

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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MAR 01 2005

STATE OF ILLINOIS  
Pollution Control Board

ILLINOIS AYERS OIL COMPANY, )  
Petitioner, )  
v. ) PCB No. 05-48  
ILLINOIS ENVIRONMENTAL ) (LUST Appeal)  
PROTECTION AGENCY, )  
Respondent. )

NOTICE

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

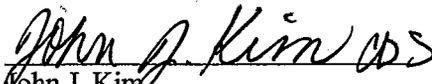
Fred C. Prillaman  
Mohan, Alewelt, Prillaman & Adami  
Suite 325  
1 North Old Capitol Plaza  
Springfield, IL 62701-1323

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 FOR RECONSIDERATION, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent

  
John J. King

Assistant Counsel  
Special Assistant Attorney General  
Division of Legal Counsel  
1021 North Grand Avenue, East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
217/782-5544  
217/782-9143 (TDD)  
Dated: February 28, 2005

**BEFORE THE POLLUTION CONTROL BOARD  
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**RESPONSE TO MOTION FOR RECONSIDERATION  
OR IN THE ALTERNATIVE, FOR EXTENSION OF TIME TO FILE APPEAL**

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, 520 and 522, hereby requests that the Illinois Pollution Control Board ("Board") deny the Petitioner's Motion For Reconsideration Or, In The Alternative, For Extension Of Time To File Appeal ("Petitioner's motion"). In support of this response, the Illinois EPA states as follows:

**I. INTRODUCTION**

On July 28, 2004, the Illinois EPA issued a final decision following its review of a request for reimbursement from the Underground Storage Tank Fund ("UST Fund") submitted by the Petitioner, Illinois Ayers Oil Company ("Ayers Oil"). On August 31, 2004, counsel for the Petitioner sent a setter via facsimile and mail delivery to the Illinois EPA. In the letter, counsel requested that the Board grant a 90-day extension of the time allowed to timely appeal the July 2004 final decision. The letter from Petitioner's counsel and the copy of the final decision received by the Petitioner do not contain any reference or indication of the date the final decision was received.

On September 1, 2004, the Illinois EPA filed, via U.S. Mail First Class delivery, a Request for Ninety Day Extension Of Appeal Period ("request") with the Board. The request

noted that the actual date of service was unknown, but that the earliest date the final decision could have been received was July 29, 2004, or the day after the final decision was sent. The request also noted that, pursuant to Section 40(a)(1) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/40(a)(1)) and 35 Ill. Adm. Code 105.208, the joint request sought up to January 5, 2005, or any other date not exceeding 125 days from the date of service of the Illinois EPA's final decision. The Board received the request on September 3, 2004.

On September 16, 2004, the Board entered an order in response to the request. The Board noted that the postmark date of the joint request was within the time for filing, and thus the request was timely filed. The Board also used the July 29, 2004 date as the basis for calculating the proper time for the ninety-day extension. (The Illinois EPA acknowledges that the January 5, 2005 date referenced in the request was miscalculated.) Thus, the Board granted an extension of time to file an appeal of the final decision to December 1, 2004. The Board stated in the order that if Ayers Oil failed to file an appeal on or before that date, the Board would dismiss the case and close the docket.

On December 1, 2004, the Petitioner sent a petition for the review of the July 2004 final decision to the Board and to the Illinois EPA. The petition was sent via Federal Express overnight delivery. On December 2, 2004, the Board received the petition.

On January 6, 2005, the Board entered an order dismissing the petition and closing the docket. The Board's action was based on the failure of the Petitioner to file its petition in a timely fashion consistent with the requirements of the Board's procedural rules and the dates set forth in the September 16, 2004 Board order.

On February 10, 2005, the Petitioner sent its motion to the Board and to the Illinois EPA via U.S. Mail. The Illinois EPA received a copy of the Petitioner's motion on February 14,

2005. Pursuant to the Board's procedural rules, the Illinois EPA's time for filing a response to the Petitioner's motion is on or before February 28, 2005.

## **II. THERE ARE NO GROUNDS JUSTIFYING RECONSIDERATION**

As the Petitioner noted, the purpose of a motion for reconsideration is to bring to the Board's attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the Board's previous application of the existing law. Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (March 11, 1993), p. 1.

The Petitioner has not met the standard needed to justify the Board's reconsideration of its January 6, 2005 order. There is no newly discovered evidence that was not available at any time leading up to the Board's January 2005 order, nor is there any change of law that has transpired in the interim. As will be discussed in more detail below, there was also no error in the Board's previous application of the existing law. The deadlines referenced and applied by the Board are well-settled, as is the reasoning employed by the Board in this and other similar types of situations. Therefore, Petitioner's motion should be denied.

## **III. THE BOARD'S FILING DEADLINES ARE JURISDICTIONAL**

One of the bases of the relief sought in the Petitioner's motion is that the Board's procedural rules concerning the deadlines for filing a timely appeal are procedural in nature, as opposed to being jurisdictional. This contention is wrong. The Board has consistently taken the position that the failure to file a petition for appeal in a timely manner, even if by one day, results in the Board lacking jurisdiction over the matter. Dewey's Service v. Illinois EPA, PCB 99-107 (February 4, 1999); Indian Refining v. Illinois EPA, PCB 91-110 (July 25, 1991).

