

ILLINOIS POLLUTION CONTROL BOARD
December 3, 2009

UNITED STATES STEEL)	
CORPORATION, a Delaware corporation,)	
)	
Petitioner,)	
)	
v.)	PCB 10-23
)	(CAAPP Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent,)	
)	
AMERICAN BOTTOM CONSERVANCY,)	
)	
Intervenor.)	

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

United States Steel Corporation (U.S. Steel) has appealed the September 3, 2009 issuance of a Clean Air Act Permit Program (CAAPP) permit by the Illinois Environmental Protection Agency (IEPA). The CAAPP permit concerns U.S. Steel's integrated steel mill plant located at 20th and State Streets in Granite City, Madison County. On October 21, 2009, American Bottom Conservancy (ABC) filed a motion to intervene in this proceeding, accompanied by a motion for one of ABC's attorneys to appear *pro hac vice*.

Today the Board grants ABC's motion to intervene, subject to restrictions set forth below, and grants the *pro hac vice* motion. The Board describes the procedural history of this case before discussing and ruling on the motions.

PROCEDURAL HISTORY

On October 7, 2009, U.S. Steel timely filed its petition for review. On October 15, 2009, the Board accepted for hearing U.S. Steel's appeal, which concerns conditions of the CAAPP permit. On October 21, 2009, ABC filed a motion to intervene (Mot. Interv.) in this proceeding, accompanied by a motion for attorney Robert R. Kuehn to appear *pro hac vice* (Mot. PHV).¹ On November 3, 2009, IEPA filed a response (IEPA Resp.) to ABC's intervention motion. On November 4, 2009, U.S. Steel filed a response (U.S. Steel Resp.) to ABC's intervention motion.

¹ ABC's motion to intervene was also accompanied by the appearance of Elizabeth Hubertz, Staff Attorney with the Interdisciplinary Environmental Clinic at the Washington University School of Law, and the appearance of Senior Law Student Melissa Katz, certified pursuant to Illinois Supreme Court Rule 711, acting under the supervision of Ms. Hubertz.

On November 6, 2009, U.S. Steel filed a waiver to April 15, 2010, of the statutory deadline for the Board to decide this appeal. On November 19, 2009, the Board issued an order granting U.S. Steel's motion for stay, confirming that the effectiveness of the CAAPP permit issued to U.S. Steel is automatically stayed under the Administrative Procedure Act (5 ILCS 100/10-65(b) (2008)). In the November 19, 2009 order, the Board reserved ruling on the motion to intervene and the motion for counsel to appear *pro hac vice*.

MOTION TO INTERVENE

The Board first sets forth the relevant provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2008)) and the Board's procedural rules. After that, the Board describes ABC's motion to intervene and the responses of IEPA and U.S. Steel. The Board then discusses its ruling and supporting reasoning.

Statutory and Regulatory Background

Section 40.2(a) of the Act (415 ILCS 5/40.2(e) (2008)) addresses appeals of CAAPP permit determinations and provides in pertinent part:

*** If the Agency refuses to grant or grants with conditions a CAAPP permit, . . . 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. *** 415 ILCS 5/40.2(a) (2008).²

Section 101.402 of the Board's procedural rules (35 Ill. Adm. Code 101.402) concerns intervention. The relevant portions of the rule follow:

- a) The Board may permit any person to intervene in any adjudicatory proceeding. If a person seeks to intervene in an adjudicatory proceeding, the person must file a motion to do so with the Clerk and serve a copy of the motion on all parties to the proceeding. The motion must set forth the grounds for intervention.
- b) In determining whether to grant a motion to intervene, the Board will consider the timeliness of the motion and whether intervention will unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding.

- d) Subject to subsection (b) of this Section, the Board may permit any person to intervene in any adjudicatory proceeding if:

² The Board's procedural rules on CAAPP permit appeals are at 35 Ill. Adm. Code 105, Subpart C.

