

ILLINOIS POLLUTION CONTROL BOARD  
December 5, 2024

PRAIRIE STATE GENERATING )  
COMPANY, LLC, )  
 )  
Petitioner, )  
 ) PCB 25-11  
v. ) (Permit Appeal - Air)  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

OPINION AND ORDER OF THE BOARD (by M. Gibson):

On August 30, 2024, Prairie State Generating Company, LLC (Prairie State) timely filed a petition asking the Board to review the Illinois Environmental Protection Agency’s (Agency or IEPA) alleged failure to act on Prairie State’s Clean Air Act Permit Program (CAAPP) permit application. *See* 415 ILCS 5/40.2(a) (2022); 35 Ill. Adm. Code 105.302(e). The CAAPP application concerns Prairie State’s coal-fired power generating facility located at 3872 County Highway 12 in Marissa, Washington County (facility).

As discussed below, the Board agrees with Prairie State and directs IEPA to issue a draft permit or a refusal to grant a permit within one year of Prairie State filing its new CAAPP permit application. The Board also directs IEPA to issue a final permit, if it decides to issue a draft permit, within two years of Prairie State filing its new CAAPP permit application.

The Board’s opinion begins below with the procedural history and the undisputed facts of this matter. After providing the legal background, the opinion discusses the issues and concludes by reaching its decision and issuing an order.

**PROCEDURAL BACKGROUND**

Prairie State filed this petition on August 30, 2024 (Pet.). On September 19, 2024, the Board accepted the petition for hearing.

On September 27, 2024, IEPA filed a motion for an extension of time to file the administrative record to October 7, 2024, which the hearing officer granted on August 30, 2024. IEPA filed its answer (Ans.) and the administrative record (Rec.) on October 4, 2024.

On October 25, 2024, IEPA pre-filed the testimony of William Marr (Test.).

On October 29, 2024, a hearing was held and on November 6, 2024, the Board received the transcript (Tr.).

On November 12, 2024, Prairie State filed its post-hearing brief (Br.). IEPA filed its post-hearing brief on November 19, 2024 (Resp.).

### **FACTS**

Prairie State submitted a CAAPP permit application on May 5, 2011 and received a notice of completeness pursuant to Section 39.5(5)(f) of the Act (415 ILCS 5/39.5(5)(f) (2022)) on May 18, 2011. Tr. at 7, 10; Pet. at 1. The Agency, as of this date, has not acted on that CAAPP permit application. Tr. at 8; Ans. at 4.

### **LEGAL BACKGROUND**

The Board first sets forth the statutory authorities. After that, the Board sets forth the standard of review.

#### **Statutory Authorities**

Section 39.5 of the Environmental Protection Act (Act) (415 ILCS 5/39.5 (2022)) sets forth the CAAPP, reflecting the requirements of Title V of the federal Clean Air Act Amendments of 1990 (42 U.S.C. §§ 7661-7661f). Generally, a CAAPP permit is designed to be a single, comprehensive document of all air pollution obligations that apply to the facility. The Agency decides whether to approve CAAPP permit applications, and Agency decisions may be appealed to the Board by, among others, the permit applicant and persons who participated in the Agency's public comment process. *See* 415 ILCS 5/40.2(a) (2022); 35 Ill. Adm. Code 105.Subpart C.

Section 39.5(5)(j) provides:

The Agency shall issue or deny the CAAPP permit within 18 months after the date of receipt of the complete CAAPP application, with the following exceptions:

- (i) permits for affected sources for acid deposition shall be issued or denied within 6 months after receipt of a complete application in accordance with subsection 17 of this Section;
- (ii) the Agency shall act on initial CAAPP applications within 24 months after the date of receipt of the complete CAAPP application;
- (iii) the Agency shall act on complete applications containing early reduction demonstrations under Section 112(i)(5) of the Clean Air Act within 9 months of receipt of the complete CAAPP application.

Where the Agency does not take final action on the permit within the required time period, the permit shall not be deemed issued; rather, the failure to act shall

be treated as a final permit action for purposes of judicial review pursuant to Sections 40.2 and 41 of this Act. 415 ILCS 5/30.5(5)(j) (2022).

