BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TAZEWELL COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	PCB No. 97-179
	)	
v.	)	
	)	
MIDWEST GRAIN PRODUCTS OF ILLINOIS, INC., an Illinois corporation,	)	
	)	
	)	
Respondent.	)	

RESPONDENT MGP INGREDIENTS OF ILLINOIS, INC.'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AMENDED FIRST SET OF INTERROGATORIES, OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER LIMITING INTERROGATORIES TO PREVENT UNDUE EXPENSE AND HARASSMENT

COMES NOW Respondent, MGP Ingredients of Illinois, Inc.'s ("MGP" or "Respondent") f/k/a Midwest Grain Products of Illinois, Inc., by and through its attorneys, and responds to Complainant's Motion to Strike Respondent's Amended First Set of Interrogatories, or, in the Alternative, Motion for Protective Order Limiting Interrogatories to Prevent Undue Expense and Harassment, as follows:

I. BACKGROUND

Respondent has submitted thirty numbered Interrogatories. Complainant objects to the interrogatories on the grounds they: 1) exceed the thirty interrogatory limit; and 2) are, in part, overly broad, ambiguous and repetitive. Complainant also argues that Respondent's interrogatories were drafted to harass and cause undue expense to the Complainant.

As noted by Complainant, the first discussions between the parties regarding Respondent's Amended First Set of Interrogatories took place during a teleconference on August 29, 2005. During this discussion, the Complainant requested clarification of only three

interrogatories; numbers 20, 21 and 24. While the parties did not resolve the Complainant's concerns about the term "exemptions" as used in Interrogatory 21, during that discussion Respondent did agree to provide clarification in writing regarding Interrogatories 20 and 24. It was also during this discussion that Respondent first learned of Complainant's approach to counting each subpart as a separate interrogatory, at least as applied to Respondent. Respondent conveyed its disagreement with Complainant's approach and specifically pointed out that Respondent's approach and use of subparts was designed to amplify and narrow the basic request. Complainant neither disputed nor denied this was the case here. The discussion was then terminated. At its conclusion, Respondent was under the impression that the Complainant was satisfied with the outcome of the meeting and that Respondent's written clarification of Interrogatories 20 and 24 would resolve any remaining differences between the parties concerning Respondent's discovery requests.

Just two days later, on August 31, 2005 and before Respondent could even complete its responses to Complainant's requests for clarification, the Respondent received an eight page, single-spaced letter from Complainant wherein the Complainant described issues it had with approximately twenty of Respondent's interrogatories. The letter further demanded a response within two working days. The date set for response was the National Holiday of Labor Day. [1] It now appears that Complainant's intentions to resolve the discovery issues raised at the August 29 teleconference were disingenuous and the eight page, single-spaced "surprise attack" had been

[1] Respondent was prepared to address the alleged deficiencies in Interrogatories 20 and 24. Respondent can only speculate as to reasons why Complainant deemed it necessary to draft an eight page, single-spaced letter essentially demanding an immediate response. Perhaps Complainant expected Respondent to acquiesce to Complainant's demands at the August 29 teleconference and was not prepared when Respondent provided counter-arguments. Discovery disputes are routinely resolved through cooperation and discussion. In fact, Illinois Supreme Court Rule 201(k) requires that the parties "facilitate discovery" and "make reasonable attempts to resolve differences over discovery." Respondent submits that Complainant's actions in this case of demanding a response within two working days and an answer on a National Holiday fail to meet even the spirit much less the strictures of Rule 201(k).

planned all along to cause further delay and prevent a reasonable resolution to this case.

Statements in the August 31, 2005 letter from Complainant to Respondent evidence Complainant's intent to hinder Respondent's discovery efforts, cause the Respondent to incur additional litigation costs and further delay the timely resolution of this matter. In the August 31 letter, the Complainant admits that it "will not start work on preparing our specific responses until we are in receipt of your response." *See* Complainant's Motion to Strike, Exhibit 4. Meanwhile, in spite of the numerous objections available to Respondent regarding Complainant's interrogatories, MGP employees have continued to diligently search for records and information, and prepare responses to the Complainant's discovery requests even at the expense of working overtime and weekends.[2] MGP has also gone so far as to add additional part-time personnel to assist in preparing the discovery responses.

