

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

NACME Steel Processing, L.L.C.,)

Petitioner,)

v.)

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)

Respondent.)

PCB 13-7 (Permit Appeal)

ORIGINAL

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NACME STEEL PROCESSING, L.L.C.'s RESPONSE TO IEPA'S MOTION TO DISMISS NACME's AMENDED PETITION FOR HEARING

Petitioner NACME Steel Processing, L.L.C. ("NACME"), by its attorneys, Reed Smith, LLP., in response to the Illinois Environmental Protection Agency's (the "Agency") Motion to Dismiss NACME's Amended Petition for Hearing ("Petition") states as follows:

Introduction

The Agency's Amended Motion to Dismiss ("Motion") is identical to its original motion to dismiss.¹ The Agency argues that it has neither refused to grant nor granted with conditions the subject FESOP permit that NACME first applied for in 2005 and that as a result the Board has no jurisdiction to hear NACME's petition. Incredibly, the Agency simultaneously alleges in an enforcement action filed on September 5, 2012 that NACME has violated the Act for failing to timely secure a FESOP permit for the subject facility.² In its Motion, the Agency spins the facts to present an impression that it is NACME's fault that its permit has not yet been issued, but as the permit file shows, this is not the case. NACME has provided the Agency with a wealth

¹ NACME filed an Amended Petition for Hearing as directed in the Board's Order of August 9, 2012. After the Board's Order issued, the Agency nonetheless filed a motion to dismiss NACME's original Petition for Hearing. The Agency subsequently filed the instant motion following NACME's filing of its Amended Petition.

² People of the State of Illinois v NACME Steel Processing, LLC, PCB 13-12

of “additional information” since its original FESOP application in 2005, including the results of two separate stack tests. NACME has paid FESOP permit fees of \$1,800 per year since then. As time dragged on and the Agency failed to meaningfully act on NACME’s original application, NACME travelled to Springfield to meet with the IEPA in order to resolve the impasse, and later met at the attorney general’s office in Chicago for a conference call with the Agency for the same purpose. At the latter meeting, NACME was promised that its long pending permit request, and a request for a higher material throughput rate, would be promptly processed if it re-submitted its FESOP application and also submitted a construction permit application in connection with its request for a higher throughput rate. NACME submitted these applications on February 22, 2012. Months later the Agency issued the subject proposed permit which contains facially absurd conditions, one of which conditions has since been withdrawn by the Agency.

Adding insult to injury, NACME has recently been sued by the Agency for not having the permit it has waited years to obtain and for which it has paid annual fees.³ At the same time the Agency argues in its Motion through the affidavit of IEPA permit manager Ed Bakowski that it has *still* not completed its review of NACME’s re-submitted February 2012 FESOP permit application, which is in essence no different from its 2005 application. It further argues that its repeated statements that a condition it insists be included in the permit, making NACME subject to new source performance standards for the first time, is not a final Agency action, and thus not yet ripe for review.

Legal Argument

The State fails to cite any legal authority supporting its position that NACME’s Petition cannot now be heard by the Board. The State argues that the Board is without jurisdiction to hear

³ The State’s enforcement action is without merit as will be shown in that proceeding.

NACME's Petition. In reality the Agency's argument is that NACME's objection to a proposed permit condition making NACME subject to new source performance standards as a "coater", is not ripe for review.

The Agency's citation to *People of Williamson County v Kibler Development*, PCB 08-93 in support of its "standing" argument is well off the mark. In *Kibler* the Board ruled that the State's Attorney for Williamson County had no standing as a third party to object to the modification of a landfill permit for a non-hazardous waste landfill. As a result of the lack of standing, the Board ruled that it had no jurisdiction to hear the State's Attorney's petition. In the course of its ruling, the Board held in *Kibler* that under the Act appeal rights lay solely with the permit applicant and not with a third party like the State's Attorney. *Kibler* at 11. The appeal provision of the Act in question in *Kibler* is nearly identical to the one in issue here. As such, based on *Kibler*, NACME's standing as a permit applicant to bring its Petition is unquestionable.⁴

The Agency's argument, then, is reduced to the issue of the ripeness of NACME's Petition, not NACME's standing. The State does not cite a single case showing that NACME's Petition is not ripe. Conversely, the State fails to rebut NACME's citation in its Petition to *ESG Watts, Inc. v Illinois Pollution Control Board*, 326 Ill. App. 3d 432, 760 N.E. 2d 1004 (Ill. App. 4th Dist. 2001) and its ruling that a statement by the Agency as here with no allusion to further negotiation, is a final agency action. Moreover, the State ignores other precedent showing that NACME's petition is indeed ripe for hearing. For example, in *Village of Fox Grove v The Pollution Control Board*, 702 N.E. 2d 656, 659 (2nd Dist. 1998) the Board heard the petition of

⁴ This is true whether section 40 or 40.2 of the Act is applicable here.

an aggrieved applicant with respect to a draft permit issued by the Agency containing more stringent effluent permit conditions than prior permits.

The Agency cites no persuasive case law for its position on standing/ripeness while at the same time it fails to rebut the case law cited by NACME that its Petition presents a ripe issue for Board determination. The Agency's citation to *Landfill, Inc. v Pollution Control Bd.*, 387 N.E.2d 258 (Ill.1978) is odd because the case addresses finality, or not, of Board orders, not Agency permit decisions.

Conclusion

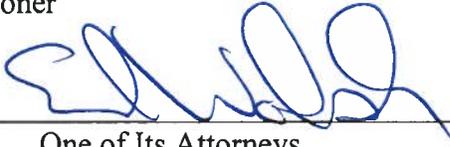
Upholding the Agency's position here would materially prejudice NACME and render its statutory appeal rights meaningless. At the same time that the Agency argues that it has not yet made an appealable final decision on NACME's re-submitted FESOP application, it has directed the attorney general to file suit seeking penalties for NACME's failure to have a FESOP permit, which it first applied for back in 2005. Surely the legislature did not intend to allow the Agency to sit on a permit application for years and then file an enforcement action for not having the permit sought. Alternatively, the Board may view the Agency's actions here as a refusal to grant the permit requested by NACME, which under the applicable appeal provision allows NACME to file the instant Petition and to proceed to hearing.

For all of the above reasons, NACME respectfully requests that the Board deny the Agency's Motion and set a hearing date on NACME's Petition.

Dated: October 9, 2012

Respectfully submitted,

NACME STEEL PROCESSING, L.L.C.,
Petitioner

By: 

One of Its Attorneys

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached **NACME STEEL PROCESSING, LLC'S RESPONSE TO IEPA'S MOTION TO DISMISS NACME'S AMENDED PETITION FOR HEARING**, by U.S. Regular Mail, upon the following persons:

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**STATE OF ILLINOIS
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By:



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