

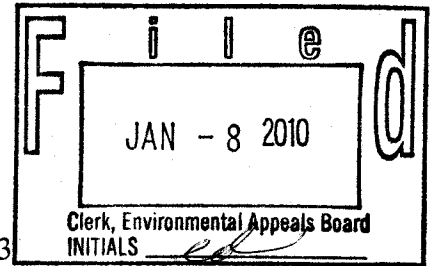
**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION
WASHINGTON, D.C.**

In re:

MGP Ingredients of Illinois, Inc.

Permit No. 07030058

PSD Appeal No. 09-03



**ORDER IMPOSING SANCTIONS, SETTING FINAL DEADLINE FOR FILING RESPONSE
AND SCHEDULING STATUS CONFERENCE**

On July 21, 2009, Sierra Club filed a petition for review of the above-captioned Prevention of Significant Deterioration permit issued to MGP Ingredients of Illinois, Inc. by the Illinois Environmental Protection Agency ("IEPA") on June 22, 2009. The Clerk of the Environmental Appeals Board ("EAB" or "Board") instructed IEPA to file a response seeking summary disposition, if any, and relevant portions of the administrative record no later than August 4, 2009. Should IEPA not file a response seeking summary disposition, the Clerk instructed, IEPA's response to the merits of the petition, relevant portions of the administrative record, and a certified index of the entire administrative record were to be filed no later than August 19, 2009. Letter from Eurika Durr, Clerk of the Environmental Appeals Board, U.S. Environmental Protection Agency to Douglas P. Scott, Director, IEPA (July 23, 2009) ("Durr Letter").

The Illinois Attorney General's Office ("Illinois AGO"), on behalf of IEPA, faxed an appearance and a motion, both dated August 19, 2009, to the Board. This motion requested a sixty

day extension, until October 20, 2009, in which to file a response to Sierra Club's petition. Motion for Extension of Time to File Response 2-3 (Aug. 20, 2009). The motion stated that issues relating to IEPA's legal representation for the appeal had not been resolved and that "the issues raised by the [p]etition, including both that of carbon dioxide regulation and cost-effectiveness, will cover extensive ground and that considerable work in preparing a response will be required, irrespective of the outcome of the representational issue." *Id.* at 2. In a September 10, 2009 letter to the Board, Sierra Club stated that the "parties ha[d] agreed to jointly propose a schedule to the Board, but [we]re waiting for IEPA to provide a complete response to Sierra Club's Freedom of Information Act request seeking the permit record." Letter from David C. Bender, McGillivray Westerberg & Bender LLC, to Eurika Durr, Clerk of the Environmental Appeals Board, U.S. EPA 1 (September 10, 2009). The parties did not file a proposed briefing schedule, and on October 21, 2009, the Board established an October 28, 2009 deadline for filing the certified index of the administrative record and a November 12, 2009 deadline for filing a response to the petition. Order Establishing Filing Deadlines for Certified Index of Administrative Record and Illinois Environmental Protection Agency's Response Brief (Oct. 21, 2009).

On October 29, 2009, one day after the filing deadline, IEPA requested an extension of the filing deadline for the certified index of the administrative record, to November 20, 2009.¹ Motion

¹ An electronic receipt generated by the U.S. Environmental Protection Agency's Central Data Exchange system indicates that IEPA electronically submitted the motion between approximately 5:30 p.m to 5:40 p.m. on October 28, 2009. However, the Board does not treat electronic submissions as filed. *E.g.* Durr Letter at 2 n.1. Rather, documents are considered filed on the date they are received by the Board, either by hand-delivery/courier or by U.S. Mail. Environmental Appeals Board, U.S. EPA, *Practice Manual* 11 (June 2004), available at <http://www.epa.gov/eab/pmanual.pdf>; see also *In re Gateway Generating Station*, PSD Appeal (continued...)

for Extension of Time to File Certified Index of the Administrative Record and Response (Oct. 29, 2009). The October 29 motion stated that “on October 23, IEPA informed the [Illinois] AGO that [IEPA] was having both technical and staffing difficulties in preparing the administrative record.” *Id.* at 2. According to IEPA, it could not meet the October 28, 2009 deadline due to the voluminous record. *Id.* On October 30, 2009, the Board established a November 12, 2009 deadline for filing the certified index of the administrative record. Order Establishing Filing Deadline for Certified Index of Administrative Record (Oct. 30, 2009).