Section 40.2(a) of the Act provides:

Subsection (a) of Section 40 does not apply to any permit which is subject to Section 39.5. If the Agency refuses to grant or grants with conditions a CAAPP permit, makes a determination of incompleteness regarding a submitted CAAPP application, *or fails to act on an application for a CAAPP permit, permit renewal, or permit revision within the time specified in paragraph 5(j) of Section 39.5 of this Act*, the applicant, any person who participated in the public comment process pursuant to subsection 8 of Section 39.5 of this Act, or any other person who could obtain judicial review pursuant to Section 41(a) of this Act, *may, within 35 days after final permit action, petition for a hearing before the Board to contest the decision of the Agency*. However, the 35-day period for petitioning for a hearing may be extended by the applicant for an additional period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period. If another person with standing to appeal wishes to obtain an extension, there must be a written notice provided to the Board by that person, the Agency, and the applicant, within the initial appeal period. Notwithstanding the preceding requirements, petitions for a hearing before the Board under this subsection may be filed after the 35-day period, only if such petitions are based solely on grounds arising after the 35-day period expires. Such petitions shall be filed within 35 days after the new grounds for review arise. *If the final permit action being challenged is the Agency's failure to take final action, a petition for a hearing before the Board shall be filed before the Agency denies or issues the final permit.*

The Agency shall appear as respondent in such hearing. At such hearing the rules prescribed in Sections 32 and 33(a) of this Act shall apply, and the burden of proof shall be on the petitioner. [emphasis added] 415 ILCS 5/40.2(a) (2022).

“Final permit action” means “the Agency’s granting with conditions, refusal to grant, renewal of, or revision of a CAAPP permit, the Agency’s determination of incompleteness of a submitted CAAPP application, or the Agency's failure to act on an application for a permit, permit renewal, or permit revision within the time specified in subsection 13, subsection 14, or paragraph (j) of subsection 5 of this Section.” 415 ILCS 5/39.5(1) (2022).

### **Standard of Review**

When reviewing a permit decision by the Agency to grant, grant with conditions or deny a permit under Section 39 of the Act (415 ILCS 5/39 (2022)), the Board’s review is pursuant to Section 40 of the Act (415 ILCS 5/40 (2022)). Under those statutory provisions the law is well settled that the question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would have occurred if the requested permit had been issued. ESG Watts v. IEPA , PCB 01-63, 64 (consol.) (Apr. 4, 2002);

Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), *citing* IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E. 2d 189 (1st Dist. 1983). Further, under Section 40 of the Act (415 ILCS 5/40 (2022)), the Agency’s denial letter frames the issues on appeal and the burden of proof is on the petitioner. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 676 N.E.2d 299 (3rd Dist. 1997). And under Section 40 of the Act (415 ILCS 5/40 (2022)), the Board’s review of permit appeals is limited to information before the Agency during the Agency’s statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency’s decision. *See* Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-04 (consol.), slip op. at 11 (Feb. 2, 2006); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987).

In this case, the Agency’s decision is made pursuant to 39.5 of the Act (415 ILCS 5/39.5 (2022)) and the Board is authorized to review the Agency’s decision under the provisions of Section 40.2 of the Act (415 ILCS 5/40.2 (2022)), which specifically states that Section 40(a) of the Act (415 ILCS 5/40(a) (2022)) does not apply. For many of the Agency’s actions under Section 39.5 of the Act (415 ILCS 5/39.5 (2022)), the standard of review followed by the Board need not change and the Board can follow the well-settled precedent. However, when reviewing the Agency’s inaction under Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2022)), there is no denial letter and no actual decision by the Agency on the permit. In fact, Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2022)) specifically states that “the permit shall not be deemed issued” by the Agency’s failure to act. Thus, the well-settled law can offer only guidance in the Board’s review of the Agency’s inaction under Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2022)).

The Board notes that the burden of proof remains on the applicant pursuant to Section 40.2 of the Act (415 ILCS 5/40.2 (2022)). In this case, the Board will look to the provisions of the Act, the Agency record, and the arguments of the parties to determine if Prairie State has demonstrated that the Agency failed to take action and, if so, what relief is appropriate.

## **DISCUSSION**

The following discussion will begin with a summary of Prairie State’s arguments. Next the Board will summarize IEPA’s position. The Board will then discuss the Board’s findings and reasons for those findings.