Further, while admitting that in the August 29, 2005 teleconference that Respondent's subparts, to some extent, provide guidance, the Complainant asks this Court to take a draconian approach to discovery, by asking for a strict reading of Board Rules and asserting each subpart is a separate interrogatory. At the same time, Complainant ignores the fact that its interrogatories take the same tact and closely follow the method it complains about Respondent using. Complainant's comments also demonstrate the continuing lack of cooperation on the Complainant's part which has existed in this matter for several years. It is apparent that the purpose of Complainant's motion is to hinder Respondent's discovery efforts, cause the Respondent to incur additional litigation costs and further delay the timely resolution of this

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[2] Complainant states, "Significantly, Respondent voiced no objection to Complainant's interrogatories prior to September 1, 2005." *See* Complainant's Motion to Strike, paragraph 9. Respondent agrees its silence is "significant" but not for the purpose Complainant offers. Respondent was then and continues now to make a good faith effort to answer Complainant's discovery requests even though Complainant's interrogatories suffer from the same "deficiencies" as Respondent's. That approach is further demonstrated by Respondent's September 20, 2005 letter to Complainant, attached as Exhibit 1.

matter.

Without citation to authority or any substantive analysis, Complainant urges the Board to apply a formulistic, draconian interpretation of the Rule. An interpretation that would reach an inequitable result, for Complainant's interrogatories suffer from the same "infirmities" as Respondent's. Accordingly, Respondent requests that the Board exercise it sound discretion to keep Complainant from this improper goal by denying Complainant's Motions.

II. RESPONDENT'S INTERROGATORIES ARE PROPERLY FORMATTED

The Illinois Pollution Control Board limits the number of interrogatories to thirty, including subparts. 35 Ill. Adm. Code 101.620(a); Illinois Supreme Court Rule 213(c). While the rule limits interrogatories to a specific number, including "subparts," it does not provide that every subpart count as a separate interrogatory. The Committee Comments regarding Rule 213(c) do not shed any light on the "subpart as a separate interrogatory" issue.

Interpretation of the parallel Federal Rule (F.R.Civ.P. 33)[3] provides the most relevant and persuasive analysis available for determining whether subparts of an interrogatory should be counted as a separate interrogatory. The attendant Advisory Committee notes make it clear that subparts are to be counted separately only when they represent a shift of subject matter. For example, the Advisory Committee stated that an inquiry "asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present and contents be stated separately for each such communication." F.R.Civ. P. Rule 33 Advisory Committee Notes, 1993 Amendments. In *Kendall v. GES Exposition Serv., Inc.*, the U.S. District Court interpreted a local rule containing similar language as follows: "Interrogatory subparts are to be counted as part of but one interrogatory ...if they are logically

[3] Respondent could not find, nor did Complainant cite, any relevant Rules analysis, Pollution Control Board decision, Order or other Illinois State authorities on this topic.

or factually subsumed within and necessarily related to the primary question." 1997 U.S.Dist. Lexis 15827 (D. Nev. August 8, 1997).

In *Swackhammer v. Sprint Corp., PCS*, the court held: "Interrogatories often contain subparts. Some are explicit and separately numbered or lettered, while others are implicit and not separately numbered or lettered." 225 F.R.D. 658, 664-65 (D. Kan. 2004). The court then recognized that an extensive use of subparts could defeat the purposes of the numerical limit, stating: "On the other hand, if all subparts count as separate interrogatories, the use of interrogatories might be unduly restricted." *Id.* (citing *Williams v. Bd. of County Comm'rs*, 192 F.R.D. 698, 701 (D. Kan. 2000). The court concluded "[A]n interrogatory containing subparts directed at eliciting details concerning a 'common theme' should generally be considered a single question. On the other hand, an interrogatory which contains subparts that inquire into discrete areas should, in most cases, be counted as more than one interrogatory." *Id.*

