

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

WHEELING/GWA AUTO SHOP,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. 10-070
(LUST Appeal - Ninety Day Extension
Granted 3/18/10, Petition Due 6/10/10)

RECEIVED
CLERK'S OFFICE
AUG 13 2010
STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, the **MOTION FOR DEFAULT JUDGMENT AND, IN THE ALTERNATIVE, SANCTIONS**, a copy of which is herewith served upon you.



JASON A. GUISINGER

CERTIFICATE OF SERVICE

I, JASON A. GUISINGER, certify that I served the foregoing Notice of Filing and **MOTION FOR DEFAULT JUDGMENT AND, IN THE ALTERNATIVE, SANCTIONS** upon the parties listed on the attached Service List, by the means listed on the attached Service List, before 4:30 p.m. on August 13, 2010.



JASON A. GUISINGER

Dennis G. Walsh
Jason A. Guisinger
KLEIN, THORPE AND JENKINS, LTD.
20 North Wacker Drive, Suite 1660
Chicago, IL 60606
(312) 984-6400

SERVICE LIST

VIA HAND DELIVERY

Pollution Control Board
Attn: John Therriault, Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

VIA FIRST CLASS MAIL

Division of Legal Counsel
Illinois Environmental Protection Agency
Attn: Melanie A. Jarvis, Ass't Counsel
1021 North Grand Avenue East
P. O. Box 19276
Springfield, IL 62794-9276

VIA FIRST CLASS MAIL

Illinois Environmental Protection
Agency, Bureau of Land
Attn: Michael Piggush
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

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**MOTION FOR DEFAULT JUDGMENT
AND, IN THE ALTERNATIVE, SANCTIONS**

NOW COMES Petitioner, Village of Wheeling (“Village”), by counsel, KLEIN, THORPE & JENKINS, LTD., and pursuant to 35 Ill. Adm. Code 101.800, moves the Illinois Pollution Control Board (the “Board”) for entry of a default judgment in favor of Petitioner and against Illinois Environmental Protection Agency (“Respondent”) or, in the alternative, for sanctions against Respondent. In support thereof, Petitioner states:

1. On June 10, 2010, Petitioner timely filed a “Petition for Review of IEPA LUST Decision” (the “Petition”), appealing Respondent’s Final Decision dated February 2, 2010.
2. On June 17, 2010, the Board entered an Order accepting the Petition and ordering Respondent to “file the entire record of its determination by July 12, 2010.” A true and correct copy of the Board’s June 17, 2010 Order is attached hereto as **Exhibit A** and made a part hereof.
3. Pursuant to 35 Ill. Adm. Code 101.304, Petitioner served a copy of the Petition on Respondent by United States Postal Service First Class Mail on June 10, 2010. A true

and correct copy of Petitioner's Notice of Filing and Certificate of Service of the Petition is attached hereto as **Exhibit B** and made a part hereof.

4. As set forth in the Board's Order of June 17, 2010, the Petition satisfied the requirements of 35 Ill. Adm. Code 105.408 in that it contained a copy of Respondent's Final Decision, a statement specifying the date of service of the Respondent's Final Decision, and a statement specifying the grounds of appeal.
5. Pursuant to the Board's June 17, 2010 Order and 35 Ill. Adm. Code 105.410, the Respondent was required to "file the entire record of its decision with the Board" on the first business day following the 30th day after the filing of the Petition. See **Exhibit A**.
6. Respondent has not filed the administrative record with the Board, nor has Respondent served a copy thereof on Petitioner. Respondent has made no filings with respect to the Petition. A true and correct copy of the Board's Clerk's online docket as of August 4, 2010 is attached hereto as **Exhibit C**.
7. 35 Ill. Adm. Code 101.800 provides for Sanctions for Failure to Comply with Procedural Rules, Board Orders or Hearing Officer Orders.
8. Respondent failed to comply with the Board's Procedural Rules, including 35 Ill. Adm. Code 105.410 and failed to comply with the Board's Order of June 17, 2010.

