

ILLINOIS POLLUTION CONTROL BOARD  
February 2, 2012

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.	)	

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

United States Steel Corporation (U.S. Steel) appealed the September 3, 2009 issuance of a Clean Air Act Permit Program (CAAPP) permit by the Illinois Environmental Protection Agency (IEPA). This “original” CAAPP permit concerns U.S. Steel’s integrated steel mill plant located at 20th and State Streets in Granite City, Madison County. After accepting the appeal for hearing, the Board granted the motion of American Bottom Conservancy (ABC) to intervene in this proceeding. Today, the Board rules upon two motions. First, the Board denies the joint motion of IEPA and ABC to dismiss this appeal. Second, the Board grants the amended motion of U.S. Steel to stay the appeal, but the Board does so only for one year, unless the Board terminates the stay earlier.

Below, the Board first describes the procedural history of this case and rules upon three motions by U.S. Steel for leave to file. Then, the Board summarizes the filings that concern the requested dismissal and stay, after which the Board discusses and rules upon both the joint motion of IEPA and ABC for dismissal of this appeal and the amended motion of U.S. Steel for stay of this appeal.

**PROCEDURAL MATTERS**

On October 7, 2009, U.S. Steel timely filed its petition for review of the original CAAPP permit, which was issued by IEPA on September 3, 2009.<sup>1</sup> On October 15, 2009, the Board accepted for hearing U.S. Steel’s appeal, which concerns conditions of the original CAAPP permit. On November 19, 2009, the Board issued an order granting U.S. Steel’s motion for stay

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<sup>1</sup> The parties agree that on May 2, 2011, IEPA issued a “revised” CAAPP permit, which is discussed later in this order.

of the original CAAPP permit, confirming that the effectiveness of the permit is automatically stayed under the Administrative Procedure Act (APA) (5 ILCS 100/10-65(b) (2010)).<sup>2</sup> ABC's motion to intervene in this proceeding was granted by the Board on December 3, 2009. On the same date, IEPA filed the administrative record of its determination on the original CAAPP permit. On August 24, 2011, U.S. Steel filed an open waiver of the Board's statutory deadline for deciding this appeal. The case has not been to hearing.

On September 2, 2011, U.S. Steel filed a motion to stay this appeal (Mot. Stay). On September 20, 2011, IEPA and ABC filed a joint response opposing U.S. Steel's motion to stay this proceeding (Joint Oppos. Stay). On October 4, 2011, U.S. Steel filed a motion for leave to file a reply to the joint opposition, attaching the reply. Neither IEPA nor ABC has responded to the motion for leave, which is granted. The Board therefore accepts U.S. Steel's reply (Reply Stay).

On October 21, 2011, IEPA and ABC filed a joint motion to dismiss this appeal (Joint Mot. Dism.). On November 4, 2011, U.S. Steel filed a response opposing the joint motion for dismissal (Oppos. Dism.).

Also on November 4, 2011, U.S. Steel filed a motion for leave to file an amended motion to stay this appeal, attaching the amended motion. Neither IEPA nor ABC has responded to this motion for leave, which is granted. The Board accordingly accepts U.S. Steel's amended motion for stay (Am. Mot. Stay). On November 15, 2011, IEPA filed a response opposing U.S. Steel's amended motion to stay this proceeding (IEPA Oppos. Am. Stay). On November 18, 2011, ABC filed a response opposing U.S. Steel's amended motion for stay (ABC Oppos. Am. Stay). On November 30, 2011, U.S. Steel filed a motion for leave to file a single reply to the responses of IEPA and ABC, attaching the reply. Neither IEPA nor ABC has responded to the motion for leave, which is granted. The Board therefore accepts U.S. Steel's reply (Reply Am. Stay).

## **SUMMARY OF FILINGS**

### **Filings Concerning U.S. Steel Motion for Stay**

#### **U.S. Steel Motion for Stay**

As background, U.S. Steel's motion to stay this appeal of the September 3, 2009 *original* CAAPP permit explains that on May 2, 2011, IEPA issued a *revised* CAAPP permit. Mot. Stay at 2. U.S. Steel adds that the company is "currently operating under the conditions and requirements of the Revised CAAPP Permit." *Id.* On August 16, 2011, U.S. Steel continues, ABC filed with the United States Environmental Protection Agency (USEPA) a "Petition Requesting That the Administrator Object to the Issuance of the Revised Title V/CAAPP Operating Permit for the U.S. Steel Granite City Works Facility." *Id.*, attaching as Exh. 1 ABC's "Petition to Object." U.S. Steel asks that the instant Board proceeding, an appeal of the *original*

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<sup>2</sup> *Cf.* 415 ILCS 5/40.2(f) (2010), added by P.A. 96-934 (eff. June 21, 2010).