In *Banks v. Office of the Senate Sergeant-at-Arms*, the court's approach to subparts was to determine if the interrogatory "threatens the purpose of the rule by putting together in a single question distinct areas of inquiry that should be kept separate." 222 F.R.D. 7, 10-11 (D. D.C. 2004). The court continued,

> After [lawyers] introduce a topic, they demand to know in detail all the particulars about it, frequently introducing their specific demands with the phrase "including but not limited to." Thus, they may ask their opponent to state whether a particular product was tested and then demand to know when the tests occurred, who performed them, how and where they were conducted and the result. In such a situation, all the questions relate to a single topic, testing, and it would [be] unfair and draconian to view each of the demands as a separate interrogatory. This approach ends, however, the moment the interrogatory introduces a new topic that is in a distinct field of inquiry. *Id.*

Relying on a tortured interpretation of the term "subparts," Complainant argues that each of Respondent's subparts should be counted as separate interrogatories. Absent any analysis of

their content, Complainant makes the bald assertion: "[T]he first 14 interrogatories posed by Respondent actually numbered 30. In addition, Complainant has determined that Respondent's interrogatory numbers 7, 8, 11 and 19, with subparts, actually number 23 interrogatories." *See* Complainant's Motion to Strike, paragraph 7. Complainant's draconian approach flies in the face of the interrogatory interpretations described above.[4] Respondent submits neither the Rule nor the case law require such a narrow approach.

Pursuant to Board Rules, Respondent's interrogatories were crafted to: 1) elicit all relevant information; and 2) elicit information calculated to lead to relevant information. 35 Ill. Adm. Code 101.616(a). Each of Respondent's interrogatories was individually designed to obtain specific details concerning a common theme. Subparts were included because they related to the single topic identified in the primary request. Examples of "single topics" contained within Respondent's interrogatories include witnesses, major stationary source determination, major modification determination, air modeling, air permits, penalty calculations and BACT analysis. The subparts also served to provide detail, guidance and clarification so that Complainant could focus its response to the specific topic or issue contained within the topic of that Interrogatory.

Respondent is cognizant of the significant amount of documents that have been generated during the past ten years in the course of resolving this matter. Respondent contends that its interrogatories, as written, provide Complainant with such specific direction that Complainant should be able to completely respond to each request. Unfortunately, Complainant disagrees, at least with regard to these interrogatories.

Complainant states that "to genuinely attempt to respond to each interrogatory

[4] By applying Complainant's mere mathematical approach to interrogatory subparts, Complainant's interrogatories exceed the Board's limit by fourteen requests.

...involves reviewing a very large amount of information in the specific context of each question."[5] *See* Complainant's Motion to Strike, paragraph 10. Respondent agrees with the general precept of this statement but not its conclusion. This matter has languished for over ten years. Complainant is well aware of the extensive case history that has been developed. However, it is counter-intuitive for the Complainant to: 1) express disbelief that the Respondent would request detailed information dating back over ten years; 2) complain about such a discovery request; and 3) seek exactly the same sort of documentation from Respondent (See, e.g., Complainant's Interrogatory 9, which seeks information about three separate dryer systems "beginning 1994 through the present."). Discovery efforts in cases like these are to be expected, given the nature and history of this matter. It should also be noted that Respondent is faced with the same burden, has raised no objections, and continues to diligently prepare its responses to Complainant's requests in spite of the glaring deficiencies that can be found in Complainant's interrogatories. Further, Complainant's contention that Respondent's interrogatories are "in part, overly broad, ambiguous, and repetitive" is both incorrect and an insufficient grounds to strike the requests.

Following is an interrogatory-specific analysis of some of Respondent's interrogatories.

Interrogatory 1: Complainant counts Interrogatory 1 as eight separate interrogatories. Interrogatory 1 is a commonly drafted interrogatory that rarely, if ever, receives objection.

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[5] The accuracy of this assertion and the conclusion Complainant desires the Board to reach are now highly questionable. Respondent has been informed by Illinois EPA that the documents subject to Respondent's FOIA request will be "ready for review" on or before September 26, 2005. Letter from Dennis E. Brown, Assistant Counsel, Illinois EPA, to John Collins, Husch & Eppenberger (September 15, 2005). If this is so, then the State will have already performed its review of a large amount of information in this case. One of two facts is then true. Either the FOIA response offered by the State is deficient or Complainant's assertions about the burdensome nature of Respondent's interrogatories are at best, inaccurate.

