

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Mr. John Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
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(VIA ELECTRONIC MAIL)

Carol Webb, Esq.
Hearing Officer
Illinois Pollution Control Board
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(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a copy of the Illinois Environmental Protection Agency and American Bottom Conservancy's JOINT MOTION TO DISMISS THE APPEAL, a copy of which is hereby served upon you.

Respectfully submitted,

Dated: October 21, 2011

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CERTIFICATE OF SERVICE

I, Maxine I. Lipeles, hereby certify that on October 21, 2011, I served the Joint Motion to

Dismiss the Appeal by e-mail (and, where noted, first-class mail) on the following persons:

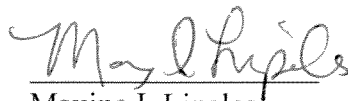
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JOINT MOTION TO DISMISS THE APPEAL

The Illinois Environmental Protection Agency (IEPA) and American Bottom Conservancy (ABC), by and through their undersigned attorneys, request that the Illinois Pollution Control Board (Board) dismiss U.S. Steel Corporation's Appeal. In support of this motion, ABC and IEPA state the following:

1. On September 3, 2009, IEPA issued a Clean Air Act Permit Program (CAAPP) Permit for U.S. Steel's Granite City Works facility (Original CAAPP Permit). ABC timely filed a Petition to Object with the United States Environmental Protection Agency (USEPA) under Section 505(b)(2) of the federal Clean Air Act on October 1, 2009. U.S. Steel then filed its Petition for Review of the Original CAAPP Permit with the Board on October 7, 2009.
2. On January 31, 2011, USEPA granted, in part, ABC's Petition to Object and directed the IEPA to reopen and reissue a revised CAAPP permit. In response, IEPA issued a

320-page revised CAAPP Permit (Revised CAAPP Permit) that replaces and completely supersedes the Original CAAPP Permit of September 3, 2009.

3. On August 16, 2011, ABC filed with USEPA a separate new petition requesting that the Administrator object to specified provisions of the Revised CAAPP Permit for the U.S. Steel Granite City Works facility. This new petition is pending before USEPA. Whatever the outcome of that proceeding, neither USEPA nor IEPA can revive the moribund Original CAAPP Permit.

4. On September 2, 2011, U.S. Steel filed a Motion to stay this proceeding, claiming there was "uncertainty" as to the effect any USEPA action on ABC's petition could have on the Original CAAPP Permit. Despite U.S. Steel's bald assertion of uncertainty, because the Revised CAAPP Permit issued by the IEPA mooted all issues arising from the Original CAAPP Permit, there is no way any USEPA action on the pending petition could revive the now dead Original CAAPP Permit.

5. U.S. Steel argues in its October 4, 2011, Reply to Joint Opposition¹ that the EPA could revoke the Revised CAAPP Permit and somehow revive the Original CAAPP Permit. That is not so. Nowhere does the Clean Air Act provide for such an odd result. Section 505(b)(3) of the CAA, 42 U.S.C. § 7661d(b)(3) states that upon objection the EPA Administrator shall modify, terminate, or revoke such permit or the state permitting authority shall revise a permit to meet the objections. There is no language in the CAA that would allow the USEPA or IEPA to revive the Original CAAPP Permit. To the contrary, the statute only allows the state "to submit a permit revised to meet the objection." 42 U.S.C. § 7661d(c).

¹ Per 35 Ill. Adm. Code Section 101.500(e), the moving party does not have the right to file a reply, except as permitted by the Board or the hearing officer to prevent material prejudice. Therefore, U.S. Steel's reply should be stricken as unauthorized by the rules.

6. In dealing with revised IEPA permits in other situations, the notes to 35 Ill. Adm. Code 703.270 state: “The Board intends that a reissued permit completely supercede the earlier version of that permit.”

7. Furthermore, the general rule is that the issuance of a new air permit renders the superseded permit null and void. *See, e.g. In The Matter of Quad Graphics Inc. Permit Application*, 1989 WL 266357 (EPA). Likewise here, any issues that U.S. Steel may have with the Original CAAPP permit have been mooted by the issuance of the superseding Revised CAAPP Permit.