- 2) The person may be materially prejudiced absent intervention; or
 - 3) The person is so situated that the person may be adversely affected by a final Board order.
- e) An intervenor will have all the rights of an original party to the adjudicatory proceeding, except that the Board may limit the rights of the intervenor as justice may require. The limits may include providing that: the intervenor is bound by Board and hearing officer orders already issued or by evidence already admitted; that the intervenor does not control any decision deadline; and that the intervenor cannot raise issues that were raised or might more properly have been raised at an earlier stage of the proceeding. 35 Ill. Adm. Code 101.402.

ABC Motion

ABC is a “grassroots organization” based in the Metro-East St. Louis region with members “residing and recreating in and around Granite City.” Mot. Interv. at 2. ABC states that the U.S. Steel Granit City Works is located in “a residential area and adjacent to a state park” and is “the primary source of fine particle pollution in the region.” *Id.* at 1-2. ABC adds that the facility “emits substantial amounts of many other pollutants that threaten human health and the environment.” *Id.* at 1.

ABC claims that it participated “actively and extensively” in the U.S. Steel CAAPP permit process before IEPA. Mot. Interv. 3. ABC states that it presented information and questions to IEPA at a December 2, 2008 public hearing on the draft CAAPP permit and on February 27, 2009, submitted 72 pages of written comments to IEPA concerning the draft permit. *Id.* at 3. According to ABC, IEPA’s September 3, 2009 responsiveness summary “addressed 106 separate comments by ABC, the greatest number of comments submitted by any interested party.” *Id.* at 3-4. ABC maintains that Section 40.2(a) of the Act allows ABC, as a person who participated in the public comment process under Section 39.5(8) of the Act, to “petition for a hearing before the Board to contest IEPA’s CAAPP permitting decision.” *Id.* at 4.

ABC represents that on October 1, 2009, it filed a “Petition to Object” to U.S. Steel’s final CAAPP permit with the United States Environmental Protection Agency (USEPA) under Section 502(b)(2) of the federal Clean Air Act. Mot. Interv. at 4. ABC claims that its 38-page petition to USEPA, which is still pending, “identified over 50 provisions in the Final CAAPP Permit that are not in compliance with the requirements of the federal Clean Air Act.” *Id.* ABC asserts that it has:

interests separate and distinct from those of IEPA, as evidenced by the substantial disagreements that ABC has set forth in its objections to the CAAPP permit that is the subject of this appeal. Therefore, IEPA cannot and should not be expected to advance the interests unique to ABC in this action. *Id.*

ABC further argues that it seeks intervention to “voice its substantial objections” to U.S. Steel’s requests for “weaker permit provisions.” Mot. Interv. at 5. An adverse Board decision may, according to ABC, “adversely affect or materially prejudice ABC’s interests.” For example, ABC describes the claim in U.S. Steel’s petition that IEPA “exceeded its gap filling authority” as being “directly at odds” with ABC’s position that IEPA “failed to include periodic monitoring sufficient to assure compliance” with the CAAPP permit. *Id.* ABC concludes by asserting that its motion is timely and that ABC has:

more to gain from an orderly and efficient resolution of these matters than the present parties as the health and welfare of its members will be better protected by having an effective CAAPP permit in place as soon as possible. *Id.*

IEPA Response

IEPA asks that the Board grant ABC’s motion to intervene. IEPA Resp. at 3. IEPA asserts that Section 40.2(a) of the Act provides ABC “an unconditional statutory right” to petition the Board for review of the CAAPP permit determination. *Id.* at 1. IEPA then maintains:

Since intervention procedures are remedial and must therefore be construed liberally, this right to seek review of the administrative determination on the permit ought to essentially translate to a right to intervene in a pending review action regarding that permit. *Id.*; *but see id.* at 2 (“grant of intervention is discretionary”).