WHEREFORE, Petitioner requests that the Illinois Pollution Control Board enter an Order:

FINDING that Respondent is in default of the Board's Order of June 17, 2010 and the Board's Procedural Rules, and

FINDING FURTHER that Respondent failed to produce an Administrative Record for review in this cause, and

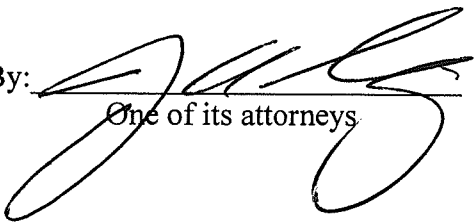
ENTERING JUDGMENT in favor of Petitioner and against Respondent as follows:

1. Reversing Respondent's Final Decision dated February 2, 2010, for the reasons stated in the Petition;
2. Ordering Respondent to reimburse Petitioner the sum of \$78,915.82;
3. Ordering Respondent to reimburse Petitioner its reasonable attorney's fees and costs in this action;
4. In addition, or in the alternative, ordering such other and further relief as the Board deems proper, including sanctions pursuant to 35 Ill. Adm. Code 101.800 barring Respondent from filing any pleading or other document and barring Respondent from maintaining any claim, counterclaim, third-party claim or defense relating to its Final Decision; and barring Respondent from presenting testimony or other evidence concerning its Final Decision.

Respectfully submitted,

VILLAGE OF WHEELING

By:


One of its attorneys

Dennis G. Walsh
Jason A. Guisinger
KLEIN, THORPE AND JENKINS, LTD.
20 North Wacker Drive, Suite 1660
Chicago, IL 60606
(312) 984-6400

EXHIBIT A

ILLINOIS POLLUTION CONTROL BOARD

June 17, 2010

WHEELING/GWA AUTO SHOP,)	
)	
Petitioner,)	
)	
v.)	PCB 10-70
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by G.T. Girard):

On March 18, 2010, at the parties' request, the Board extended until June 10, 2010, the time period for the Village of Wheeling (Village) to appeal a February 2, 2010 determination of the Illinois Environmental Protection Agency (Agency). On June 10, 2010, the Village timely filed a petition (Pet.) asking the Board to review the Agency's determination. *See* 415 ILCS 5/40(a)(1) (2008); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404, 105.406. The Agency's determination concerns the Village's leaking underground storage tank (UST) site, which is known as the "GWA Auto Shop," located at 434 South Milwaukee Avenue in Wheeling, Cook County. For the reasons below, the Board accepts the Village's petition for hearing.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2008)), the Agency decides whether to approve proposed cleanup plans and budgets for leaking UST sites. The Agency also decides whether to approve requests for cleanup cost reimbursement from the State's UST Fund, which consists of UST fees and motor fuel taxes. If the Agency disapproves or modifies a submittal, the UST owner or operator may appeal the decision to the Board. *See* 415 ILCS 5/40(a)(1), 57-57.17 (2008); 35 Ill. Adm. Code 105.Subpart D. In this case, the Agency approved the Village's corrective action plan but modified the associated budget. Specifically, the Agency disapproved \$78,915.82 of the Village's budget as being ineligible for reimbursement from the UST Fund. Pet. at 3-4. The Agency stated that the disapproved costs were incurred before January 23, 2006, the date on which the Agency received the Village's election to proceed as "owner." *Id.* The Agency disapproved the costs because, according to the Agency, prior to January 23, 2006, the Village did not meet the definition of "owner" or "operator" under Section 57.2 of the Act (415 ILCS 5/57.2 (2008)). *Id.* The Village appeals on the grounds that it has been the owner of the site under Section 57.2 of the Act since August 9, 2002, and that the Agency's assertion that the Village was not the owner until January 23, 2006, is "contrary to law, and is an arbitrary and capricious interpretation of the law." *Id.* at 4. The Village's petition meets the content requirements of 35 Ill. Adm. Code 105.408.