CAAPP permit, be stayed “until the proceeding currently pending before USEPA [ABC’s contest of the *revised* CAAPP permit] is resolved.” Mot. Stay at 3.

U.S. Steel moves to stay the appeal before the Board on the grounds that ABC’s pending objection before USEPA “creates uncertainty as to the impact of its filing, as well as USEPA’s future response, on the Revised CAAPP Permit.” Mot. Stay at 2. U.S. Steel argues that it cannot be known whether the “status” of the original CAAPP permit “could be meaningful until there is sufficient information to determine whether the Revised CAAPP Permit will withstand scrutiny by USEPA.” *Id.* U.S. Steel further asserts that a stay does not harm the public or the parties because the revised CAAPP permit has already been issued by IEPA, U.S. Steel is currently operating under the revised CAAPP permit, and U.S. Steel has filed an open waiver of the Board’s statutory decision deadline. *Id.* at 2-3.

U.S. Steel cites as precedent a trade secret appeal in which the Board granted a stay “while USEPA review of a similar determination was underway” and another appeal in which the Board granted a stay “while a similar case on Petitioner’s issue was pending in Circuit Court.” Mot. Stay at 3, citing Midwest Generation EME, LLC v. IEPA, PCB 04-216 (Apr. 6, 2006) and Chicago Coke Co. v IEPA, PCB 10-75 (May 6, 2010).

### **IEPA and ABC Joint Opposition to Motion for Stay**

By way of background, IEPA and ABC explain that ABC also filed with USEPA a petition to object to IEPA’s September 3, 2009 issuance of the *original* CAAPP permit. Joint Oppos. Stay at 1. ABC filed that petition on October 1, 2009. *Id.* In turn, on January 2, 2011, USEPA granted, in part, ABC’s petition to object and directed IEPA to revise the original CAAPP permit. *Id.* On May 2, 2011, IEPA issued the *revised* CAAPP permit, which “replaces and completely supersedes” the original CAAPP permit, according to the joint opposition. *Id.* at 1-2. IEPA and ABC also note ABC’s pending petition requesting that the USEPA Administrator object to specified provisions of the revised CAAPP permit. *Id.* at 2.

IEPA and ABC assert that a decision by USEPA to grant ABC’s pending petition “would require the IEPA to make additional changes to the *Revised* CAAPP Permit,” but “would not and could not revive the moribund *Original* Permit,” the terms and conditions of which “are no longer in effect.” Joint Oppos. Stay at 2 (emphasis added). IEPA and ABC observe that U.S. Steel chose not to appeal the *revised* CAAPP permit, under which the company is admittedly operating. *Id.* U.S. Steel fails to state, continue IEPA and ABC, what “uncertainty might exist toward the now moot Original CAAPP Permit or how USEPA’s review of the Revised CAAPP Permit might in any way impact the superseded Original CAAPP Permit that is the subject of this proceeding.” *Id.* at 2-3, citing 35 Ill. Adm. Code 703.270, Board Note (“The Board intends that a reissued permit completely supersede the earlier version of that permit.”). “[T]he general rule,” according to IEPA and ABC, is that the issuance of a new air permit renders the superseded permit “null and void, and moots an[y] pending appeals thereof.” Joint Oppos. Stay at 3, citing In the Matter of Quad/Graphics, Inc., 1989 WL 266357 (EPA).

Contrary to U.S. Steel’s “bald assertions” about the lack of harm from a stay, IEPA and ABC argue that “staying, rather than dismissing as moot,” the instant appeal will “waste time and resources dealing with moot issues” and “irrelevant motions and status conferences, siphoning time away from working on live matters.” Joint Oppos. Stay at 3.

Finally, IEPA and ABC argue that the cases cited by U.S. Steel do not support the motion for stay. Joint Oppos. Stay at 3. IEPA and ABC maintain that in both Midwest Generation and Chicago Coke, “the outcome of the related proceeding would aid the Board in resolving a pending matter.” *Id.* at 4. That is not so here, continue IEPA and ABC, “where ABC’s pending Petition to Object before USEPA only addresses the *Revised CAAPP* Permit and will not impact in any way the now null *Original CAAPP* Permit that is the subject of this appeal.” *Id.* (emphasis in original).

