86-19, March 27, 1986 and Moore et. al. v. Wayne County et. al., ("Daubs I"), PCB 86-197, November 20, 1986.

The law governing administrative citations is Section 31.1(d)(1) of the Environmental Protection Act. It provides:

If the person named in the administrative citation fails to petition the Board for review within 35 days from the date of service, the Board shall adopt a final order which shall include the administrative citation and findings of violations as alleged in the citation and shall impose the penalty specified in subdivision (b)(4) of Section 42.

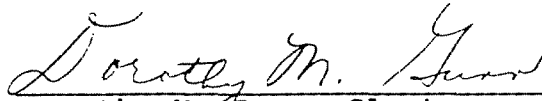
Ill. Rev. Stat. 1987, ch. 111  
1/2, par. 1031.1(d)(1).

The Board believes in strict adherence to this clearly stated mandate, as stated in In the Matter of John R. Vander, AC 88-99, March 9, 1989. However, a special circumstance in this case warrants an exception. The special circumstance is that counsel for Respondent presumably did not know or have reason to know that the docket number given to him by the Agency was incorrect. Therefore, counsel for Respondent could not foresee that as a result of this incorrect information, the Board would find Respondent in violation upon default.

Therefore, due to the special facts in this case, the Agency's motion is granted. The Default Order entered April 6, 1989 is vacated and this case is dismissed. However, the Board notes that dismissal is not the only possible course of action. The Board could have vacated the Default Order and construed ESG Watts' petition as timely filed. The case could have then proceeded as a contested administrative citation.

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 11th day of May, 1989, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board