

ILLINOIS POLLUTION CONTROL BOARD
April 18, 2002

E & L TRUCKING COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 02-53
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by C.A. Manning):

This case involves a petition for review of an Illinois Environmental Protection Agency (Agency) determination concerning E & L Trucking Company's (E & L) request for reimbursement from the underground storage tank fund. Subsequent to the Agency's determination, the parties requested that the Board grant a 90-day extension of the 35-day appeal period for appealing the Agency's determination, as set forth in Section 40(a)(1) of the Environmental Protection Act (Act). 415 ILCS 4/40(a)(1) (2000). In granting that request, the Board ordered that the appeal of this determination be filed by February 4, 2002. *See E & L Trucking Company v. IEPA*, PCB 02-53 (Nov. 15, 2001). On February 4, 2002, E & L timely filed this appeal.¹

Pursuant to the Board's procedural rules, the Agency record in this docket was due to be filed on March 6, 2002. To date, the record has not been filed. Rather, on March 28, 2002, some 22 days after its due date, the Agency filed a motion for extension of time to file the record. On April 11, 2002, E & L filed an objection to the Agency's motion and requested that the Board sanction the Agency for its conduct in avoiding its record filing obligation. While the Agency's time for response has not yet

¹ Prior to E & L's February 4, 2002 filing of this permit appeal, and during the preceding 90-day extension of the appeal period, the Agency issued a second letter, on January 4, 2002, which also dealt with E & L's request for reimbursement. On January 25, 2002, E & L attempted to file a separate appeal of that letter. While the Board initially opened a separate docket, PCB 02-101, to accommodate E & L's standard request for a 90-day extension of time in which to ultimately file an appeal of the January letter, the Board determined that such docket was unnecessary and dismissed it. This decision was reached because the Board found that any issues raised by the Agency's second letter were properly before the Board in the context of this appeal, as further explained in this order. *See E & L Trucking Co. v. IEPA*, PCB 02-101 (Mar. 7, 2002).

run on that motion, in the interests of moving this matter forward, the Board will decide E & L's motion in this order.

In summary, this order denies the Agency's motion for an extension of time to file the Agency record, now 43 days late, but also denies E & L's motion for sanctions. The order further requires that the case be immediately set for hearing. The Board directs the Clerk's Office to fax a copy of this order to the parties' counsel immediately upon its issuance so that they will understand their respective obligations.

FILING OF RECORD REQUIREMENT

Section 105.116 of the Board's procedural rules provides:

The State agency must file with the Board the entire record of its decision within 30 days after the filing of the petition for review, unless this Part provides otherwise, or the Board or hearing officer orders a different filing date. If the State agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. 35 Ill. Adm. Code 105.116.

The Agency offers two reasons for its delay in filing the record in this matter. Both reasons fail.

Requirements and Background of Section 105.116

First, Agency counsel in this matter asserts: "[f]or purposes of administrative economy, the undersigned attorney generally does not prepare or file a record in a matter until first learning that the Board has formally accepted the matter for hearing." Agency Motion for Extension of Time at 2. Such assertion disregards the plain language of the Board's rule on record filing. The rule does not tie the filing requirement to the Board's first formal order in a permit appeal matter. Rather, the record filing requirement is tied to the actual filing of the petitioner's permit appeal. Unlike some types of cases, virtually all permit appeals are "accepted" by the Board. Further, since permit appeals carry with them a statutory 120-day decision deadline (*see* 415 ILCS 5/40(a) (2000)), these cases must move quickly. Therefore, the Agency is wrong to assume that its 30-day obligation begins only when the Board issues an accept for hearing order in a permit appeal.