IEPA observes that granting intervenor status to ABC “would in no way unlawfully extend appeal rights.” IEPA Resp. at 3. Further, IEPA agrees with ABC that ABC’s motion is timely and that intervention will not unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding. *Id.* IEPA concludes that the Board “may properly exercise its discretion to afford ‘appeal rights’ to [ABC] by allowing its request to intervene.” *Id.*

U.S. Steel Response

U.S. Steel does not object to ABC’s intervention, but U.S. Steel requests that, should the Board grant ABC’s motion, ABC’s participation “be limited due to ABC’s failure to timely file an appeal in this matter.” U.S. Steel Resp. at 2. U.S. Steel acknowledges that ABC participated in the permitting process by submitting public comments on the draft CAAPP permit and that ABC therefore had the right to file an appeal of the permit within thirty-five days after final permit action, *i.e.*, by October 8, 2009. *Id.* at 3. Because ABC failed to timely file an appeal, U.S. Steel argues that:

ABC should be precluded from fully participating in this appeal as an intervenor having all rights of an original party; however, U.S. Steel does not object to ABC’s participation in this matter, should ABC’s Motion be granted by the Board, as long as such participation is subject to certain conditions. *Id.*

U.S. Steel proposes the following limits on ABC's participation:

1. "ABC should not be allowed to participate in any discovery proceedings, including serving interrogatories, requests for production of documents, or requests to admit or conducting depositions." U.S. Steel Resp. at 6.
2. "ABC should not be permitted to control any decision deadline." *Id.*
3. "ABC should not be allowed to raise issues that were raised (or might have been raised) or decided earlier in this proceeding, or to raise any new issues other than those raised by U.S. Steel." *Id.*
4. "ABC should not be allowed to raise issues that it did not raise during the public comment period." *Id.*
5. "ABC should not be permitted to introduce evidence that is not part of the record." *Id.*
6. "ABC must comply with any Board or hearing officer orders, including those issued to date." *Id.*

U.S. Steel asserts that because ABC apparently chose to object to the permit at the federal level rather than exercise its right to appeal at the State level, the Board should limit ABC's participation here: "If ABC intended to participate in this proceeding as an original party and exercise all the rights afforded to original parties, it should have filed a timely appeal in accordance with the Act's provisions." U.S. Steel Resp. at 7. Further, citing trade secret appeals in which the Board denied intervention but allowed other participation short of granting party status as intervenor, U.S. Steel emphasizes that "the Board can allow ABC to participate in this matter by making oral or written statements at hearing and by filing *amicus curiae* briefs or public comments." *Id.* at 6.

Finally, U.S. Steel states that if the Board is inclined to allow ABC's intervention without U.S. Steel's proposed limitations, U.S. Steel "requests that the Board schedule additional briefing on this issue." U.S. Steel Resp. at 8.

Board Analysis

The Board first finds that it is legally permissible to allow ABC to intervene in this CAAPP permit appeal. The Board then exercises its discretion in permitting ABC to intervene and imposing limits on ABC's participation.

The Board Has the Authority to Allow ABC to Intervene

The Board "lacks the authority to give party status through intervention to persons the General Assembly does not allow to become parties to this type of proceeding." Sutter Sanitation, Inc. v. IEPA, PCB 04-187, slip op. at 4 (Sept. 16, 2004) (intervention in permit

appeal denied in absence of third-party appeal rights); *see also* Riverdale Recycling, Inc. v. IEPA, PCB 00-228, slip op. at 1-2 (Aug. 10, 2000) (rationale applies regardless of whether the proposed intervenor seeks to support or object to the IEPA permit determination). Under Section 40.2(a) of the Act (415 ILCS 5/40.2(a) (2008)), several persons may appeal an IEPA final CAAPP permit determination to the Board, including any person who participated in IEPA's public comment process pursuant to Section 39.5(8) of the Act (415 ILCS 5/39.5(8) (2008)).³ It is undisputed that ABC so participated before IEPA during U.S. Steel's CAAPP permit application proceeding. Accordingly, ABC could have obtained Board review of IEPA's CAAPP permit determination by filing a third-party petition for hearing with the Board. *See* 415 ILCS 5/40.2(a) (2008).