Clearly, this interrogatory was drafted as a single topic asking information regarding only those individuals involved in answering the interrogatories. The subparts were directed to details concerning a common theme and should, therefore, be considered a single question. One need only look to Complainant's Interrogatory 29 to recognize the folly in Complainant's argument.

Complainant's Interrogatory 29, seeking information similar to Respondent's Interrogatory 1, is a major compound sentence containing multiple permutations and combinations, including an "and/or." Applying Complainant's logic, if separated into its subparts, its Interrogatory 29 would count, depending upon how one parses the sentence, from 4 to 10 separate interrogatories.

Interrogatories 2 through 5: Complainant argues that Interrogatories 2 through 5 go beyond the information specifically identified in Illinois Supreme Court Rule 213(f) and are duplicitous. These interrogatories ask for information about fact and expert witnesses. The subparts of Interrogatories 2 through 5 were included merely to provide clarification and direction about such witnesses. Individual Interrogatories 2 through 5 do not introduce new topics within themselves that reflect distinct fields of inquiry. Without any analysis, Complainant seeks to bar these interrogatories on a strict mathematical reading of Rule 213(f). Again, Complainant fails to examine its interrogatories on the same subject matter through the same interpretive lens. For example, Complainant's Interrogatory 14, subpart c, goes beyond Rule 213(f) requirements by soliciting information regarding the dates on which MGP met or consulted with the witness; Complainant's Interrogatory 16, subparts g and h, both exceed the limitations set by Rule 213(f) by apparently asking for the dates and/or nature of the witnesses' prior testimony and the dates and/or nature of Respondent's retention of the witnesses; Complainant's Interrogatory 16, subpart e, requests identical information found within the same

interrogatory, subpart i.

Interrogatory 7: Complainant submits numerous objections to Respondent's Interrogatory 7. The crux of the complaint appears to center on the assertion that Interrogatory 7 contains "subparts that go beyond the subject matter of the original interrogatory." Interrogatory 7 concerns the allegation that MGP was, and continues to be a "major stationary source." This is a critical issue for MGP and one the Board has left open. On August 21, 1997, the Illinois Pollution Control Board denied the Attorney General's motion to strike MGP's affirmative defense that as a result of the shutdown of the fluidized bed coal boiler in 1994, it was no longer a "major stationary source" and the PSD program requirements were no longer applicable to MGP. All Interrogatory 7 subparts are elements of the "major stationary source" theme and were designed to elicit specific information for each piece of equipment, process or operation identified by Complainant. *See* Complaint, paragraphs 18 - 21. All subparts of this interrogatory are directly related to the single topic "major stationary source" and the Complaint in this case. These subparts were enumerated for the benefit of Complainant and provide both detail and clarification to the primary request.

Interrogatory 8: Complainant objects to Interrogatory 8 primarily because the topic "major modification" was not mentioned in the original request. Complaint also avers that this request should "count" as four interrogatories because it consists of four "subparts." First, each of the "subparts" of this interrogatory are related to the single topic: "major modification." Respondent could have drafted this interrogatory without subparts, separating each request by commas or semi-colons and containing the term "major modification."[6] The "subparts" are internally consistent and directly related to the issue of "major modification." They provide

[6] For examples of subparts separated with commas and semi-colons within an individual request see Complainant's Interrogatories 3, 10 and 11.

discrete and direct inquiry about specific subjects within that topic. In short, the subparts focus the broad topic on four specific matters. Alternatively, Respondent could have drafted a request asking for "any and all information related to the 'major modification' determination." However, similar to Interrogatory 7, Respondent chose to provide detail and clarification for the benefit of the Complainant. Further, the interrogatory is directly related to MGP's pending affirmative defense that it is not subject to PSD program requirements.

