

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. )

**NOTICE OF FILING**

TO: Mr. John Therriault Carol Webb, Esq.  
Assistant Clerk of the Board Hearing Officer  
Illinois Pollution Control Board Illinois Pollution Control Board  
100 West Randolph Street 1021 North Grand Avenue East  
Suite 11-500 Post Office Box 19274  
Chicago, Illinois 60601 Springfield, Illinois 62794-9274  
**(VIA ELECTRONIC MAIL) (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 **UNITED STATES STEEL CORPORATION'S RESPONSE TO AMERICAN BOTTOM CONSERVANCY'S MOTION TO INTERVENE**, a copy of which is hereby served upon you.

Respectfully submitted,

UNITED STATES STEEL CORPORATION,  
Petitioner,

Dated: November 4, 2009

By: /s/ Katherine D. Hodge

One of Its Attorneys

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Monica T. Rios  
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UNITED STATES STEEL	)	
CORPORATION, a Delaware corporation,	)	
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Petitioner,	)	
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v.	)	PCB No. 10-23
	)	(CAAPP Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**UNITED STATES STEEL CORPORATION'S RESPONSE TO  
AMERICAN BOTTOM CONSERVANCY'S MOTION TO INTERVENE**

NOW COMES, Petitioner, UNITED STATES STEEL CORPORATION ("U.S. Steel"), by and through its attorneys, HODGE DWYER & DRIVER, pursuant to 35 Ill. Admin. Code § 101.500, for its Response to American Bottom Conservancy's Motion to Intervene ("Motion") states as follows:

1. On October 7, 2009, U.S. Steel filed a Petition for Review ("Petition") of the Clean Air Act Permit Program ("CAAPP") permit (No. 96030056) ("Permit") issued on September 3, 2009, by the Illinois Environmental Protection Agency ("Illinois EPA") for U.S. Steel's integrated steel mill plant located in Granite City, Illinois. Petition for Review, *United States Steel Corporation v. Illinois EPA*, PCB No. 10-23 (Ill.Pol.Control.Bd. Oct. 7, 2009) (hereafter appeal cited as "PCB No. 10-23").

2. On October 15, 2009, the Illinois Pollution Control Board ("Board") accepted U.S. Steel's Petition for hearing. Board Order, PCB No. 10-23 (Ill.Pol.Control.Bd. Oct. 15, 2009) (hereafter "Board Order"). On October 21, 2009, American Bottom Conservancy ("ABC") filed its Motion requesting the Board allow

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ABC to intervene in this matter. Motion to Intervene, PCB No. 10-23

(Ill.Pol.Control.Bd. Oct. 21, 2009).

3. As discussed in more detail below, although U.S. Steel does not object to ABC's intervention in this matter, U.S. Steel requests that, should the Board grant ABC's Motion, ABC's participation in this appeal be limited due to ABC's failure to timely file an appeal in this matter. In addition, such limitation is authorized pursuant to Section 101.402(e) of the Board's procedural rules. 35 Ill. Admin. Code § 101.402(e). Further, subject to the conditions on ABC's participation as discussed below, ABC's participation in this matter should not "unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding." 35 Ill. Admin. Code § 101.402(b).

4. Section 40.2(a) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/40.2(a), 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.

415 ILCS 5/40.2(a). (Emphasis added.)

5. ABC participated in the U.S. Steel permitting process by submitting public comments on the draft CAAPP permit. Motion at ¶ 9. Therefore, pursuant to Section 40.2(a), ABC had the right to file an appeal of the Permit within thirty-five days after final permit action. 415 ILCS 5/40.2(a). Thus, any appeal of the Permit by the applicant or persons that participated in the public comment period should have been filed by October 8, 2009, thirty-five days after the issuance of the final Permit.

6. ABC has demonstrated that it is familiar with statutory and regulatory deadlines and has timely filed public comments and appeals in cases involving U.S. Steel's construction permits, NPDES permit, case-by-case MACT determination, and CAAPP permit. Motion at ¶¶ 6-7, 9-10. However, in this case, ABC failed to timely file an appeal of the Permit as provided for in Section 40.2 of the Act.