Granting ABC's motion to intervene would therefore not give party status to a person without standing to have appealed under Section 40.2(a) of the Act. *See* Landfill, Inc. v. PCB, 74 Ill. 2d 541, 557-60, 387 N.E.2d 258, 264-65 (1978) (where Act allowed permit denial appeals only by permit applicants, Board procedural rule authorizing third-party challenges to granted permits held by Court to be unauthorized); Kibler Development Corp. v. IEPA, PCB 05-35, slip op. at 5 (May 4, 2006) (where Act allowed appeal only by permit applicant, Board held that granting third parties intervenor status in appeal brought by permit applicant "would be unlawfully extending appeal rights"). Neither IEPA nor U.S. Steel suggests that ABC is prohibited from intervening here. The Board finds that it is authorized to allow ABC to intervene in this CAAPP permit appeal. *See* Valessares v. County Board of Kane County, PCB 87-36, slip op. at 1 (Apr. 30, 1987) (granting intervention in appeal of siting approval where intervention sought beyond 35-day appeal period by third-party who participated in local government's hearing).

The Board Will Exercise its Discretion to Allow ABC to Intervene

When ruling on a motion to intervene, the Board considers the timeliness of the motion and whether intervention will negatively impact the proceeding. *See* 35 Ill. Adm. Code 101.402(b). ABC filed its motion to intervene on October 21, 2009, merely two weeks after U.S. Steel filed its petition for review and less than one week after the Board accepted the case for hearing. To date, no hearing has been scheduled; the record has not been filed; no dispositive motions are pending; and no discovery orders have issued. U.S. Steel has waived the decision deadline to April 15, 2010. The Board finds ABC's motion to intervene timely. *See* 35 Ill. Adm. Code 101.402(b). Further, with the case in its present procedural posture, and conditioning ABC's participation on the restrictions described below, the Board also finds that ABC's intervention would not "unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding." 35 Ill. Adm. Code 101.402(b).

³ A person who participated in the public comment process is "someone who, during the public comment period, either commented on the draft permit, submitted written comments, or requested notice of the final action on a specific permit application." 35 Ill. Adm. Code 105.302(d).

ABC seeks permissive intervention under Section 101.402(d) of the Board's procedural rules (35 Ill. Adm. Code 101.402(d)). The Board "may permit any person to intervene in any adjudicatory proceeding" if the person "may be materially prejudiced absent intervention" or the person "is so situated that the person may be adversely affected by a final Board order." 35 Ill. Adm. Code 101.402(d)(2), (3). The Board "has no reason to believe that the Agency will proceed here with anything other than its usual 'competence and zeal.'" Kibler, PCB 05-35, slip op. at 6. Accordingly, to the extent ABC seeks intervention to support IEPA's CAAPP permit determination, the Board cannot find on this record that ABC may be materially prejudiced absent intervention. *See* 35 Ill. Adm. Code 101.402(d)(2). However, to the extent ABC seeks party status as an intervenor to object to the CAAPP permit determination, the Board finds that ABC may be materially prejudiced absent intervention, as the pleadings demonstrate that ABC's interests may diverge sharply from those of IEPA and U.S. Steel. *Id.*

Additionally, neither IEPA nor U.S. Steel contests ABC's representations that its members reside and recreate in and around Granite City and that their health and welfare may be affected by the outcome of this proceeding. ABC moves for intervention to object both to permit conditions it considers inadequate and to U.S. Steel's requests for "weaker" permit provisions. Mot. Interv. at 4-5. The Board finds that ABC is so situated that it may be adversely affected by a final Board order within the meaning of 35 Ill. Adm. Code 101.402(d)(3).

Under these circumstances, the Board will exercise its discretion to allow ABC's intervention.