Interrogatories 9 and 10: Complainant objects to Respondent's Interrogatories 9 and 10, arguing the need for clarification of the difference between the two interrogatories."[7] A casual comparison of the request shows that Interrogatory 9 has set out a request for communications related to "air particulate permits or air particulate emission issues" within a specific time period, and between specific parties. Respondent even went so far in Interrogatory 9 to provide specific dates on which conversations took place to aid the Complainant in its search. Interrogatory 10 concerns the separate topic of air particulate permit **modifications** and air particulate permit application **modifications**. Complainant requests clarification yet seems to answer its own question by stating that permits issued by the Illinois EPA Bureau of Air "are in two forms, construction and operating permits."

Interrogatory 11: Complainant objects that Respondent's Interrogatory 11 consists of one primary request and four subparts requesting information "above and beyond" the information sought in the primary request. Complainant thus counts this request as five interrogatories instead of one. Interrogatory 11 relates to the Complainant's penalty calculations. All of the "subparts" are directly related to eliciting details concerning the common theme of

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[7] Complaint also asserts Interrogatory 9 is "over broad". A reading of the request will show the folly of Complainant's position.

"penalty calculation." Each seeks a specific fact about the single topic of "penalty calculations." Counsel for Respondents asserts that adopting Complainant's draconian approach by separating this interrogatory into five individual interrogatories is not warranted by the Rule and would be doing our client an injustice. The extensive history of this matter demands efficient interrogatory drafting and the inclusion of "subparts" aids in meeting this demand.

Interrogatories 14 and 16: Complainant objects to Respondent's Interrogatories 14 and 16 as mirroring information requested in Interrogatories 12 and 13, and 8 and 12 respectively. Each of these interrogatories is a single interrogatory that pertains to discrete topics. Interrogatory 12 concerns communications related to a BACT determination; Interrogatory 13 concerns the analysis and methodology used to determine the BACT; Interrogatory 14 concerns communications related to economic and technological feasibility; Interrogatory 8 concerns issues related to the "major modification" determination; Interrogatory 16 specifically concerns communications related to the use of "top down" analysis to select the BACT. Obviously none of the interrogatories identified overlap or seek duplicitous information. Respondent notes that Complainant has drafted interrogatories seeking duplicitous information. Complainant's Interrogatory 8 is seeking a subset of information it requested in Interrogatory 5. Additionally, Complainant's Interrogatory 11 is seeking a subset of information it requested in Interrogatory 9.

Interrogatory 19: Complainant objects that Respondent's Interrogatory 19 contains four separate interrogatories. Interrogatory 19 asks only for one thing: IEPA's air emission modeling at the MGP site. The specific requests for communications and data related to the modeling are provided for nothing more than Complainant's benefit, allowing it to narrow its response. Respondent submits that a broader interrogatory requesting any and all communications and data related to air emission modeling at MGP would also be in order here.

Interrogatory 21: Complainant objects to the Respondent's use of the term "exemptions." Complainant, attempting to "shift the burden" to Respondent, asks, "Which exemptions does Respondent believe are applicable?" *See* Complainant's Motion to Strike, paragraph 38. First, Respondent is not asking Complainant to address every exemption provided for in the Clean Air Act ("CAA") or the Illinois Environmental Protection Act (the Act"). Respondent is merely asking what, if any, exemptions were considered. Nothing more. Second, this request calls for a simple, straight-forward inquiry and answer. Respondent is perplexed by Complainant's attempt to make this interrogatory more difficult than it really is. Lastly, Complainant's objection is counter-intuitive. If Respondent complied with Complainant's request and included every exemption in the CAA or the Act, it would likely be met with responses of "vague, overly broad, burdensome" or "subparts count as separate interrogatories." As it stands, this request is simple and direct. It calls for a similar response.[8]

In sum, Respondent's interrogatories were carefully crafted to ensure that MGP obtains the information it needs to meet the elements of its defense. The interrogatories seek fundamental information and although they are detailed to ensure a complete response, each specific subpart addresses itself to a single topic and thus should not be considered separate interrogatories.