Historically, problems have occurred in the processing of permit appeals before the Board because of late-filed Agency records. When the Board revised its procedural rules, we extended the time for filing Agency records from 14 days to 30 days, in part at the Agency's request. Since 14 days was too short a time to be realistic, especially with large permit records, the rule was generally not observed. To avoid having the rule ignored, the Board extended the timeframe to 30 days. This change was based upon the belief, that the Agency did not contradict, that such a timeframe was realistic, allowing the Agency to effectively comply

in most instances. To further enhance compliance, the rule provides that if the Agency is unable to comply, it may seek an extension prior to the due date of the record. The rule allows flexibility for the hearing officer or Board to order a different due date, in consideration of the likelihood and timeframe for proceeding to hearing.

The rule does not allow the Agency to ignore the due date and file the record, or a request for extension of the filing requirement, well after the due date of the record. During the procedural rule revision process, the Board even contemplated assessing a \$500 fine on the Agency for each day a record was late. *See* Revision of the Board's Procedural Rules, R97-8, slip op. at 17 (Oct. 3, 1996), Ultimately, however, the Board dropped that provision and, instead, reiterated that the Agency would be subject to sanctions if the record was late. Regrettably, the issue of late-filed agency records still haunts the permit review process despite the Board's attempts at revising the procedural rules to make them more workable. *See, e.g.,* E.G. Vogt Oil Co. v. IEPA, PCB 00-70; Freeburg Investors Group, Inc. v. IEPA, PCB 00-74; East Side Acquisitions, Inc. d/b/a State Street Shell v. IEPA, PCB 00-76; Linneman Oil Co. v. IEPA, PCB 00-94; Granite City Sheet Metal v. IEPA, PCB 00-138; L. Wolf Co. v. IEPA, PCB 00-139; E.G. Vogt Oil Co. v. IEPA, PCB 00-141.

The Dismissed Docket, PCB 02-101

The Agency's second reason for missing the 30-day deadline is equally untenable. Essentially, the Agency seeks a further delay in filing the record so that the Board has an opportunity to rule on the Agency's motion to reconsider or clarify the Board's March 7, 2002 decision to close docket PCB 02-101. *See* E & L Trucking Co. v. IEPA, PCB 02-101 (Mar. 7, 2002). This docket was administratively opened, by the Board's Clerk's Office, to accommodate the parties' request for a 90-day extension of time in which to file an appeal of the Agency's January letter concerning E & L's request for reimbursement from the underground storage tank fund. The Board dismissed this docket as unnecessary, since reimbursement pursuant to E & L's request to the Agency is the subject of this appeal and any issues relating to the January letter should be dealt with in this docket.

However, because of issues related to Reichhold Chemicals Inc. v. PCB, 204 Ill. App. 3d 674, 561 N.E.2d 1343 (3rd Dist. 1990), the Agency, on March 28, 2002, sought reconsideration or clarification of the Board's March 7, 2002 decision. Today, the Board again dismisses docket PCB 02-101 as unnecessary and denies the Agency's motion to reconsider that decision. *See* PCB 02-101 (Apr. 18, 2002). Nonetheless, to the extent that the Agency needs further clarification, we do so in this docket.

The Board's March 7, 2002 decision was intended to ensure a smooth administrative continuum in the review of permit appeal decisions made by the Agency. Indeed, we are mystified by the Agency's confusion and, more particularly, by their position that their January determination letter is "void." Rather, we construed this letter as a change in Agency position that it made during the 90-day extension of the appeal period. While the Agency now appears to question its authority to make such change, the Board obviously considers that such

authority, at least as exercised in this situation, is the natural outgrowth of the legislative 90-day appeal period extension enactment. Further, as we stated in PCB 02-101, we believe that this position is consistent, not inconsistent, with Reichhold. See E & L Trucking Co. v. IEPA, PCB 02-101 (Mar. 7, 2002).

