

ILLINOIS POLLUTION CONTROL BOARD  
April 25, 1991

|                        |   |                 |
|------------------------|---|-----------------|
| CALVARY TEMPLE CHURCH, | ) |                 |
|                        | ) |                 |
| Petitioner,            | ) |                 |
|                        | ) |                 |
| v.                     | ) | PCB 90-3        |
|                        | ) | (Permit Appeal) |
| ILLINOIS ENVIRONMENTAL | ) |                 |
| PROTECTION AGENCY,     | ) |                 |
|                        | ) |                 |
| Respondent.            | ) |                 |

ORDER OF THE BOARD (by R.C. Flemal):

On March 11, 1991, Calvary Temple Church ("Calvary") filed an appeal of the Illinois Environmental Protection Agency's ("Agency") most recent denial on remand of Calvary's application for construction and operation of a wastewater land treatment system. On March 26, 1991, Calvary submitted a copy of the Agency's denial letter, as well as other information, pursuant to Board Order of March 14, 1991. On March 28, 1991, the Agency requested an extension of time to file a response to the Board Order of March 14, 1991. By Order of March 28, 1991, the Board granted the extension until April 12, 1991. On April 24, 1991, the Agency filed its response accompanied by a motion to file instant. The Agency attorney essentially states that due to work load and time deadlines in other matters, she was unable to file this response by April 12, 1991. The Board grants the motion to file instant.

It is necessary to relate some of the events surrounding this action. On December 1, 1989, the Agency denied Calvary's application for a permit. Calvary appealed that denial on January 4, 1990, within 35 days of denial of the application. On April 26, 1990, the Board remanded the matter back to the Agency, finding that the Agency failed to conduct its technical review on the application. The Agency appealed the Board's decision to the Appellate Court, Second District. That court granted the Board's motion to dismiss, based on the fact that the decision was not final for purposes of appeal. The Agency subsequently conducted its technical review, and issued its second denial of Calvary's application on January 14, 1991. It is from this denial that Calvary brings the instant appeal.

Section 40 of the Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1040) ("Act") states in part:

If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the

applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency.

Section 40 thus allows 35 days from Agency denial for an applicant to file an appeal. Since the Agency made its determination on January 14, 1991, the appeal filed March 11, 1991 was not timely filed within the statutory 35 days. It makes no difference that the Agency issued its decision as part of a remand. Even though this is a second denial, it is still a denial, and hence would begin a 35-day appeal timeframe.

In finding Calvary's appeal untimely, the Board need go no further. However, the Board notes that Calvary also raises the question of timeliness of the Agency's determination on remand. Calvary alleges that the Agency issued its determination within 95 days of the Appellate Court's decision, and that therefore Calvary should be granted a permit pursuant to Section 39(a) of the Act. Section 39(a) reads in part:

If there is no final action by the Agency within 90 days after the filing of the application for permit, the applicant may deem the permit issued...

The Agency's original decision was issued within 90 days after the filing of Calvary's application. However, no new application has been filed at any time since the original application, such that a new 90-day decision time would begin pursuant to Section 39(a). Furthermore, the fact that the Agency's original determination, timely rendered, was faulty and necessitated remand does not begin anew the decision deadline under Section 39(a). Also, as the Agency points out in its response, there is nothing in the Act to suggest that the Section 39(a) decision deadline apply to situations other than that explicitly set out.

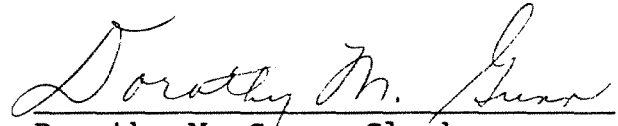
Calvary's appeal of March 11, 1991 is dismissed as untimely filed. Calvary is, of course, free to refile its permit application with the Agency.

IT IS SO ORDERED.

Board Member J. Anderson concurred.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111 ½ par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 25<sup>th</sup> day of April, 1991 by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board