### **U.S. Steel Reply to Joint Opposition to Motion for Stay**

U.S. Steel replies that this matter, where an intervenor to the Board proceeding has objected with USEPA to a *revised CAAPP* permit while an appeal of the *original CAAPP* permit is pending before the Board, appears to be one of “first impression.” Reply Stay at 2. Further, continues U.S. Steel, Section 39.5(9) of the Environmental Protection Act (Act) (415 ILCS 5/39.5(9) (2010)) provides that IEPA may revise and resubmit the CAAPP permit to USEPA after the receipt of an objection from USEPA, but if IEPA fails to do so, “USEPA ‘shall modify, terminate or revoke’ the permit.” Reply Stay at 2, quoting 415 ILCS 5/39.5(9)(g) (2010). U.S. Steel argues that if USEPA revokes the *revised CAAPP* permit, the status of the *original CAAPP* permit issued by IEPA is unclear, which uncertainty “serves as a reasonable basis to stay this proceeding.” Reply Stay at 3.

U.S. Steel asserts that the reliance of IEPA and ABC on a Board Note to rules on Resource Conservation and Recovery Act (RCRA) permits is “completely out of context in this situation.” Reply Stay at 3-4. Further, the single case cited by IEPA and ABC for the so-called “general rule” on superseding permits, Quad/Graphics, 1990 EPA App. LEXIS 39 (EAB April 13, 1990), is a USEPA Environmental Appeals Board decision from over 20 years ago, concerning a Prevention of Significant Deterioration (PSD) construction (not operating) permit issued by a Wisconsin agency. Reply Stay at 4. Moreover, U.S. Steel continues, no authority has held that the original CAAPP permit here has been superseded or rendered null and void. *Id.*

U.S. Steel disagrees that harm would result from a stay. Reply Stay at 5. During the stay, the parties, the Board, and the public “will simply be waiting for resolution of the USEPA proceeding.” *Id.* If, however, the Board hearing officer should schedule a status conference, “a minimal amount of the parties’ time would be required,” according to U.S. Steel. *Id.* U.S. Steel also maintains that Midwest Generation and Chicago Coke are “analogous to this proceeding in that in each matter, there was a non-Board proceeding, and the Board granted a stay while the other proceeding was pending.” *Id.* at 4.

## Filings Concerning U.S. Steel Amended Motion for Stay

### U.S. Steel Amended Motion for Stay

In its amended motion for stay, U.S. Steel seeks to clarify what it calls a “mischaracterization” in the joint motion for dismissal. Am. Mot. Stay at 2. U.S. Steel states that the company’s stay motion does *not* request that the Board “issue an advisory opinion.” *Id.*, quoting Joint Mot. Dism. at ¶ 15. According to U.S. Steel, its motion requests “nothing more than a stay of this proceeding until such time USEPA takes final action on [ABC’s] Petition to Object.” Am. Mot. Stay at 2. U.S. Steel adds that if USEPA’s final action on the petition to object to the *revised* CAAPP permit has no impact on this appeal of the *original* CAAPP permit, then the company will move to voluntarily dismiss the instant appeal. *Id.*

### IEPA Opposition to Amended Motion for Stay

IEPA begins by quoting extensively from its “Statement of Basis” for the revised CAAPP permit, some of which is highlighted here:

[I]f a public petition objecting to a CAAPP permit is granted by USEPA after the permit has already been issued, the Illinois EPA is authorized to revise and resubmit the CAAPP permit to USEPA. See generally, Section 39.5(9)(e)-(g) of the Act and 35 IAC 252.301. This authority . . . effectively allows for a formal reconsideration of the issued permit . . .

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[I]t is important to note that this permit revision is a continuation of the initial CAAPP permit proceeding . . . . Notwithstanding the time and resources that have gone into processing US Steel’s application and issuance of a CAAPP permit to US Steel, with the issuance of the USEPA’s Order, the process of creating an initial CAAPP permit for US Steel is now incomplete. \*\*\* In any event, it is hoped that this further permitting action will bring to a close those procedures of the CAAPP relating to the issuance of US Steel’s initial CAAPP. IEPA Oppos. Am. Stay at 1-2.

IEPA describes this discussion from its “Statement of Basis” as being limited to an “initial but *not yet effective* CAAPP Permit” and as not addressing an “effective permit subject to a second Petition to Object before the [USEPA] Administrator.” *Id.* at 2 (emphasis added). “This may be a critical distinction,” continues IEPA, “useful for the Board’s consideration of the pending motions.” *Id.*<sup>3</sup>

IEPA then adds that Section 39.5 of the Act (415 ILCS 5/39.5 (2010)) “does not directly address” when a CAAPP permit is effective or how a subsequently-issued CAAPP permit

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<sup>3</sup> IEPA does not state that its September 3, 2009 issuance of the original CAAPP permit did not constitute “final permit action” within the meaning of Sections 39.5 and 40.2(a) of the Act (415 ILCS 5/39.5, 40.2(a) (2010)).

supersedes a previously-issued CAAPP permit. IEPA Oppos. Am. Stay at 2. However, IEPA continues, because the effectiveness of the original CAAPP permit has been stayed and the revised CAAPP permit is not the subject of any timely appeal with the Board, the revised CAAPP permit must be considered effective and enforceable. *Id.* IEPA also maintains that ABC's pending petition to object with USEPA "did not seek and could not effectuate any stay of the effectiveness" of the revised CAAPP permit. *Id.* at 2-3.