There is no doubt that the rules and regulations promulgated by the Board have the force and effect of law, are presumed to be valid, and will be construed by the same standards as

statutes. Illinois EPA v. Jersey Sanitation Corporation, 336 Ill. App. 3d 582, 588, 784 N.E.2d 867, 872 (4<sup>th</sup> Dist. 2003). Further, the Board has the power to construe its own rules and regulations to avoid absurd or unfair results. Id., 336 Ill. App. 3d at 589, 784 N.E.2d at 872.

Here, Section 40(a)(1) of the Act and Sections 105.208 and 105.406 of the Board's procedural rules clearly set forth the guidelines and limitations regarding the Board's authority in extending the time for filing an appeal of a final decision of the Illinois EPA. The Board's decisions as found in the September 16, 2004 and January 6, 2005 orders were correct and made pursuant to statutory and regulatory guidelines.

Also, there is no question that the time limitation for filing a timely appeal is jurisdictional in nature, and not merely procedural. In the case of Pickering v. Illinois Human Rights Commission, 146 Ill. App. 3d 340, 496 N.E.2d 746 (2<sup>nd</sup> Dist. 1986), the appellate court detailed the relevant law to this issue. The Pickering court, citing to the Illinois Supreme Court case of Fredman Brothers Furniture Company, Inc. v. Department of Revenue, 109 Ill.2d 202, 486 N.E.2d 893 (1985), noted that statutes of limitation only fix the time within which the remedy for a particular wrong may be sought. They are procedural in nature, and not designed to alter substantive rights. However, statutes which create a substantive right unknown to the common law and in which time is made an inherent element of the right so created are not statutes of limitation. Such a time period is more than an ordinary statute of limitations, and is a condition of the liability itself, and not of the remedy alone. The time period goes to the existence of the right itself, and is a condition precedent to the plaintiff's right to seek a remedy. Pickering, 146 Ill. App. 3d at 344, 496 N.E.2d at 749.

In Pickering, the court went on to conclude that in the situation in which a statute itself creates a substantive right unknown at common law, and at the same time prescribes the time

within which a party must file a charge to redress an alleged deprivation of those rights, such a statute is not a statute of limitation. Specifically, the court found that a 180-day filing deadline regarding the filing of a charge with the Department of Human Rights (as set forth in the Human Rights Act) must be deemed to be jurisdictional. Pickering, 146 Ill. App. 3d at 346, 496 N.E.2d at 750.

A similar finding was recently reached by the Illinois Supreme Court in Nudell v. Forest Preserve District, 207 Ill.2d 409, 799 N.E.2d 260 (2003). The court there ruled that the requirement that a complaint for administrative review be filed within a specific period of time is jurisdictional. Nudell, 207 Ill.2d at 422, 799 N.E.2d at 267-268.

Thus, there is no doubt that the time deadline for filing a petition with the Board seeking a challenge of a final decision by the Illinois EPA is a jurisdictional requirement, and that failure of a Petitioner to comply with that requirement results in the Board losing jurisdiction to consider the matter. The Board's decision here, then, was correct and should not be reversed.

#### **IV. THE BOARD SHOULD GRANT NO FURTHER RELIEF**

The Petitioner's motion also asks, in the alternative, that the Board grant further relief to either extend the time allowed for filing the petition (i.e., reconsider the relief granted in the Board's September 16, 2004 order) or find some kind of exigent circumstances that would otherwise allow for the filing of a petition.

However, that portion of the motion should also be denied. First, the Petitioner did not contest the Board's September 2004 order at any time after it was entered, and therefore is bound to the findings of the Board (as well as the basis for the Board reaching those findings). Second, as to the notion of the Board somehow granting further relief to allow the Petitioner to side-step the time deadline for filing a petition, there is simply no regulatory or statutory authority that

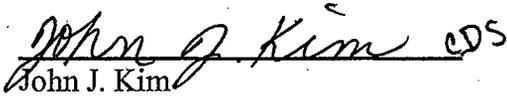
would allow for such a discretionary act. Given that the Board has no authority to grant such relief, the Board must deny that portion of the Petitioner's motion.

## V. CONCLUSION

For the reasons above, the Illinois EPA hereby respectfully requests that the Board deny the Petitioner's motion in its entirety.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent

 *John J. Kim* <sup>cds</sup>  
John J. Kim

Assistant Counsel  
Special Assistant Attorney General  
Division of Legal Counsel  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
217/782-5544  
217/782-9143 (TDD)  
Dated: February 28, 2005

## CERTIFICATE OF SERVICE

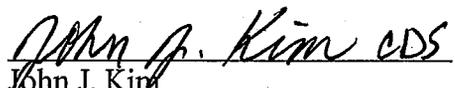
I, the undersigned attorney at law, hereby certify that on February 28, 2005, I served true and correct copies of a RESPONSE TO MOTION FOR RECONSIDERATION, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

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

Fred C. Prillaman  
Mohan, Alewelt, Prillaman & Adami  
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