8. The Illinois Supreme Court has held that “[a]s a general rule, courts in Illinois do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided.” *In re Alfred H.H.*, 910 N.E.2d 74, 78 (Ill. 2009). A moot question “presents or involves no actual controversy, interest, or rights of the parties, or which involves issues that have ceased to exist” *People v. Redlich*, 83 N.E.2d 736, 741 (Ill. 1949).

9. *In Commonwealth Edison Co. v. People*, 367 N.E.2d 270 (Ill. App. 1977), the Board found that Commonwealth Edison (ComEd) was operating a waste disposal site without a required permit, and ordered ComEd to obtain a permit. ComEd had previously applied for a permit, but no permit had yet been issued by the IEPA. ComEd later obtained a permit from the IEPA to operate the disposal site. ComEd then chose to appeal the Board’s initial order that it was operating in violation of the Environmental Protection Act, arguing that the Board misconstrued Illinois law. *Id.* at 271. Upon reviewing the appeal, the court found that since the permit had been issued and was now in effect, and since IEPA stated that it would not take any action against ComEd for its failure to operate without the required permit, ComEd’s petition

presented only moot questions. None of the exceptions to the mootness doctrine applied. *Id.* at 272-73.

10. U.S. Steel's pending appeal of the Original CAAPP Permit presents moot questions similar to those raised by ComEd. In *Commonwealth Edison*, a permit was issued by the IEPA that mooted any prior issues or requirements. Similarly, in this case, a Revised CAAPP Permit has been issued by the IEPA that supersedes any prior requirements in the Original CAAPP Permit that is the subject of the present appeal. Therefore, the issuance of the Revised CAAPP Permit renders this case challenging the Original CAAPP Permit moot.

11. There are only two narrow exceptions to the mootness doctrine: the public interest exception and cases capable of repetition but evading review. *See In re Robin C.*, 918 N.E.2d 1284 (Ill. App. 2009).

12. The public interest exception "allows a court to consider an otherwise moot case when (1) the question presented is of a public nature, (2) there is a need for an authoritative determination for the future guidance of public officers, and (3) there is a likelihood of future recurrence of the question." *Id.* at 1288. The Illinois Supreme Court has held that "[t]he public interest exception is 'narrowly construed by courts and requires a clear showing of each criterion'" *In re Alfred H.H.*, 910 N.E.2d 74, 80 (Ill. 2009) (Internal citations omitted).

13. U.S. Steel has not demonstrated that its petition meets all three criteria; indeed, it has made no showing of any criterion. In its September 2, 2011 Motion to Stay the Proceeding, U.S. Steel argued there is "uncertainty" concerning the effect of a revised permit on the original superseded permit. In making its unsupported assertion, U.S. Steel has failed to identify a single issue raised by ABC's August 16, 2011 petition that creates the supposed "uncertainty." The objections raised by ABC regarding the Revised Permit are the only matters that IEPA would

address when issuing another revised permit -- should USEPA grant the pending petition. IEPA would not address the issues raised by U.S. Steel in this appeal regarding the superseded Original Permit.

14. The Illinois Supreme Court has also explained that "where a case involves an event of short duration which is 'capable of repetition, yet evading review,' it may qualify for review even if it would otherwise be moot." *In re Barbara H.*, 702 N.E.2d 555, 559 (Ill. 1998). To meet the requirements of this exception, "the complaining party must demonstrate that: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.*

15. U.S. Steel has made no showing that the "capable of repetition but evading review" exception would allow U.S. Steel's moot appeal to survive. U.S. Steel had a chance to obtain review of the Revised CAAPP Permit but chose not to appeal. By its own admission on page 2 of its Motion to Stay Proceeding, U.S. Steel is currently operating under the conditions and requirements of the Revised CAAPP Permit. Having passed up its right to appeal the Revised CAAPP Permit, U.S. Steel cannot now complain about its need for the Board to issue an advisory opinion on unidentified issues still remaining from the Original CAAPP Permit which is no longer in effect.

16. Because the pending appeal presents only moot questions concerning the Original CAAPP Permit which is no longer in effect, it would be improper for the Board to render an advisory opinion that cannot bind any party. Thus, the correct course of action is not to stay this proceeding but to dismiss U.S. Steel's appeal.

WHEREFORE, for the reasons set forth above, IEPA and ABC respectfully request that the Board grant their Motion to Dismiss and enter an order dismissing the appeal with prejudice.

Respectfully submitted,

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Dated: October 21, 2011