The Board Will Impose Limits on ABC's Intervention as Justice Requires

As an intervenor, ABC has "all the rights of an original party" to this proceeding (35 Ill. Adm. Code 101.402(e)), including the right to appeal the Board's final decision (Kibler, PCB 05-35, slip op. at 5). However, the Board "may limit the rights of the intervenor as justice may require." 35 Ill. Adm. Code 101.402(e). Clearly, ABC is bound by all hearing officer and Board orders already issued, and only the permit applicant, U.S. Steel, may waive the decision deadline. *See* 35 Ill. Adm. Code 101.402(e); United States Steel Corp. v. IEPA, PCB 10-23, slip op. at 2 (Oct. 15, 2009) ("only U.S. Steel may extend by waiver" the decision deadline under 415 ILCS 5/40.2(c) (2008)). Beyond that, however, IEPA's response to the motion for intervention appears to suggest that ABC should be afforded all of the rights of a third-party petitioner (IEPA Resp. at 3), while U.S. Steel's response seems to indicate that during the course of the proceeding, ABC should be treated like a non-party participant (U.S. Steel Resp. at 6). The Board finds that the proper scope of ABC's participation as intervenor lies between the two.

As is plain from the motion to intervene, ABC has substantial disagreements with both IEPA and U.S. Steel over the CAAPP permit. However, like any intervenor, ABC "must take the case as it finds it." Saline County Landfill, Inc. v. IEPA, County of Saline, PCB 02-108, slip op. at 6 (Apr. 18, 2002). The only appeal before the Board was brought by U.S. Steel. ABC could have challenged IEPA's determination under Section 40.2(a) of the Act, but the 35-day appeal period ran without ABC filing a third-party petition for review. Accordingly, no matters beyond those set forth in U.S. Steel's petition are at issue in this appeal. *See* XCTC Ltd. P'ship v. IEPA, PCB 01-46, Georgia-Pacific Tissue, LLC v. IEPA, PCB 01-51 (consol.), slip op. at 1-2

(in CAAPP permit appeal, Board “lacks jurisdiction” to consider amended petition that was filed after appeal period and through which petitioner sought review of a permit condition not cited in original petition, which had been accepted for hearing). As U.S. Steel argues, justice requires that ABC not be permitted to raise other issues. *See* 35 Ill. Adm. Code 101.402(e); Valessares, PCB 87-36, slip op. at 14 (July 16, 1987) (finding intervention appropriate where intervenor’s issues fell within the scope of matters challenged by petition for review of siting approval). This is consistent with the Board’s long-held view that “allowing intervenor status does not enlarge the scope of review.” Land & Lakes Co. v. Village of Romeoville, PCB 91-7, slip op. at 2-3 (Apr. 11, 1991) (“Allowing intervention does not imply that the [intervenor] can dispute [siting] criteria on appeal which were not raised by [the siting applicant] in its appeal of the . . . denial of siting”), *rev’d on other grounds sub nom. Land & Lakes Co. v. PCB*, 245 Ill. App. 3d 631, 616 N.E.2d 349 (3rd Dist. 1993) (affirming Board’s grant of intervention).

U.S. Steel cites no authority, however, directly supporting its proposition that the issues ABC may address as intervenor should be *further* limited to those raised by ABC during the public comment period before IEPA. Additionally, in proposing this extra restriction on ABC’s participation, U.S. Steel has not identified which issues would remain for ABC to litigate. Moreover, given the potential complexities of this case as suggested by the initial pleadings, implementing this proposed limitation may prove unduly burdensome and risk interfering with an orderly and efficient proceeding. The Board therefore declines to adopt U.S. Steel’s suggestion in this instance.