IEPA characterizes U.S. Steel's position as "basically that USEPA might terminate or revoke the Revised CAAPP Permit *and* that the initial CAAPP Permit might somehow be reinstated." IEPA Oppos. Am. Stay at 3 (emphasis by IEPA). IEPA describes the "possibility of termination or revocation" as a "legally available option" for USEPA but an "extremely unlikely" one. *Id.* at 3-4. IEPA then describes the "reinstatement" of the permit already found inadequate by USEPA as "another possibility that is both unlikely and unreasonable." *Id.* at 4. IEPA concludes that "[t]his combination of mere possibilities is not enough to avoid mootness." *Id.*

### **ABC Opposition to Amended Motion for Stay**

ABC emphasizes once more that U.S. Steel has failed to meet its burden under 35 Ill. Adm. Code 101.514 by not clearly detailing why a stay is needed. ABC Oppos. Am. Stay at 1. ABC continues that U.S. Steel does not state "how any action of [US]EPA could have any effect on the original CAAPP Permit that is the subject of this appeal." *Id.* at 2. ABC reiterates that because the original CAAPP permit is "dead" and has been "superseded" by the revised CAAPP permit, "[t]here is nothing that the USEPA could do to revive the original CAAPP Permit." *Id.* The "no longer legally valid" original CAAPP permit, according to ABC, "can present only moot questions and any decision by the Board in this case would be an advisory opinion." *Id.* ABC maintains that staying rather than dismissing this appeal will waste time and resources "dealing with moot issues." *Id.*

### **U.S. Steel Reply to IEPA and ABC Opposition to Amended Motion for Stay**

According to U.S. Steel, IEPA's response to the amended motion for stay admits the "uncertainty" associated with the petition to object pending before USEPA, the "possible impact" of the USEPA proceeding on the instant appeal, and that "termination or revocation of the Revised CAAPP Permit is an option available to USEPA." Reply Am. Stay at 2, citing IEPA Oppos. Am. Stay at ¶¶ 4, 6. U.S. Steel asserts that ABC's response, on the other hand, alleges without support that the original CAAPP permit is "void." Reply Am. Stay at 2. U.S. Steel maintains that "the law on these issues is not settled" and "the uncertainty itself" justifies a stay until the matter before USEPA is resolved. *Id.*

U.S. Steel asserts that after IEPA's response recognizes both that the revised CAAPP permit could be terminated or revoked *and* that the original CAAPP permit could be reinstated, IEPA misrepresents the burden for establishing mootness. Reply Am. Stay at 2-3. It is these "mere possibilities" conceded by IEPA, continues U.S. Steel, that are sufficient to avoid mootness and serve as the basis for granting the requested stay. *Id.* at 2-3, quoting IEPA Oppos.

Am. Stay at ¶ 6. U.S. Steel explains that “[a]n appeal is moot if it is *impossible* for a reviewing court to grant effective relief to either party.” Reply Am. Stay at 3, quoting Tumminaro v. Tumminaro, 198 Ill. App. 3d 686, 691 (2nd Dist. 1990), citing George W. Kennedy Construction Co. v. City of Chicago, 112 Ill. 2d 70 (1986) (emphasis added by U.S. Steel). According to U.S. Steel, if USEPA revokes the revised CAAPP permit and reinstates the original CAAPP permit, “it is not impossible for the Board to grant the parties relief.” Reply Am. Stay at 3.