The Board accepts the petition for hearing. The Village has the burden of proof. *See* 35 Ill. Adm. Code 105.112(a). Hearings will be based exclusively on the record before the Agency at the time the Agency issued its determination. *See* 35 Ill. Adm. Code 105.412. Accordingly,

though the Board hearing affords petitioner the opportunity to challenge the Agency's reasons for its decision, information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See* Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(2) (2008)), which only the Village may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, the Village may deem its request granted. *See* 415 ILCS 5/40(a)(2) (2008). Currently, the decision deadline is October 8, 2010, which is the 120th day after the date on which the Board received the petition, June 10, 2010. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for October 7, 2010.

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by July 12, 2010, which is the first business day following the 30th day after the Board received the Village's petition. *See* 35 Ill. Adm. Code 105.410(a). If the Agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.410(b).

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 17, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board

EXHIBIT B

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

RECEIVED
CLERK'S OFFICE
JUN 10 2010
STATE OF ILLINOIS
Pollution Control Board

WHEELING/GWA AUTO SHOP,)
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TO: See Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, the **PETITION FOR REVIEW OF IEPA LUST DECISION**, a copy of which is herewith served upon you.



JASON A. GUISINGER

CERTIFICATE OF SERVICE

I, JASON A. GUISINGER, certify that I served the foregoing Notice of Filing and **PETITION FOR REVIEW OF IEPA LUST DECISION** upon the parties listed on the attached Service List, by the means listed on the attached Service List, before 4:30 p.m. on June 10, 2010.



JASON A. GUISINGER

Dennis G. Walsh
Jason A. Guisinger
KLEIN, THORPE AND JENKINS, LTD.
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Chicago, IL 60606
(312) 984-6400

SERVICE LIST

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Division of Legal Counsel
Illinois Environmental Protection Agency
Attn: Melanie A. Jarvis, Ass't Counsel
1021 North Grand Avenue East
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VIA FIRST CLASS MAIL

Illinois Environmental Protection
Agency, Bureau of Land
Attn: Michael Piggush
1021 North Grand Avenue East
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EXHIBIT C



www.ipcb.state.il.us

Pat Quinn, Governor

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View Case Details

GENERAL INFORMATION			
Case No:	PCB 2010-070	Case Name:	Wheeling/GWA Auto Shop v. IEPA
Case Type:	Permit Appeal	Board Member:	Unassigned
Media Type:	Land	Hearing Officer:	Unassigned
County:	Cook		
Status:	Board Order		

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Case Activity

Date	Activity Type	Activity Notes	View File
6/17/2010	Order	Order of the Board by G. t. Girard: Board accepts petition for hearing; Agency must file entire record of its determination by July 12, 2010	
6/10/2010	Petition/Complaint	Petition for Review of Final Decision; \$75 Filing Fee Received (4.2 MB)	
3/18/2010	Order	Order of the Board by G. T. Girard: Board extends appeal period until June 10, 2010, as requested	
3/10/2010	Initial Filing	Request for Ninety-Day Extension of Appeal Period	

Service List

Party Name	Address	City/State/Zip	Phone/Fax
IEPA Respondent	1021 North Grand Avenue East	Springfield IL 62794-9276	217/782-5544 217/782-9807
<ul style="list-style-type: none"> • Melanie A. Jarvis - Assistant Counsel 	P.O. Box 19276		
Klein, Thorpe and Jenkins, Ltd. Petitioner	20 North Wacker Drive Suite 1660	Chicago IL 60606-2903	312/984-6400 312/984-6444
<ul style="list-style-type: none"> • Dennis G. Walsh 			

Total number of participants: 2

Notice List

No participants found.

Total number of participants: 0

Scheduled Hearings

Appeals on File

No appeals on file