

ILLINOIS POLLUTION CONTROL BOARD
February 3, 1994

DAVID GEUTHER and)
FEHR-GRAHAM & ASSOCIATES,)
)
Petitioners,)
)
v.) PCB 93-232
) (UST Fund)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

DAVID GEUTHER and)
FEHR-GRAHAM & ASSOCIATES,)
)
Petitioners,)
)
v.) PCB 94-53
) (UST Fund)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on several filings. First, on December 2, 1993, the Board issued an order in PCB 93-232 directing petitioners David Geuther and Fehr-Graham & Associates (collectively, petitioners) and the Illinois Environmental Protection Agency (Agency) to address the issue of whether this appeal is timely. The December 2 order pointed out that although the Agency's "Attachment A" stated that the Board's procedural rules provide that a petitioner may appeal an Agency decision "within 35 calendar days from the date the Comptroller mails the accompanying check", the procedural rule actually state that an appeal shall be filed within 35 days of the date of mailing of the Agency's final decision. (35 Ill. Adm. Code 105.102(a)(2).) Petitioners filed their response on December 20, 1993, and the Agency filed its response on January 20, 1994.

The issue of timeliness of the appeal in PCB 93-232 arises because although the invoice voucher prepared by the Agency is dated October 8, 1993, the accompanying checks from the Comptroller are dated October 18 and 19, 1993. The petition for review was mailed on November 22, 1993 and filed by the Board on November 23, 1993. Pursuant to the "mailbox rule" (see 35 Ill. Adm. Code 101.102(d)), the petition for review is timely if the 35-day appeal period began to run on October 18. The petition is not timely if the appeal period began to run on October 8.

After reviewing the parties' response, the Board concludes that the appeal in PCB 93-232 is timely. The Agency states that the documents prepared by the Agency (the invoice voucher and Attachment A) are no longer sent directly from the Agency to petitioners. Instead, those documents are mailed by the Comptroller immediately after the checks are issued. It would be unfair to require petitioners to file an appeal within 35 days of the date of the Agency decision (here, October 8), when petitioners received no notice until after the Comptroller processed the invoice voucher and issued a check.

However, the Board must state its reservations about the Agency's statement, on its invoice voucher, that "for purposes of appeal, this voucher constitutes the Agency's final decision as of the date the check was issued by the Comptroller." Given the past history of the Underground Storage Tank (UST) Fund, in which there have been long delays in payment because the Fund was exhausted, the Board is concerned by a scenario in which the Agency's obligation to make a final decision, which cannot be amended (see Illinois Environmental Protection Agency v. Pollution Control Board (November 23, 1993), No. 5-92-0468), is extended while the invoice voucher is awaiting payment by the Comptroller. We are also concerned by the misstatement of our procedural rules on the Agency's Attachment A. However, in this case, we find that the appeal is timely.

Second, on January 31, 1993, the Agency filed its record in this case, along with a motion for leave to file the record *instanter*. The motion states that petitioners filed their appeal on January 14, 1994, and that the Agency received notice of that petition on the same day. However, the Board points out that this petition was filed on November 23, 1993, with an amended petition filed on December 20, 1993. Because the record is necessary for the decision of this appeal, the Agency's motion for leave to file *instanter* is granted.

Finally, on January 19, 1994 petitioners filed a "motion to supplement petition for review". Petitioners seek to supplement their November petition for review (PCB 93-232) with an appeal from a December 15, 1993 Agency determination.

Petitioners' motion to supplement their petition in PCB 93-232 is denied. An appeal from a different Agency decision must be a new petition for review. Therefore, we will construe petitioners' January 19, 1994 motion to supplement in PCB 93-232 as a new petition for review, docketed as PCB 94-53. The Clerk is directed to place a copy of that January 19, 1994 motion in the PCB 94-53 file. However, petitioners have not paid the statutorily-mandated \$75 filing fee for PCB 94-53. Petitioners must submit that filing fee within 14 days of the date of this order, or PCB 94-53 will be subject to dismissal. Additionally, if petitioners wish to move for consolidation of these two cases,

that motion should be made within that same 14 days.

We note that petitioners filed a waiver of the decision deadline in PCB 93-232, extending the deadline in that case until October 21, 1994. Any request for consolidation of the two cases should include an appropriate waiver of the decision deadline in PCB 94-53.

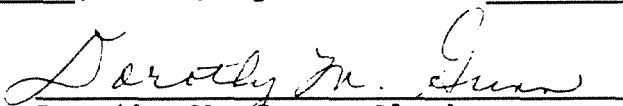
This matter is accepted for hearing. The hearing must be scheduled and completed in a timely manner, consistent with Board practices and the applicable statutory decision deadline, or the decision deadline as extended by a waiver. (Petitioner may file a waiver of the statutory decision deadline pursuant to 35 Ill. Adm. Code 101.105). The Chief Hearing Officer shall assign a hearing officer to conduct hearings. The Clerk of the Board shall promptly issue appropriate directions to the assigned hearing officer consistent with this order.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing. Any briefing schedule shall provide for final filings as expeditiously as possible and, in time-limited cases, no later than 30 days prior to the decision due date, which is the final regularly scheduled Board meeting date on or before the statutory or deferred decision deadline. In this case, both the statutory decision deadline and the decision due date is May 19, 1994.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible. The Board notes that Board rules (35 Ill. Adm. Code 105.102) require the Agency to file the entire Agency record of the permit application within 14 days of notice of the petition.

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 3rd day of February, 1994, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board