U.S. Steel reiterates that it is not requesting that the Board “make any determination or issue an advisory opinion.” Reply Am. Stay at 4. U.S. Steel is simply asking for a stay of this appeal. *Id.* It is ABC, U.S. Steel continues, that is wasting time and resources through repeated filings and by “requesting the Board make a legal determination that is not necessary at this time.” *Id.*

Lastly, U.S. Steel argues that it is not required to demonstrate “why dismissal is not appropriate.” Reply Am. Stay at 4. According to U.S. Steel, because the company has met its burden of demonstrating that a stay is appropriate, while IEPA and ABC have failed to demonstrate why dismissal is warranted, this appeal should be stayed instead of dismissed. *Id.*

### **Filings Concerning IEPA and ABC Joint Motion for Dismissal**

#### **IEPA and ABC Joint Motion for Dismissal**

IEPA and ABC argue that the revised CAAPP permit “replaces and completely supersedes” the original CAAPP permit. Joint Mot. Dism. at 2. From their joint opposition to a stay, the movants repeat their arguments about (1) the “general rule” providing that issuance of a new air permit renders null and void the superseded permit and (2) a Board Note from a RCRA rule providing that reissuance of a permit supersedes the earlier version of the permit. *Id.*, citing Quad/Graphics and 35 Ill. Adm. Code 703.270, Board Note.

According to IEPA and ABC, no matter what the outcome is of ABC’s petition with USEPA on the revised CAAPP permit, “neither USEPA nor IEPA can revive the moribund Original CAAPP Permit.” Joint Mot. Dism. at 2. IEPA and ABC argue that the federal Clean Air Act does not provide for the “odd result” held out as a possibility by U.S. Steel: that USEPA “could revoke the Revised CAAPP Permit and somehow revive the Original CAAPP Permit.” *Id.* Instead, according to the movants, the Clean Air Act states that upon objection, the USEPA Administrator “shall modify, terminate, or revoke such permit or the state permitting authority shall revise a permit to meet the objections.” *Id.*, citing 42 U.S.C. §§ 7661d(b)(3), (c).

Despite U.S. Steel’s allegedly unsupported claim that a stay is warranted because of uncertainty over the impact here of USEPA’s proceeding, IEPA and ABC argue that the revised CAAPP permit “mooted all issues arising from the Original CAAPP Permit.” Joint Mot. Dism. at 2. IEPA and ABC quote the Illinois Supreme Court in In re Alfred H.H.: “[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.” *Id.* at 3, quoting In re Alfred H.H., 910 N.E.2d 74, 78 (2009). Again quoting the Illinois Supreme Court,

IEPA and ABC state that a moot question is one which “presents or involves no actual controversy, interest, or rights of the parties, or which involves issues that have ceased to exist.” Joint Mot. Dism. at 3, quoting People v. Redlich, 83 N.E.2d 736, 741 (1949).

IEPA and ABC liken the instant appeal to Commonwealth Edison Co. v. PCB, 51 Ill. App. 3d 345, 367 N.E.2d 270 (3rd Dist. 1977). Joint Mot. Dism. at 3. IEPA and ABC explain that in that case, after the Board ordered ComEd to obtain a permit for operating a waste disposal site, the company was issued a permit and IEPA represented that it would not take any action against the company for operating without a permit. *Id.* As IEPA and ABC explain, the court held that ComEd’s appeal of the Board order “presented only moot questions” and “[n]one of the exceptions to the mootness doctrine applied.” *Id.* at 3-4, citing Commonwealth Edison, 367 N.E.2d at 272-73.

IEPA and ABC argue that as the issued permit mooted any prior questions in Commonwealth Edison, so too did the issuance of the revised CAAPP permit moot this appeal of the original CAAPP permit. Joint Mot. Dism. at 4. IEPA and ABC further argue that the present appeal does not fall under either of the “two narrow exceptions to the mootness doctrine: the public interest exception and cases capable of repetition but evading review.” *Id.* at 4-5, citing Alfred H.H., 910 N.E.2d at 80, In re Robin C., 918 N.E. 2d 1284,1288 (3rd Dist. 2009), and In re Barbara H., 702 N.E.2d 555, 559 (1998). According to IEPA and ABC, the correct course for the Board is to dismiss, not stay, the instant appeal because the case presents only moot questions on which the Board could *only* “render an advisory opinion that cannot bind any party.” Joint Mot. Dism. at 5.

### **U.S. Steel Opposition to Joint Motion for Dismissal**

U.S. Steel first emphasizes that it is requesting a stay, not an advisory opinion. Oppos. Dism. at 2. U.S. Steel then reiterates that Section 703.270 on RCRA permits and Quad Graphics, a 20-year old decision by another state on a PSD construction permit, serve as a “poor basis” for concluding that the original CAAPP permit here is superseded. *Id.* U.S. Steel states that IEPA and ABC fail to identify any authority in Section 39.5 of the Act, Title V of the Clean Air Act, or the regulations promulgated thereunder “to support their conclusion that the Revised CAAPP permit superseded the initial CAAPP permit and would continue to do so should USEPA terminate the Revised CAAPP permit.” *Id.* at 3.

