

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NACME Steel Processing, L.L.C.,)	
)	
Petitioner,)	
)	
v.)	PCB 13-07
)	(CAAPP Permit Appeal-Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF SERVICE

TO: John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

Edward V. Walsh, III
ReedSmith LLP
10 South Wacker Drive
Chicago, Illinois 60606-7507

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that today I have caused to be filed with the Illinois Pollution Control Board MOTION TO DISMISS PETITION FOR HEARING, a copy of which is served upon you.

Respectfully submitted,



 Nancy J. Tilvsky
 Assistant Attorney General

Office of the Illinois Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-8567

Date: September 4, 2012

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NACME Steel Processing, LLC)	
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Petitioner,)	
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v.)	PCB 13-07
)	(CAAPP Permit Appeal-Air)
ILLINOIS ENVIRONMENTAL)	
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CERTIFICATE OF SERVICE

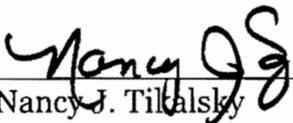
I, the undersigned attorney at law, hereby certify that on September 4, 2012, I served true and correct copies of a MOTION TO DISMISS PETITION FOR HEARING upon the persons and by the methods as follows:

[First Class U.S. Mail]

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
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MOTION TO DISMISS PETITION FOR HEARING

Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by and through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, respectfully moves the Illinois Pollution Control Board ("Board") to dismiss Petitioner NACME Steel Processing, L.L.C.'s Petition for Hearing, pursuant to 105.108(d) of the Board Procedural Rules, 35 Ill. Adm. Code 105.108(d). Because the Petition fails to set forth a final decision by the Illinois Environmental Protection Agency ("Agency") that is subject to the Board's review, it should be dismissed as prematurely filed.

In support of its Motion, Respondent states as follows:

I. Procedural Background

On August 1, 2012, Petitioner NACME Steel Processing, L.L.C. ("Petitioner") filed its Petition for Hearing ("Petition") with the Board, captioned as a "Permit Appeal." In the Petition, Petitioner asserted that it operates a steel pickling facility located at 127th Street, Chicago, Cook County, Illinois. (Petition at ¶1.) Petitioner further asserts it is filing said Petition for Hearing to contest a single provision referred to as Permit Condition No. 2a in the preliminary draft FESOP No. 05100052, which states that the Coil Coater at the

Facility is subject to New Source Performance Standard ("NSPS") entitled Standards for Performance for Metal Coil Surface Coating, 40 CFR 60, Subpart TT ("Contested Provision"). (See a copy of the draft FESOP at Petition Exhibit A.)

On August 5, 2012, the Agency received service of the Petition.

On or about October 2005 NACME applied to the Agency for a Federally Enforceable State Operating Permit ("FESOP") for its Facility. At that time, the Agency requested additional information in the form of a construction permit application.

On February 22, 2012, NACME submitted a construction permit in response to the Agency's 2005 request.

On or about April 26, 2012, the Agency issued an "air emission source Construction Permit" and a preliminary draft FESOP requesting NACME's response by May 17, 2012. (See a copy of the draft FESOP at Petition Exhibit A.)

On or about May 15, 2012, NACME responded to the Agency on the preliminary draft FESOP, including setting out its objections for the Contested Provision. (See a copy of NACME's May 15, 2012 letter at Petition Exhibit B.)

On May 23, 2012, the Agency responded by email to NACME's objections to the Contested Provision and set forth its reasons. (See a copy of the Agency's May 23, 2012 email correspondence at Petition Exhibit C.)

On June 14, 2012, NACME submitted additional comments on the Contested Provision expanding on its reasoning. (See a copy of NACME's June 14, 2012 letter at Petition Exhibit D.)

On June 15, 2012, the Agency responded by email rejecting NACME's reasoning for removal of the Contested Provision while providing additional explanation. (See a copy of the Agency's June 15, 2012 email correspondence at Petition Exhibit E.)

On June 26, 2012, NACME responded to the Agency's reasoning in its June 15, 2012 response, and repeated its assertion that the Contested Provision was not applicable to its process with additional explanation for its reasoning. (See a copy of NACME's June 26, 2012 letter at Petition Exhibit F.)

On June 27, 2012, the Agency responded by email to NACME's response to the Agency's reasoning as irrelevant and asserted that it continued to consider that the Contested Provision was applicable to NACME's coating operation. There was no indication in the email correspondence that the Agency's opinion was a final determination or that it would not consider other reasons for removing the Contested Provision. ("Agency June 27, 2012 Email") (See a copy of the Agency's June 27, 2012 email correspondence at Petition Exhibit G.)

II. Relevant Law

Pursuant to Section 105.108(d) of the Board Procedural Rules, 35 Ill. Adm. Code 105.108(d), a petition for review of a final decision by the Agency is subject to dismissal if the Board determines that "[t]he petitioner does not have standing under applicable law to petition the Board for review of the State agency's final decision." If the petitioner lacks standing to petition the Board for review of a final decision by the Agency, then the Board correspondingly lacks jurisdiction to hear the Petitioner's appeal. *Williamson Cty. v Kibler Dev. Corp.*, PCB 08-93 (July 10, 2008) at 13.

Because the Board was created by the Act, its assertion of authority to review final decisions by the Agency must be rooted in the Act's provisions. *See Landfill, Inc. v. Pollution Control Bd.*, 74 Ill. 2d 541, 553-54 (Ill. 1978). Section 40(a) of the Act, 415 ILCS 5/40 (2010), authorizes the Board to review the Agency's denials of permits pursuant to Section 39 of the Act, 415 ILCS 5/39 (2010), and reads, in pertinent part, as follows:

Appeal of permit denial.

