

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)
)
Archer Daniels Midland Company)
Decatur, Illinois)
Facility CCS#2)
)
Underground Injection Control (UIC))
Permit No. IL-115-6A-0001)
)

Appeal No: UIC 14-72

**MOTION TO DISMISS PETITION AS UNTIMELY, AND MOTION FOR EXTENSION
OF TIME AND STAY OF DEADLINE TO RESPOND TO BOARD OFFER OF
ALTERNATIVE DISPUTE RESOLUTION.**

The United States Environmental Protection Agency, Region 5, respectfully requests that the Environmental Appeals Board (Board) dismiss the petition filed by Jeffrey Sprague as untimely. Should the Board allow review of the petition, the Region requests an additional 30 days from the date of the Board's ruling to file its response on the merits. While the Board rules on this motion and all accompanying pleadings, the Region also requests a stay of its response to the Board's offer of Alternative Dispute Resolution.

In support of its motion, Region 5 states the following:

1. On April 16, 2014, Region 5 notified the public of the opportunity to comment on a draft Underground Injection Control (UIC) Permit, No. IL-115-6A-0001, for the Archer Daniels Midland (ADM) facility in Decatur, Illinois, for the construction and operation of a new

Class VI well for injection of carbon dioxide. The public comment period ended on May 30, 2014.

2. On September 23, 2014, Region 5 issued a final Class VI UIC permit, No. IL-115-6A-0001, to ADM. The well is referred to as CCS#2.

3. Along with the final permit, the Region issued a Response to Comments (RtC), which detailed the Agency's responses to all public comments it received on the proposed permit during the comment period. The notice of the final permit and RtC was mailed to ADM and all individual commenters who participated in the public comment process. The RtC provided instructions on pages numbered 81 and 82 on how to appeal the final permit to the EAB, as provided in 40 C.F.R. §124.19. (Attachment 1 - RtC). Mr. Sprague, a commenter, received the final permit notice and RtC.

4. The cover letter Region 5 sent to Mr. Sprague transmitting the final permit and RtC also outlined the requirements of 40 C.F.R. §124.19 and provided mailing and filing information. (Attachment 2 - Letter to Sprague). Specifically, the letter states the following:

“A petition for review of any condition of a UIC permit decision must be filed with the EAB within 30 days after EPA serves notice of the issuance of the final permit decision. 40 C.F.R. §124.19(a)(3). When EPA serves the notice by mail, service is deemed to be completed when the notice is placed in the mail, not when it is received. However, to compensate for the delay caused by mailing, the 30-day deadline for filing a petition is extended by three days if the final permit decision being appealed was served on the petitioner by mail. 40 C.F.R. §124.20(d). Petitions are deemed filed when they are received by the Clerk of the Board at the address specified for the appropriate method of

delivery. 40 C.F.R. §124.19(a)(3) and 40 C.F.R. §124.19(i). The request will be timely if received within the time period described above.”

5. The Region served notice of the final permit and RtC to Mr. Sprague via Certified U.S. Mail on September 24, 2014. (Attachment 3 - Certified Mail Receipt to Sprague). Service of notice was completed on September 24, 2014, commencing the 33-day period within which to file an appeal. As such, Mr. Sprague had until October 27, 2014, to file an appeal with the Clerk of the EAB.

6. The Clerk of the EAB received Mr. Sprague’s Petition for Review of ADM Permit IL-115-6A-0001 on October 28, 2014.

7. October 28, 2014 is outside the 33-day time period within which to file a timely appeal in this matter. Because the petition is untimely, it does not satisfy the requirements of 40 C.F.R. §124.19 and should be dismissed. *In re Maralex Disposal, LLC*, SDWA Appeal No. 13-01, at 3 (EAB Sept. 3, 2013)(Order Dismissing Appeal as Untimely) (citing *In re B & L Plating*, 11 E.A.D. 183, 189-90 (EAB 2003)); *see also, In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 328 (EAB 1999), *aff’d sub nom Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996); *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 15-16 (EAB 1994).

8. In general, the Board strictly construes threshold proceeding requirements absent special circumstances to justify the lack of timeliness. *In re B & L Plating*, 11 E.A.D. at 190-91; *In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-07 through 10-10, at 7 (EAB May 3, 2010)(Order Dismissing Four Petitions for Review as Untimely). The Board has found such special circumstances to include mailing delays outside of a party’s control. *See, e.g., In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002)(delay caused by rerouting of

mail due to anthrax contamination concerns); *In re AES Puerto Rico*, 8 E.A.D. at 328-29 (delays caused by aircraft problems of an overnight package delivery service); and *In re Stonehaven Energy Mgmt., LLC*, UIC Appeal No. 12-02, slip op. at 9-10 (EAB Mar. 28, 2013)(delay caused by permitting authority incorrectly directing petitioners to file appeals with the EPA Administrator).

9. Despite the requirements of the regulations and the explicit instructions in both the RtC and final permit cover letter stating the time frame for appeal and the requirement that the petition be filed with the Clerk of the EAB, Mr. Sprague failed to file his petition with the EAB by the deadline. The Board has stated that “neglect of a party or a party’s attorney does not excuse an untimely filing, nor does lack of willfulness, by itself, affect the determination.” *In re Maralex*, SDWA Appeal No. 13-01, at 4 (citing *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 667 (EAB 2004)).

10. While the Board considers this threshold procedural matter, the Region requests an extension of time to allow EPA to file a full response on the merits of the petition and coordinate with HQ on its response should the Court not grant this motion to dismiss. An extension of time of 30 days from the date of the Board’s ruling on this motion will not prejudice Mr. Sprague.

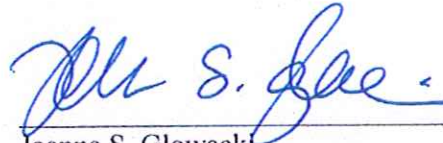
11. While counsel was preparing this motion, the Region received a letter from Ms. Eurika Durr on November 5, 2014, with an offer to participate in the Board’s ADR program. The Region requests that the Board stay the deadline to respond to this offer pending the Court’s ruling on whether to dismiss the petition.

12. In accordance with 40 C.F.R. §124.19(f)(2), the undersigned counsel contacted Mr. Sprague via email on November 10, 2014, to ascertain whether he consents or objects to this motion. Mr. Sprague has not responded.

For the reasons set forth above, EPA, Region 5, respectfully requests that its Motion to Dismiss Petition as Untimely, and Motion for Extension of Time and Stay of Deadline to Respond to Board Offer of ADR be granted.

Dated: November 12, 2014

Respectfully Submitted,



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ATTACHMENTS

- ATTACHMENT 1 Response to Comments for Draft Class VI Permit Issued to Archer Daniels Midland, September 23, 2014
- ATTACHMENT 2 - Letter to Jeffrey Sprague and Declaration of Lillateese Simmons
- ATTACHMENT 3 - US Certified Mail Postmark Receipt and Green Card Receipt