Disputing the assertion that this appeal is moot, U.S. Steel claims that none of the parties can conclusively determine the impact on this appeal of USEPA action on the petition to object to the revised CAAPP permit. Oppos. Dism. at 3. According to U.S. Steel, “there is a possibility (albeit, perhaps, remote) that USEPA could terminate or revoke the Revised CAAPP permit,” and the parties “do not know what happens” procedurally or substantively in that event. *Id.*; *see also id.*, n.2 quoting 42 U.S.C. § 7661d(b)(3) (“[u]pon receipt of an objection by the Administrator under this subsection, the permitting authority may not issue the permit unless it is revised and issued in accordance with subsection (c) of this section. If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, *terminate, or revoke such permit* and the



permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.” (emphasis added by U.S. Steel)).

U.S. Steel argues that IEPA and ABC have provided “no authority whatsoever” to support their assertion that whatever the outcome of the USEPA proceeding, “neither USEPA nor IEPA can revive the moribund Original CAAPP Permit.” Oppos. Dism. at 3-4, quoting Joint Mot. Dism. at 2. Movants’ use of the word “moribund” to describe the original CAAPP permit is telling, says U.S. Steel, because it indicates their recognition that the initial permit is only “on the verge of termination, as opposed to actually expired or terminated.” Oppos. Dism. at 4. Additionally, U.S. Steel claims that support for the company’s position is had in IEPA’s “Statement of Basis” to the revised CAAPP permit, which states that “this permit revision is a *continuation of the initial CAAPP permit proceeding*” and “*it is hoped that this further permitting action will bring to a close those procedures of the CAAPP relating to the issuance of US Steel’s initial CAAPP permit.*” *Id.*, quoting Statement of Basis for a Planned Revision of the Clean Air Act Permit Program (CAAPP) Permit for U.S. Steel Corporation, Granite City Works, 20th and State Streets, Granite City, Illinois at 13-14 (IEPA Mar. 2011) (emphasis added by U.S. Steel).

U.S. Steel seeks to distinguish Commonwealth Edison, the decision relied upon by movants for the proposition that the instant appeal is moot. Oppos. Dism. at 4. In Commonwealth Edison, U.S. Steel explains, ComEd contended that the Board erred by finding that ComEd’s disposal operation did not fall within the statutory exemption from the permitting requirement. *Id.*, citing Commonwealth Edison, 51 Ill. App. 3d 345, 346. According to U.S. Steel, the court held that ComEd’s petition for review was moot because ComEd obtained a permit. *Id.*, citing Commonwealth Edison, 51 Ill. App. 3d at 348-49. Unlike Commonwealth Edison, continues U.S. Steel, where the court “could determine whether the issue raised by ComEd’s petition was moot, U.S. Steel’s case has not reached that point of determination.” Oppos. Dism. at 5. The parties should know whether the instant appeal is moot once USEPA takes action on ABC’s petition to object. *Id.* Moreover, U.S. Steel concludes, “there is no reason for the Board, at this time, to determine ‘mootness,’ as U.S. Steel merely seeks a stay until the USEPA proceeding is resolved.” *Id.*

## **DISCUSSION**

The Board’s discussion begins with procedural and legal background. Then, as the joint motion for dismissal of this appeal is potentially dispositive, the Board addresses that motion before turning to the amended motion to stay the proceeding.

### **Background**

On September 3, 2009, IEPA issued the original CAAPP permit to U.S. Steel for the Granite City Works. On October 7, 2009, U.S. Steel filed its petition with the Board for review of the original CAAPP permit. *See* 415 ILCS 5/40.2(a) (2010). U.S. Steel’s petition has been accepted for hearing, but no hearing has been held to date. By order of November 2009, the

Board confirmed that the effectiveness of the original CAAPP permit is automatically stayed under Section 10-65(b) the APA (5 ILCS 100/10-65(b) (2010)).<sup>4</sup>

On October 1, 2009, ABC, intervenor in the instant proceeding, filed with USEPA a petition to object to IEPA's issuance of the original CAAPP permit. On January 2, 2011, USEPA granted, in part, ABC's petition to object and directed IEPA to revise the original CAAPP permit. On May 2, 2011, IEPA issued the revised CAAPP permit to U.S. Steel. U.S. Steel did not appeal the revised CAAPP permit and purports to be operating under its terms and conditions. On August 16, 2011, ABC filed with USEPA a petition to object to IEPA's issuance of the revised CAAPP permit. ABC's petition to object to the revised CAAPP permit is still pending with USEPA.