The purpose of the limit on interrogatories is not to prevent discovery but to prevent potentially excessive use of this particular discovery device. *Power & Telephone Supply Co., v. Suntrust Banks, Inc.*, 2004 U.S. Dist. Lexis 6325, *4 (W.D. Tenn. March 15, 2004). Where a party has not excessively abused the right to discovery, it is appropriate to mandate a response to

[8] Respondent could certainly assert a similar objection to Complainant's Interrogatory 26. Complainant's request is phrased in such a manner that it is requiring MGP to prove a negative. Complainant's objection further exemplifies its unwillingness to cooperate in discovery and its intent to delay a reasonable resolution to this matter.

interrogatories even if they exceed the set numerical limit. *Id.* at *5. Despite the numerous deficiencies in Complainant's interrogatories, Respondent has: 1) diligently worked to comply with the mutually agreed upon schedule and Order to complete discovery in a timely way; 2) sought to provide clarification when requested; 3) asked for clarification when necessary and 4) expressed its wishes to bring this matter to a conclusion that is long over due. Respondent submitted its interrogatories in good faith and requests that Complainants be directed to respond to them even if the Hearing Officer determines that they exceed the set limits. Accordingly, Respondent respectfully requests that the Hearing Officer deny Complainant's Motion.

III. RESPONDENT'S FOIA REQUEST IS NOT RELEVANT TO THE ISSUE CURRENTLY BEFORE THE HEARING OFFICER

Without citation to authority or basis in fact, Complainant impugns the integrity of opposing counsel while misstating the facts. Respondent is shocked and dismayed by Complainant's vituperative assertions and baseless allegations regarding opposing counsel's conduct surrounding a Freedom of Information Act request. First, such requests are a statutorily mandated right. Second, the use or submission of FOIA is irrelevant to these proceedings. Finally, Complainant ascribes to opposing counsel such improper motives, and unprofessional conduct that it leaves Respondent no course but to move to strike all references to the FOIA request.[9]

Respondent is entitled to submit a FOIA request to Illinois EPA pursuant to 5 ILCS 140. Neither the Illinois FOIA statue nor the Supreme Court Rules provide any basis for anything

[9] The State has made the outrageous and unprofessional allegation that Respondent's FOIA request was brought in a "vindictive manner." The Complainant then makes the even more outrageous statements, "Complainant does not have the ability to FOIA Defendant's files and information. Respondent is taking advantage of the fact that Complainant is a government agency subject to FOIA to unduly harass the Complainant, when Respondent itself is not subject to the requirements of FOIA and thus not likewise accessible to the Complainant." *See* Complainant's Motion to Strike, paragraph 43. Complainant proceeds to use Respondent's FOIA request as justification for granting the motion that is currently before the Hearing Officer. Complainant fails to cite any statute, rule, case law, committee comments or guidance to support its contention and Respondent cannot find any either.

remotely related to striking or limiting a party's discovery requests based upon the party's FOIA request. Respondent has numerous, legitimate reasons for submitting its FOIA. First, MGP hopes to use the FOIA documents to aid it in responding to Complainant's discovery requests. As noted above, this matter has dragged on for several years resulting in lost or destroyed documents, copies of which may be in the FOIA requested files and might prove to be relevant. MGP believes the FOIA request is necessary to obtain these documents and is uncertain if it can respond completely to some of Complainant's discovery requests without the FOIA documents. Secondly, the sooner MGP receives the FOIA documents, the better its chances of understanding specific details of the case and perhaps bringing a more rapid resolution to this matter. Lastly, Respondent felt it had no choice but to renew the FOIA request after receiving Complainant's eight page letter threatening to petition the Hearing Officer to strike Respondent's interrogatories and stating that it was going to delay responding to Respondent's discovery requests. As mentioned above, MGP desires to resolve this case equitably and promptly. The information in Complainant's possession and subject to the FOIA is critical to expediting this resolution.