Furthermore, while the procedural posture of this case may well be peculiar, given the opening of a second docket for essentially the same set of circumstances, the issue presented is rather straightforward. E & L requested reimbursement from the underground storage tank fund in the amount of \$41,618.10. The Agency's October 2001 letter determined that only \$614.90 was properly reimbursable. The Agency's January 2002 letter determined that an additional \$5,624.60 was reimbursable. Since the statutory deductible is \$10,000, even taking these letters together as one decision for purposes of appeal, as the Board does here, E & L is unable to access the fund. Thus, there is but one legal issue presented to the Board: what, if any, amount of money should E & L be allowed as reimbursement from the underground storage tank fund. In many respects, Reichhold notwithstanding, public policy dictates that E & L has every right to request Board review of all elements that went into the Agency decision-making on its request for reimbursement.

Thus, the record that is due in this docket, to the extent the Agency still needs clarification, is the record concerning E & L's request to the Agency that it be reimbursed from the underground storage fund. Any and all documents relevant to the creation of the two Agency letters, both made prior to the appeal of this matter to the Board, during the 90-day extension period, are anticipated. As this record is long overdue, and presumably within the Agency's immediate control, it should be mailed overnight or hand-delivered to the Board's Clerk's Office, as well as delivered to E & L, immediately upon the issuance of this order.

REQUEST FOR SANCTIONS

E & L requests the Board to sanction the Agency for its failure to file the record in this matter. At this point, because of the strange procedural posture of this case, that request is denied. The Board has the authority to sanction the Agency when the situation warrants. See Grigoleit Co. v. PCB, 245 Ill. App. 3d 337, 613 N.E.2d 371(4th Dist. 1993). Further, as stated above, the new procedural rules provide for specific sanction authority for failure to timely file Agency records. Section 105.118 of the Board's procedural rules provides:

If the State agency unreasonably fails to timely file the record on or before the date required under this Part, the Board may sanction the State agency in accordance with 35 Ill. Adm. Code 101.Subpart H. 35 Ill. Adm. Code 105.118.

The Board alerts the Agency that, pursuant to Subpart H, Section 101.800, the Board considers at least two types of sanctions specifically applicable to the issue of late-filed Agency records. Pursuant to Section 101.800(b)(2) the offending person, here the Agency counsel of record in the relevant proceeding, could be barred from filing future pleadings or otherwise appearing

before the Board. Second, pursuant to Section 101.800(b)(4)-(5) the petitioner may be immediately awarded the result it seeks, regardless of the Agency's position in the matter.

In this case, the Board declines to order such drastic measures. The Agency should be on alert, however, that the Board will no longer tolerate late-filed Agency records in permit appeals and will, in an appropriate case, sanction the Agency in one of the manners prescribed above.

As a final matter, the Board is concerned with the statement made by E & L's counsel, in response to the Agency's motion, that E & L was forced to file a waiver. Certainly, as counsel for E & L well knows, no party need feel compelled to file a waiver of its statutory decision timeframe with this Board. E & L has a right to have the appeal of its reimbursement request decided within 120 days. Further, E & L has a right to waive that timeframe. The Board notes that E & L's waiver, filed with the Board as early as March 14, 2002, clearly stated that it "agrees to extend the statutory decision deadline for a period not to exceed 61 days." Waiver at 1.

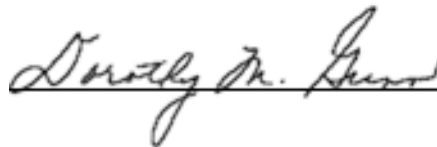
Nonetheless, given that this case has been delayed long enough in its processing, the Board orders that the hearing officer contact the parties and set this matter for hearing within 30 days of this order. Further, the Board directs that no continuance be allowed in this proceeding unless it is requested by E & L and accompanied by a new waiver of its statutory decision timeframe.

CONCLUSION

The Board denies the Agency's motion for an extension of time to file the Agency record, and orders its immediate filing in the Board's Clerk's Office, as well as delivery to the counsel for E & L. The Board denies E & L's motion for sanctions, but points the Agency to the relevant portion of the procedural rules where sanctions are applicable. Finally, the Board directs that this matter proceed to hearing as set forth above.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 18, 2002, by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board