Section 39.5 of the Act (415 ILCS 5/39.5 (2010)) 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). Section 39.5(9) of the Act provides in part:

b. [IEPA] shall not issue the proposed CAAPP permit if USEPA objects in writing within 45 days after receipt of the proposed CAAPP permit and all necessary supporting information.

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e. If USEPA does not object in writing to issuance of a permit under this subsection, any person may petition USEPA within 60 days after expiration of the 45-day review period to make such objection.

f. If the permit has not yet been issued and USEPA objects to the permit as a result of a petition, [IEPA] shall not issue the permit until USEPA's objection has been resolved. [IEPA] shall provide a 10-day comment period in accordance with paragraph c of this subsection. A petition does not, however, stay the effectiveness of a permit or its requirements if the permit was issued after expiration of the 45-day review period and prior to a USEPA objection.

g. If [IEPA] has issued a permit after expiration of the 45-day review period and prior to receipt of a USEPA objection under this subsection in response to a petition submitted pursuant to paragraph e of this subsection, [IEPA] may, upon receipt of an objection from USEPA, revise and resubmit the permit to USEPA pursuant to this subsection after providing a 10-day comment period in accordance with paragraph c of this subsection. If [IEPA] fails to submit a revised permit in response to the objection, USEPA shall modify, terminate or revoke the permit. \*\*\* 415 ILCS 5/39.5(9)(b), (e)-(g) (2010); *see also* 42 U.S.C. §§ 7661d(b), (c), (e).

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<sup>4</sup> *Cf.* 415 ILCS 5/40.2(f) (2010), added by P.A. 96-934 (eff. June 21, 2010).

### **IEPA and ABC Joint Motion for Dismissal**

In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. *See, e.g., In re Chicago Flood Litigation*, 176 Ill. 2d 179, 184, 680 N.E.2d 265 (1997); *United City of Yorkville v. Hamman Farms*, PCB 08-96, slip op. at 14 (Oct. 16, 2008); *Joe's Midtown Auto Repair v. IEPA*, PCB 07-143, slip op. at 2 (Oct. 18, 2007); *Lone Star Industries, Inc. v IEPA*, PCB 03-94, slip op. at 2 (Mar. 6, 2003). Further, "it is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250 (2003); *Hamman Farms*, PCB 08-96, slip op. at 14; *Joe's Midtown*, PCB 07-143, slip. op. at 2; *Lone Star*, PCB 03-94, slip op. at 2; *see also Chicago Flood*, 176 Ill. 2d at 189 ("trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party.").

IEPA and ABC jointly move to dismiss this appeal as moot. "An issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief." *Dixon v. Chicago & North Western Transp. Co.*, 151 Ill. 2d 108, 116, 601 N.E.2d 704 (1992); *see also Krohn v. Arthur*, 301 Ill. App. 3d 138, 141, 703 N.E.2d 602 (1st Dist. 1998) ("An appeal is considered moot if one of [the] two circumstances arises."). The Board notes that because the statutory 35-day period for appealing the original CAAPP permit has expired (415 ILCS 5/40.2(a) (2010)), dismissal of U.S. Steel's petition would necessarily be with prejudice (*see City of Joliet v. IEPA*, PCB 11-08, slip op. at 1-2 (July 7, 2011)).

U.S. Steel's petition contests numerous conditions of the original CAAPP permit. In moving for dismissal of this appeal, IEPA and ABC stop short of claiming that the original CAAPP permit has been terminated. Further, though they believe the possibility to be remote, the movants acknowledge that the revised CAAPP permit could be revoked. As U.S. Steel points out, IEPA and ABC also cite no federal or State CAAPP provisions to support their contention that the revised CAAPP permit superseded the original CAAPP permit and would continue to do so in the event the revised CAAPP permit is revoked. No controlling authority has been cited that rules out the possibility of (1) USEPA revoking the revised CAAPP permit and (2) the original CAAPP permit having legal effect.

The Board finds that IEPA and ABC have failed to establish that there is no actual controversy over the original CAAPP permit or that it is impossible for the Board to grant U.S. Steel effectual relief in the instant appeal. IEPA and ABC have therefore not demonstrated that this proceeding is moot. Accordingly, the Board need not address the two exceptions to the mootness doctrine argued by IEPA and ABC. Because the Board cannot find at this time that there is clearly is no set of facts that could be proven which would entitle U.S. Steel to relief, the Board denies the joint motion for dismissal of this appeal.