On November 12, 2009, IEPA filed the certified index of the administrative record. IEPA also sought to extend the filing deadline for the response to December 18, 2009, to accommodate a recent three-week absence of IEPA’s primary counsel contact and the complexity of the issues in the appeal. Motion for Extension of Time to File Response to Petition for Review 2 (Nov. 12, 2009). The Board granted the request and extended the deadline in which to file the response to December 18, 2009. Order Granting Motion for Extension of Time to File Response to Petition for Review (Nov. 12, 2009). Finally, the Board stated that no further extensions would be granted. *Id.* at 2.

On the extended deadline of December 18, 2009, IEPA sought to extend the deadline for filing the response yet again, to January 25, 2010. Motion for Extension of Time to File Response to

¹(...continued)
No. 09-02, at 3 n.5 (EAB Sept. 15, 2009) (Order Dismissing Petition for Review). This information was further conveyed in Board orders issued in this appeal. Order Establishing Filing Deadline for Certified Index of Administrative Record 2 n.2 (Oct. 30, 2009); Order Granting Motion for Extension of Time to File Response to Petition for Review 2 n.1 (Nov. 12, 2009).

Petition for Review (Dec. 18, 2009). In support of this motion, IEPA stated that “internal coordination issues * * * ar[o]se[] and, consequently, the filing of the Response by the date set by the Board’s [November 12, 2009] order will not be met.” *Id.* IEPA also stated that it consulted Sierra Club’s counsel, who does not object to the extension sought. *Id.* Notably, the December 18 motion does not acknowledge the Board’s admonition in its November 12 order that the Board would not grant further requests for extensions of time in which to file the response.

IEPA’s December 18 motion is in contravention of both the Board’s November 12 order and the procedures for practice before the Board included in its Practice Manual and available on the Board’s website. Environmental Appeals Board, U.S. EPA, *Practice Manual* 38 (June 2004), available at <http://www.epa.gov/eab/pmanual.pdf> (“[M]otions for extensions of time must ordinarily be filed sufficiently in advance of the due date as to allow other parties reasonable opportunity to respond and to allow the EAB reasonable opportunity to issue an order.”). This procedural history evidences systematic failure to timely assemble the administrative record, provide representation, and defend the permit issued by IEPA on June 22, 2009. Since at least the July 21, 2009 petition filed by Sierra Club, IEPA has been on notice of the “complex” issues that are at issue in this case, yet IEPA has failed to defend the permit over the course of the ensuing six months.

Given this procedural history, Board is imposing sanctions of a fifty-page limit for IEPA’s response.² That response shall be filed with the Board no later than **Friday, January 22, 2010**.

² This page limit may not be achieved by using line spacing, font sizes and margin settings inconsistent with those used in IEPA’s previous filings with the Board in this matter.

Further, the parties are ordered to participate in a status conference beginning at 10:00 a.m. Eastern Standard Time on **Thursday, January 14, 2010**, in the Administrative Courtroom, U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. A manager from the Illinois AGO and a manager from the IEPA program office shall participate in the conference. The parties may choose to appear in person or to participate via video-conferencing equipment and shall contact the Clerk of the Board, at (202) 233-0112, no later than January 12, 2010, to advise how they wish to participate in the conference. All participants shall provide the Board in writing with names of counsel and the IEPA managerial representative who will be participating in the status conference no later than 4:30 p.m. Eastern Standard Time on January 12, 2010.

So ordered.

Dated:

January 8, 2010

ENVIRONMENTAL APPEALS BOARD

By:

Anna L. Wolgast

Anna L. Wolgast
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Imposing Sanctions, Setting Final Deadline for Filing Response and Scheduling Status Conference in the matter of *MGP Ingredients of Illinois, Inc.*, PSD Appeal No. 09-03, were sent to the following persons in the manner indicated:

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Date: 1/8/2010


Annette Duncan
Secretary