7. Since ABC waived its statutory right to appeal by failing to file a petition for review of the Permit by October 8, 2009, 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.

8. Section 101.402(e) of the Board's procedural rules provides:

An intervenor will have all 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 and 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. Admin. Code § 101.402(e). (Emphasis added.)

9. The Board, in the past, has denied intervenor status to a third party, but allowed the party to participate in the proceeding by making statements at hearing and/or submitting public comments or *amicus curiae* briefs. *Midwest Generation EME, LLC v. Illinois EPA*, PCB No. 04-185 (Ill.Pol.Control.Bd. Nov. 4, 2004); *Midwest Generation EME, LLC v. Illinois EPA*, PCB No. 04-216 (Ill.Pol.Control.Bd. Aug. 18, 2005); *Commonwealth Edison Company v. Illinois EPA*, PCB No. 04-215 (Ill.Pol.Control.Bd. Aug. 18, 2005) (collectively “Midwest Generation cases”). In the Midwest Generation cases, Midwest Generation EME, LLC (“Midwest Generation”) filed appeals of the Illinois EPA’s determination denying trade secret protection for information submitted to the Illinois EPA. Sierra Club filed a Motion to Intervene in each of the Midwest Generation cases arguing that it would be “materially prejudiced absent intervention.” PCB No. 04-185 at \*14; PCB No. 04-216 at \*17; PCB No. 04-215 at \*15.

10. In the PCB No. 4-215 and 4-216 matters, the Illinois EPA supported the intervention of Sierra Club, as long as such participation was subject to certain conditions. PCB No. 04-216 at \*19; PCB No. 04-215 at \*17. The Illinois EPA requested the following limitations on Sierra Club’s participation:

- Sierra Club “not be allowed to control any decision deadline;”
- Sierra Club “be barred from serving discovery interrogatories, and requests to admit;”
- Sierra Club “be barred from conducting any depositions;”

- Sierra Club “be bound by all Board and hearing officer orders issued to date;” and
- Sierra Club “not be allowed to raise any issues that were raised and decided, or might have been raised earlier in this proceeding;”

*Id.*<sup>1</sup>

11. The Board concluded that Sierra Club did not establish “that it may be materially prejudiced absent intervention” and did not demonstrate “that it may be adversely affected by a final Board order in this case.” PCB No. 04-216 at \*27, \*32; PCB No. 04-215 at \*24, \*29. Accordingly, the Board denied the Motion to Intervene. PCB No. 04-216 at \*34; PCB No. 04-215 at \*31. However, the Board did provide that Sierra Club could participate by “making oral or written statements at hearing and by filing *amicus curiae* briefs or public comments.” PCB No. 04-216 at \*33-34; PCB No. 04-215 at \*30.

12. In this case, U.S. Steel does not oppose the intervention of ABC subject to certain conditions. Since ABC waived its right to appeal in this matter by failing to file a timely petition pursuant to Section 40.2(a) of the Act, ABC’s participation should be limited as it did not avail itself of the statutory right to appeal. Accordingly, U.S. Steel

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<sup>1</sup> In the PCB No. 04-185 matter, the Illinois EPA filed a response opposing Sierra Club’s Motion to Intervene. PCB No. 04-185 at \*4. However, the Illinois EPA subsequently filed a joint Stipulation with Sierra Club, where the Illinois EPA withdrew its objection to the Motion to Intervene and agreed to support intervention if Sierra Club agreed to “abide by the limitations on its participation” recommended by the Illinois EPA. Stipulation Withdrawing Respondent’s Objection to Intervention by Sierra Club, PCB No. 04-185 (Ill.Pol.Cotrol.Bd. June 23, 2004). The limitations recommended by the Illinois EPA were the same limitations that the Illinois EPA proposed in PCB Nos. 04-215 and 04-216 (see above). The Board concluded that Sierra Club had not demonstrated that it would be materially prejudiced and denied the Motion to Intervene. PCB No. 04-185 at \*30. The Board did allow Sierra Club to participate in the proceeding by filing *amicus curiae* briefs or public comments or making statements at public hearing. *Id.*

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requests that, should the Board grant ABC's Motion, it limit ABC's participation in this matter as follows:

- 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;
- ABC should not be permitted to control any decision deadline;
- 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;
- ABC should not be allowed to raise issues that it did not raise during the public comment period;
- ABC should not be permitted to introduce evidence that is not part of the record; and
- ABC must comply with any Board or hearing officer orders, including those issued to date.