### **U.S. Steel Amended Motion for Stay**

U.S. Steel's amended motion for stay makes it plain that the company seeks no decision by the Board other than a determination that the granting of a stay is warranted. To demonstrate that a stay should issue, U.S. Steel is not required to prove that this appeal is *not* moot. Motions

for stay simply “must be accompanied by sufficient information detailing why a stay is needed.” 35 Ill. Adm. Code 101.514(a). The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” See People v. State Oil Co., PCB 97-103 (May 15, 2003), *aff’d sub nom* State Oil Co. v. PCB, 822 N.E.2d 876, 291 Ill. Dec. 1 (2nd Dist. 2004).

The precise legal status of U.S. Steel’s original CAAPP permit, in light of the revised CAAPP permit and ABC’s pending petition to object, is argued sharply and at length. The parties were unable to provide citation to any dispositive authority. Ultimately, IEPA concedes that Section 39.5 of the Act (415 ILCS 5/39.5 (2010)) does not address when a CAAPP permit is effective or how a revised CAAPP permit supersedes its predecessor CAAPP permit. IEPA further concedes that, however unlikely, it is possible both for USEPA to revoke the revised CAAPP permit and for the original CAAPP permit to have legal effectiveness. In addition to presenting a question of first impression for the Board, U.S. Steel’s contention that this area of the law is unsettled is not seriously disputed.

The Board finds that the present uncertainty over the impact that the USEPA proceeding could have on this appeal supports a stay, as does U.S. Steel’s representation that it is currently operating under the terms and conditions of the revised CAAPP permit. The suggestions of IEPA and ABC that considerable resources would have to be expended on this appeal *during* a stay are unconvincing. On the other hand, to proceed now with this litigation does risk wasting the resources of the parties and the Board. All three parties would appear to agree that resolution of the USEPA proceeding on ABC’s petition should indicate definitively whether the instant appeal is moot. U.S. Steel has also filed an open waiver of the Board’s statutory deadline for deciding the case. Under these circumstances, the Board finds that U.S. Steel has established that a stay is appropriate. See, e.g., Midwest Generation, PCB 04-216, slip op. at 7-8 (stay of Board proceeding granted where potentially relevant USEPA proceeding is pending).

The Board is concerned, however, that the duration of the stay requested by U.S. Steel, until USEPA’s final action on ABC’s petition to object to the revised CAAPP permit, is too open ended. The Board will therefore limit the duration of the stay to a date-certain, roughly one year from today, *i.e.*, through February 4, 2013, unless the Board issues an order ending the stay sooner. See Midwest Generation, PCB 04-216, slip op. at 8 (granting stay to date-certain rather than until resolution of federal process). To that extent, the Board grants U.S. Steel’s motion for stay.

Additionally, U.S. Steel must file with the Board a status report on the federal proceeding in six months, *i.e.*, on August 2, 2012, unless USEPA takes final action on ABC’s petition before then. During the stay, if USEPA takes final action on ABC’s petition, U.S. Steel must promptly provide written notification to the Board. If final action by USEPA does not take place during this one-year stay, any motion by U.S. Steel to further stay the appeal must be directed to the Board and accompanied by a report on the status of the USEPA proceeding.

**CONCLUSION**

The Board denies the joint motion of IEPA and ABC to dismiss this appeal by U.S. Steel of the original CAAPP permit. In addition, the Board grants U.S. Steel's amended motion to stay the instant proceeding, but only through February 4, 2013, unless the Board issues an order terminating the stay earlier. During the stay, U.S. Steel is subject to reporting as provided in this order.

**SUMMARY OF ORDER**

1. The Board denies the joint motion of IEPA and ABC for dismissal of this appeal of the CAAPP permit issued by IEPA to U.S. Steel on September 3, 2009 (original CAAPP permit).
2. The Board grants U.S. Steel's amended motion for a stay of this appeal of the original CAAPP permit, but the stay will last only through February 4, 2013, unless the Board terminates the stay sooner.
  - a. On August 2, 2012, U.S. Steel must file a report on the status of the USEPA proceeding concerning ABC's petition to object to the CAAPP permit issued by IEPA to U.S. Steel on May 2, 2011 (revised CAAPP permit), unless USEPA takes final action on ABC's petition before that date.
  - b. During the stay, if USEPA takes final action on ABC's petition to object to the revised CAAPP permit, U.S. Steel must promptly notify the Board in writing.
  - c. If final action by USEPA on ABC's petition to object to the revised CAAPP permit does not occur during the stay, any motion by U.S. Steel to further stay this appeal of the original CAAPP permit must be directed to the Board and accompanied by a report on the status of the USEPA proceeding.

IT IS SO ORDERED.

Chairman Holbrook abstained.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 2, 2012, by a vote of 4-0.



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John Therriault, Assistant Clerk  
Illinois Pollution Control Board