Respondent suspended its FOIA request in the spirit of cooperation. Complainant's actions left Respondent no alternative but to exercise its statutory right. At the risk of delay in receiving discovery responses from the Complainant, Respondent has renewed its FOIA request. That request is irrelevant to these proceedings and all references to the FOIA request should be stricken from the record. Unlike the Complainant, MGP is diligently responding to discovery requests and the FOIA documents are useful in responding to these requests.[10]

WHEREFORE, Respondent respectfully requests that the Hearing Officer deny

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[10] Interestingly, the FOIA documentation has been announced as ready and available on or before September 26, 2005. See Exhibit 2.

Complainant's Motion to Strike Respondent's Amended First Set of Interrogatories, and deny Complainant's alternative Motion for Protective Order Limiting Interrogatories to Prevent Undue Expense and Harassment. Respondent respectfully further requests that Complainant's be directed to respond to the interrogatories even if the Hearing Officer determines that the sum total of Interrogatories they exceed the set limit of thirty.

Respectfully submitted,

HUSCH & EPPENBERGER, LLC

By: _____
One of its attorneys

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Dated: September 21, 2005

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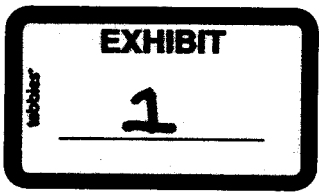
FROM: Patrick M. Flachs

DATE: September 20, 2005

NUMBER OF PAGES INCLUDING THIS COVER SHEET: 5

MESSAGE:



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September 20, 2005

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Re: *People v. MGP Ingredients of Illinois, Inc.* PCB No. 97-179

Dear Ms. McBride:

Pursuant to our clients' efforts to comply with the Discovery process so this matter may be brought to a conclusion and Rule 201(k) of the Illinois Supreme Court Rules, we have reviewed your various Interrogatories and Request for Document Production with the appropriate MGP representatives. During that review, we have identified issues with Interrogatories 4, 9, 11, 26, and 28. In an effort to attempt to informally resolve those issues we see with the Interrogatory (and in any concomitant or related Request for Documents), I will outline our concerns in an effort to informally resolve these Discovery issues.

Interrogatory No. 4 (Document Request No. 2)

It is virtually impossible for us to ". . . provide all costs entailed in the purchase, installation, modification, maintenance and operation of the feed dryer systems 651 and 661, and the Swiss Combi system, as well as the dates upon which each such cost was incurred and the date upon which it was paid, or installment schedule upon which it was paid."

This request encompasses virtually every document generated by operational activities at MGP and the preponderance of our financial documentation. In addition, there are several practical issues related to this request. First, MGP does not have maintenance documentation for hours worked prior to 1999. After 1999, we estimate the mechanic work orders by themselves encompass of several hundred instances per year. In order to find these documents, and to satisfy your Interrogatory and Document Request we would have to first find the files related to the dryers, then review the maintenance

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files; find those files related to the dryers; and, pull the materials used in each work order (if they are apparent) and determine the associated costs from financial data and information. Moreover, we cannot assure the accuracy of this information, so the documentation you would receive would, at best, be an estimate. This effort in our estimation would require one person, working full-time at least one month to find, collect and produce.

In addition, all the documentation relating to the operational costs of the dryers, including all operator time sheets, gas readings and expense documents; along with management notes including internal MGP meetings and those with the IEPA would have to be found and collected. We estimate this would take an additional person, working full-time at least 3 ½ weeks to assemble this information. We would like to discuss how we might narrow or focus this request to obtain the documents or information necessary for your purpose.

Our client has committed to obtaining, collecting and providing all the costs entailed in the purchase, installation and modification of feed dryer system 651 and 661. We might, however, require an additional week or two from the current production date to accomplish this task.

None of these estimates include the identification, collection and production of information and documents related to the Swiss Combi dryer. We believe information related to the Swiss Combi is not relevant for Discovery purposes in this lawsuit. We would welcome the opportunity to discuss your theory or theories why we should produce documentation related to the Swiss Combi system.

Interrogatory No. 9 (Document Request No. 7)

To comply with your request that we ". . . provide all information known to the Respondent and/or in its possession and control regarding the dates of operation of feed dryer system 651 and 661 . . . beginning in 1994 through the present", would require that we find and copy information from three shifts per day, 365 days per year, for 11 years. This amounts to over 12,000 discreet events and an unknown (at this point) number of pages. In addition, we currently possess only related documents from 1999 to the present and have not yet located any logs prior to that date.