See 35 Ill. Admin. Code § 101.402(e); Board Order at 2 (stating that the hearing “will be based exclusively on the record before the Agency at the time the Agency issued its permit decision” and “information developed after the Agency’s decision typically is not admitted at hearing or considered by the Board”); *XTC Limited Partnership v. Illinois EPA, Georgia-Pacific Tissue, LLC v. Illinois EPA*, PCB Nos. 01-46, 01-51 (consolidated) (Ill.Pol.Control.Bd. Feb. 5, 2004) (where the Board held that an amended petition, filed three years after the issuance of the CAAPP permit, which sought review of a condition not previously cited, was “prohibited by the express language of section 40.2 of the Act”). As in the Midwest Generation cases, 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.

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13. ABC will not be prejudiced by the above limitations since ABC will still have the opportunity to discuss its concerns regarding the Permit with the Illinois EPA and U.S. Steel during the course of this proceeding, as well as provide public comments on the re-issued CAAPP permit. Further, prohibiting ABC from conducting discovery should not adversely impact ABC because the Board's decision in this matter will be based on the information in the record. Board Order at 2 (stating that the hearing "will be based exclusively on the record before the Agency at the time the Agency issued its permit decision" and "information developed after the Agency's decision typically is not admitted at hearing or considered by the Board"). Any discovery on the part of ABC is beyond the scope of the record in this matter. And as noted above, limited participation by ABC in this matter should not "unduly delay or materially prejudice the proceeding or otherwise interfere with an orderly or efficient proceeding." 35 Ill. Admin. Code § 101.402(b).

14. Limiting ABC's participation here is appropriate also since, on October 1, 2009, ABC filed a Petition to Object to U.S. Steel's Final CAAPP Permit with United States Environmental Protection Agency. Motion at ¶ 10. Apparently, ABC chose to object to the Permit at the federal level rather than exercising its right to appeal pursuant to Section 40.2(a) at the state level. Thus, justice requires that ABC's participation in this matter be limited. 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.

15. Pursuant to the Board's authority to limit the rights of an intervenor, U.S. Steel requests that, should the Board grant ABC's Motion, it limit ABC's participation in

this matter in the manner and with the limitations set forth above. However, if the Board is inclined to allow ABC's intervention in this matter without the limitations discussed above, U.S. Steel respectfully requests that the Board schedule additional briefing on this issue.

WHEREFORE, Petitioner, UNITED STATES STEEL CORPORATION requests the Board to limit participation of the American Bottom Conservancy as an intervenor in this matter should the Board grant the Motion to Intervene.

Respectfully submitted,

UNITED STATES STEEL  
CORPORATION,  
Petitioner,

Dated: November 4, 2009

By: /s/ Katherine D. Hodge  
One of Its Attorneys

Katherine D. Hodge  
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USSC:003/Fil/Response to Motion to Intervene

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, certify that I have served the attached  
UNITED STATES STEEL CORPORATION'S RESPONSE TO AMERICAN  
BOTTOM CONSERVANCY'S MOTION TO INTERVENE upon:

Mr. John Therriault  
Assistant Clerk of the Board  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

via electronic mail on November 4, 2009; and upon:

Carol Webb, Esq.  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
P.O. Box 19274  
Springfield, Illinois 62794-9274

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by depositing said documents in the United States Mail, postage prepaid, in Springfield,  
Illinois, on November 4, 2009.

/s/Katherine D. Hodge  
Katherine D. Hodge