### **Prairie State’s Arguments**

Prairie State seeks an order from the Board requiring the Agency to issue a draft CAAPP permit within one year of Prairie State submitting an update to its CAAPP permit application. Br. at 2. Prairie State maintains that the completed permit application was submitted over thirteen years ago. *Id.* at 1. Prairie State argues that “relief from the Board is necessary to ensure that Illinois EPA takes final action on Prairie State’s CAAPP permit application as expeditiously as possible.” *Id.*

Prairie State agrees with IEPA that “the technical review, drafting and negotiating of a CAAPP permit for a large stationary source like Prairie State’s is an inherently lengthy and

complex process.” Br. at 2. Therefore, Prairie State acknowledges that “the statutorily required review process following the issuance of a draft CAAPP permit could take an additional one year to complete.” *Id.* Prairie State argues that “there is parity between Prairie State’s and Illinois EPA’s position on timing for Illinois EPA to take final action on the CAAPP permit application.” *Id.*

### **IEPA’s Arguments**

The Agency argues that the CAAPP permit process is a complex process that involves a significant amount of time and resources. Resp. at 2. The Agency opines that “the permitting of a coal-fired power plant with a collocated mine is both complex and controversial, requiring detailed technical review, extensive interaction with the applicant, and further investigation to properly respond to public comments and USEPA review.” Resp. at 3. In a footnote, IEPA stated that it opposes “any order that would require Illinois EPA to *issue* a draft CAAPP permit or to *issue* a CAAPP permit.” Resp. at 2 n.2 (emphasis in original). In that same footnote, IEPA “requests that the Board direct Illinois EPA to *take final action* on such permit application within two years from the date that PSGC [Prairie State Generating Company] submits an updated, complete application.” *Id.* (emphasis in original).

### **Board Discussion**

Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2022)) unequivocally requires the Agency to act on initial CAAPP permit applications within 24 months. The failure to take such action can be appealed to the Board pursuant to Section 40.2 of the Act (415 ILCS 5/40.2 (2022)). The facts before the Board clearly establish that the Agency has not acted on Prairie State’s application within 24 months or two years. Thus, Prairie State is entitled to a review of the Agency inaction.

The Board can only review the record placed before the Board. On October 4, 2024, the Agency filed the permit record as required by Section 105.302(f) of the Board regulations (35 Ill. Adm. Code 105.302(f)). The Agency has offered no explanation for its failure to act on the permit application. Therefore, the record before the Board simply demonstrates that Prairie State filed a CAAPP permit application with the Agency on May 5, 2011, and that the Agency deemed that CAAPP permit application complete on May 18, 2011. Thus, pursuant to the statutory provisions of Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2022)), Prairie State was entitled to action by the Agency.

Prairie State now seeks an order requiring IEPA to issue a draft permit within one year of the date of this order. The Agency seeks two years to complete the review process and issue a final permit. In a footnote in its post-hearing brief, IEPA did state that it opposes a Board order requiring IEPA to issue a draft or final CAAPP permit. However, IEPA did not argue that it opposes such an order or provide any evidence supporting that statement in the main body of its post-hearing brief. Therefore, the Board is unpersuaded by this unsubstantiated claim.

As stated, IEPA has not demonstrated that the one-year timeframe to issue a draft permit is too short. Therefore, the Board finds that one year from the time that Prairie State submits an

updated, complete CAAPP application is sufficient to issue a draft CAAPP permit or a refusal to grant a permit. The Board further finds that two years is an adequate timeframe to issue a final permit, which is in line with the 24 months that Section 39.5(5)(j)(ii) of the Act gives the Agency to review a CAAPP permit.

### **CONCLUSION**

The Board finds that the Agency failed to take action on Prairie State's completed application for a CAAPP permit as required by Section 39.5(5)(j) of the Act (415 ILCS 5/39.5(5)(j) (2022)). Therefore, Prairie State is entitled to a review of that inaction. The Board directs IEPA to issue a draft permit or a refusal to grant a permit within one year of Prairie State filing an updated, complete CAAPP permit application. The Board also directs IEPA to issue a final permit, if it decides to issue a draft permit, within two years of Prairie State filing an updated, complete CAAPP permit application.

### **ORDER**

The Illinois Environmental Protection Agency is directed to:

1. issue a draft permit or a denial of a permit within one year of Prairie State filing an updated, complete application for a Clean Air Act Permit Program permit; and
2. issue a final permit, if it decides to issue a draft permit, within two years of Prairie State filing an updated, complete Clean Air Act Permit Program permit application.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 5, 2024, by a vote of 4-0.



Don A. Brown, Clerk  
Illinois Pollution Control Board