(a) (1) If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency.

III. Argument

NACME's prematurely filed Petition should be dismissed for lack of standing by Petitioner and, subsequently, lack of jurisdiction for the Board to hear it. Though it is brought as a permit appeal pursuant solely to Section 40.2 of the Act, 415 ILCS 5/40 (2010), this Section applies to only CAAPP permit applications submitted under Section 39.5 of the Act, 415 ILCS 5/39.5 (2010), not FESOP applications.

Alternatively, if the Petition had been brought more appropriately under Section 40 of the Act, 415 ILCS 5/40 (2010), and pursuant to the Order of the Board dated August 9, 2012, page 1, in this matter, the Petitioner does not set forth that its Petition is based on the Agency's grant of a permit with conditions. Instead, Petitioner is merely aggrieved by the Agency's statement of a legal opinion in its June 27, 2012 email correspondence discussing the Contested Provision. Petitioner has no standing to contest an Agency legal opinion on a draft FESOP before the Board.

The Agency certainly has not issued a final decision reviewable by the Board under authority provided by Section 40 of the Act, 415 ILCS 5/40 (2010). (See Affidavit of Ed Bakowski, Illinois EPA Manager for Bureau of Air ("Bakowski Affidavit") hereto attached as Respondent Exhibit A.) Standing alone, that section of the Act relates only to the Board's review of the Agency's granting a permit with conditions under Section 39 of the Act. Petitioner does not contend that the Agency has granted a FESOP permit with the Contested Provision.

Moreover, the Agency has not completed its application review, nor provided a notice of FESOP permit application no. 5100052 to the public as required by Section 40 of the Act, 415 ILCS 5/40 (2010). (See Bakowski Affidavit at ¶7.) In fact, the Agency has not signed a FESOP permit or made a final permit decision on the request for FESOP permit application No. 5100052. (See Bakowski Affidavit at ¶7.) Accordingly, the Agency June 27, 2012 Email is not a formal written final determination from the Agency on the issue discussed in the email. (See Bakowski Affidavit at ¶8.)

Finally, the Board does not have authority under Section 40 of the Act, 415 ILCS 5/40 (2010), to review the opinion expressed by the Agency in its June 27, 2012 email correspondence.

WHEREFORE, Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, requests that the Board dismiss Petitioner NACME Steel Processing, L.L.C.'s Petition for Review, pursuant to Section 105.108(d) of the Board Procedural Rules, 35 Ill. Adm. Code 105.108(d).

THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

ELIZABETH WALLACE, Chief
Environmental Bureau

BY:



NANCY J. TITALSKY

Assistant Attorney General
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AFFIDAVIT

I, Edwin C. Bakowski, being duly sworn on oath, depose and state that I am over 21 years of age, have personal knowledge of the facts stated herein, and, if called as a witness, could competently testify to facts as set forth herein as follows:

1. I am a Licensed Professional Engineer in the State of Illinois.
2. I am currently employed by the Illinois Environmental Protection Agency ("Illinois EPA"), as Manager for the Bureau of Air, Permit Section. I have held this position since December, 2006. I have been employed with the Illinois EPA since 1978.
3. As Manager for the Permit Section of the Bureau of Air, my duties and responsibilities include ensuring that all permit decisions are made consistent with the Illinois Environmental Protection Act and applicable regulations.
4. Generally after receipt of an application, the application is assigned to an appropriate Unit Manager and subsequently a Permit Analyst for review. Upon determining that an application is complete, and then a detailed review, the assigned Permit Analyst will draft a permit or denial for review by the Unit Manager. Upon completion and manager approval of a draft FESOP permit, as appropriate, the Agency

provides notice of the permit to the public, including an opportunity for public comment and a hearing prior to issuance of the FESOP.

5. At times, a copy of the draft permit is provided to the applicant prior to the public notice period. The applicant is requested to provide comments or suggested language for the permit for the Agency's consideration, if the applicant feels it is necessary. Additionally, a source may make comments on the permit during the public notice period, which the Agency will consider.

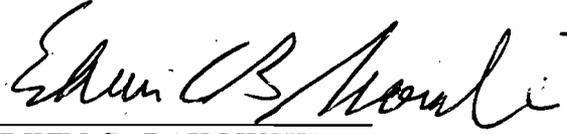
6. Subsequent to any public notice period and any hearing, a final permit is prepared and signed under the Permit Section Manager's authority for the Bureau of Air, Permit Section on behalf of the Director of the Illinois EPA. Until signature and issuance of the permit document, no FESOP permit decision is final.

7. I am aware that to date the Agency has not completed its application review nor provided notice of FESOP permit application no. 5100052 to the public. Further, a permit has not been signed and a final permit decision on the request for FESOP has not been made.

8. Electronic mail correspondence dated Friday June 27, 2012 2:41 PM from Valeriy Brodsky to Britt Wenzel is not a formal written final determination from the Illinois EPA on the issue discussed in the email. Rather, it is a response to a request from Britt Wenzel for additional comments on discussions regarding the applicability of a Condition in draft FESOP Application No. 05100052.

9. FESOP permits are issued pursuant to Section 39 of the Act not Section 39.5 of the Act, and thus Section 40.2 of the Act is not a basis for appeal of a FESOP.

FURTHER, AFFIANT SAYETH NOT.



EDWIN C. BAKOWSKI
Manager, Permit Section
Bureau of Air
Illinois Environmental Protection Agency

SUBSCRIBED and SWORN to
Before me this 29th day
Of Aug., 2012


NOTARY PUBLIC