We have two suggestions how to handle/narrow/meet your requests. First, is for you or your representatives to come to the MGP facility in Pekin whereupon we will provide you or your representative access to those logs we currently possess and those we are

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able to locate. Subject to reasonable restrictions (e.g., business hours and space), we could arrange for this review at your earliest convenience. The second suggestion is that you narrow this Interrogatory and Document Request to information related to the hours of operation of dryer 651 and/or 661 on a yearly basis. We can readily provide this information to you and represent that it accurately depicts the dryers' operations.

Again, the Swiss Combi system was not involved in this analysis.

Interrogatory No. 11 (Document Request No. 7)

This Interrogatory, like Interrogatory No. 9, is quite broad; ",. . . provide all information known . . . or in its possession and control regarding the construction and operation of feed dryer systems . . .". It also appears to actually subsume the request of Interrogatory No. 9: operation viz. construction and operation; and then adds specific additional requests for emissions testing; construction and operation of air pollution control equipment to control PM emissions (we are not sure what this means); and "modeling" (which appear to be discreet requests in and of themselves).

This request, like No. 9 would require nearly two months for document collection and production by itself. We would like to discuss how we might restructure this request and coordinate production with Interrogatory No. 9.

Again, the Swiss Combi system was not involved in this analysis.

Interrogatory No. 26

We find this request that we "prove a negative" confusing. It does, however, appear to ask for the inverse of what MGP seeks in our Interrogatories 10, 21, 26, and 27 and our Request for Admissions 1 thru 4. Accordingly, I think we should be able, through meaningful discussions, be able to resolve this request.

Interrogatory No. 28

Setting aside the conclusory statements contained in the first portion of the Interrogatory, and the improper use of the Stipulation and Proposal for Settlement, the fact is that this request is extraordinarily broad; how does one show that a repeated violation is caused by the installation of equipment that would only fail? In short, we need to discuss either a narrowing or clarification of this Interrogatory.

Husch & Eppenberger, LLC

I think we can come relatively close to the current production/Discovery schedule, if we can resolve the issues I have outlined for you with regard to these five Interrogatories. Please contact me at your earliest convenience to discuss these issues.

Very truly yours,

Patrick M. Flachs

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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217/782-5544
217/782-9143 (TDD)

September 15, 2005

Certified Mail
Return Receipt Requested
7002 3150 0000 1221 0291

Mr. John Collins
Husch & Eppenberger, LLC
190 Carondelet Plaza, Suite 600
St. Louis, Missouri 63105-3441

Re: Freedom of Information Act Request

Dear Mr. Collins:

On September 6, 2005, the Illinois Environmental Protection Agency ("Illinois EPA") received from Husch & Eppenberger, LLC ("H&E"), by electronic transmission ("e-mail"), a letter requesting information pursuant to the Illinois Freedom of Information Act ("FOIA"). Specifically, H&E request that the Illinois EPA provide copies of all documents relative to emissions testing performed by Midwest Grain Products of Illinois, Inc. ("MGP") on January 10, 1996, an Illinois EPA inspection of MGP performed on September 21, 1995, meetings between representatives of the Illinois EPA and MGP, and correspondence between representatives of the Illinois EPA and MGP, as specifically set forth in detail within the information request. This letter responds to the above-mentioned request.

As the number of documents maintained by the Illinois EPA Bureau of Air ("BOA") relative to MGP is significant, additional time is required by the Illinois EPA to assemble, review, and evaluate records contained within BOA files to determine whether records responsive to the request are exempt from public disclosure. Given the number of records contained within Illinois EPA BOA files, and limited available State resources, the Illinois EPA has been unable to complete its review of all documents within the initial seven day period prescribed by the FOIA. Accordingly, documents responsive to the information request will be made available to H&E on or before September 26, 2005.

Should you have questions or comments with regard to this matter, please contact the undersigned.

Sincerely,

Dennis E. Brown

Dennis E. Brown
Assistant Counsel
Division of Legal Counsel