U.S. Steel proposes additional limits on ABC’s participation, which pertain to discovery and the introduction of evidence. Though an intervenor is a party, U.S. Steel states that ABC should not be allowed to participate in any discovery. U.S. Steel relies on pleadings in which IEPA proposed that a would-be intervenor in trade secret appeals not be allowed to participate in discovery. U.S. Steel Resp. at 4-5, citing Midwest Generation EME, LLC v. IEPA, PCB 04-185 (Nov. 4, 2004); Midwest Generation EME, LLC v. IEPA, PCB 04-216 (Aug. 18, 2005); Commonwealth Edison Co. v. IEPA, PCB 04-215 (Aug. 18, 2005). However, concerns over avoiding the inadvertent disclosure of claimed trade secret information are not at issue here. *Cf. Midwest Generation*, PCB 04-216, slip op. 13. The Board declines to impose U.S. Steel’s suggested ban on ABC participating in any discovery.⁴ U.S. Steel also asks that ABC “not be permitted to introduce evidence that is not part of the record.” U.S. Steel Resp. at 6. The Board’s review is based solely on the record before IEPA at the time of the permit determination, but this well-settled principle limits the scope of evidence that any party may introduce, including U.S. Steel and IEPA. *See United States Steel*, PCB 10-23, slip op. at 2 (and cases cited therein); *see also Community Landfill Co. and City of Morris v. IEPA*, PCB 01-48, PCB 01-49 (consol.), slip op. at 3, 19-20 (Apr. 5, 2001) (and cases cited therein), *aff’d in part and rev’d in part on other grounds sub nom. Community Landfill Co. and City of Morris v. PCB*, No. 3-01-

⁴ Of course, what is considered discoverable information in a permit appeal is generally limited based on the nature of the Board’s review. *See, e.g., Des Plaines River Watershed Alliance v. IEPA and Village of New Lenox*, PCB 04-88, slip op. at 19 (Apr. 19, 2007) (discovery requests in third-party permit appeal denied where respondents failed to persuasively identify discoverable information), *aff’d sub nom. IEPA and Village of New Lenox v. PCB*, 386 Ill. App. 3d 375, 896 N.E.2d 479 (3rd Dist. 2008).

0552 (3rd Dist. Oct. 29, 2002) (unpublished order under Illinois Supreme Court Rule 23). The Board finds that U.S. Steel's proposed evidentiary limit on ABC's intervention is not necessary.

Board Ruling

Exercising its discretion, the Board grants ABC's motion to intervene, giving party status to ABC as an intervenor, subject to the restrictions on ABC's participation described above. Having imposed or found unnecessary most of U.S. Steel's suggested limits on ABC's intervention, the Board declines U.S. Steel's request that the Board schedule additional briefing on this issue. If U.S. Steel believes that any aspect of ABC's ensuing participation would unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding, U.S. Steel may make an appropriate motion at that time.

MOTION TO APPEAR *PRO HAC VICE*

Robert R. Kuehn filed a motion to appear *pro hac vice* on behalf of ABC. According to the motion, Mr. Kuehn is a licensed attorney in Missouri, is in good standing, and has been practicing law since 1981. Mot. PHV at 1. Further, the motion states that Mr. Kuehn is the Co-Director of the Interdisciplinary Environmental Clinic at Washington University School of Law, which is representing ABC. *Id.* No response has been filed to the motion to appear *pro hac vice*. See 35 Ill. Adm. Code 101.500(d). The Board grants the motion. See 35 Ill. Adm. Code 101.400(a)(3).

CONCLUSION

Neither IEPA nor U.S. Steel objects to the Board granting ABC intervenor status in this CAAPP permit appeal. The Board grants ABC's motion to intervene, subject to the restrictions set forth in the order below. Future pleadings must reflect the amended caption of this opinion and order. The Board also grants the uncontested motion of Mr. Kuehn to appear *pro hac vice* on behalf of ABC.

ORDER

1. The Board grants the motion of American Bottom Conservancy (ABC) to intervene in this appeal. ABC therefore has all of the rights of an original party to this proceeding, subject to the following limitations:
 - A. ABC is bound by all hearing officer and Board orders issued to date;
 - B. ABC does not control the statutory deadline by which the Board must decide this case; and
 - C. ABC cannot raise any issues that are outside the scope of the matters set forth in U.S. Steel's petition for review.

2. The Board grants the motion of Robert R. Kuehn to appear *pro hac vice* on behalf of ABC.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 3, 2009, by a vote of 5-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John Therriault, Assistant Clerk
Illinois Pollution Control Board