

ILLINOIS POLLUTION CONTROL BOARD

July 11, 1991

PIERCE & STEVENS, CORP.)	
)	
Petitioner,)	
)	
v.)	PCB 91-100
)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD by (M. Nardulli):

This matter comes before the Board on petitioner Pierce & Stevens Corporation's filing of a petition for review challenging the Illinois Environmental Protection Agency's (Agency) imposition of permit conditions. On June 27, 1991, the Board entered an order directing the parties to address the issue of whether this permit appeal was timely filed. On July 8, 1991, the parties filed a "Joint Statement of Timeliness of Filing" and petitioner filed an open waiver of the Board's decision deadline. Unfortunately, in the absence of an affidavit filed by the Agency, the parties' statement still does not settle the issue of whether this petition for review was timely filed.

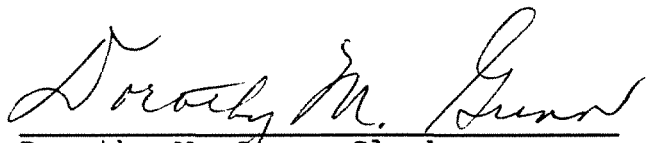
The 35-day limit is jurisdictional; thus, the failure to file a petition for review with the Board within that time period will result in dismissal. (Johnson v. State Employees Retirement Systems, 155 Ill. App. 3d 616, 508 N.E.2d 351 (1st Dist. 1987); Calvary Temple Church v. IEPA, PCB 90-3 (April 25, 1991).) As the Board noted in its June 27, 1991 order, the date the Agency mailed the permit determination from which appeal is sought starts the time clock for petitioner's filing of its petition for review. (35 Ill. Adm. Code 105.102(a)(2).) Although the permit is dated May 10, 1991, the parties' joint statement asserts that "the permit was not actually mailed to Pierce & Stevens until on or after May 13, 1991, and therefore the Permit Appeal was timely filed." Petitioner has 35 days from the date of Agency mailing of the permit decision to file its petition for review. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1040(a)(1).) 35 days from May 13, 1991, in accordance with 35 Ill. Adm. Code 101.109, is June 17, 1991; petitioner filed its petition for review on June 18, 1991.

The burden is on the Agency to establish the date of mailing. As the Board has previously stated, this burden could easily be met by the Agency by attaching a proof of service with all final permit decisions. (Finks & Austman v. IEPA, PCB 90-243 at 3 (February 7, 1991).) As a result of the Agency's failure to adopt this simple, yet effective, procedure in all permit matters, the parties and the

Board must deal with the confusion presented here. In the absence of an affidavit filed by someone having factual knowledge of the mailing of Agency permit decisions, the Board is left in the position of presuming a date of mailing to establish jurisdiction based upon an unverified assertion of the parties. Therefore, the Board directs the Agency to file an affidavit stating with as much specificity as possible the date the permit decision was mailed. The Agency utilized such a procedure in Finks & Austman v. IEPA to establish the date of mailing in the absence of a proof of service. The Agency's affidavit shall be filed so that it is received by the Board no later than July 22, 1991.

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 July, 1991 by a vote of 7-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board