

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	Edward V. Walsh, III
Illinois Pollution Control Board	ReedSmith LLP
100 West Randolph Street, Suite 11-500	10 South Wacker Drive
Chicago, Illinois 60601	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 RESPONDENT'S REPLY TO PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS AMENDED PETITION FOR HEARING, a copy of which is served upon you.

Respectfully submitted,



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

Date: October 26, 2012

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

CERTIFICATE OF SERVICE

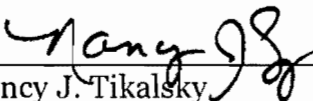
I, the undersigned attorney at law, hereby certify that on October 26, 2012, I served true and correct copies of a RESPONDENT'S REPLY TO PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS AMENDED PETITION FOR HEARING upon the persons and by the methods as follows:

[First Class U.S. Mail]

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
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



Nancy J. Tikalsky
Assistant Attorney General
Office of the Illinois Attorney General
Environmental Bureau
69 West Washington Street, Suite 1800
Chicago, IL 60602
(312) 814-8567

Date: October 26, 2012

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.)	

**RESPONDENT'S REPLY TO PETITIONER'S RESPONSE TO RESPONDENT'S
MOTION TO DISMISS AMENDED PETITION FOR HEARING**

NOW COMES RESPONDENT, Illinois Environmental Protection Agency ("Agency" or "IEPA"), by LISA MADIGAN, Attorney General of the State of Illinois ("State"), pursuant to the Section 101.500 (e) of the Board's Procedural Rules, 35 Ill. Adm. Code 101.500 (e), in reply to Petitioner's, **NACME Steel Processing, L.L.C.** ("NACME"), Response to Respondent's Motion to Dismiss Amended Petition for Hearing, states as follows:

I. Procedural Background

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

On September 12, 2012, the State received service of the Amended Petition.

On September 26, 2012, the State filed a Motion to Dismiss Amended Petition ("Motion").

On October 9, 2012, the Petitioner filed a Response to the State's Motion to Dismiss Amended Petition ("Response").

On October 11, 2012, the State received service of Petitioner's Response and on October 12, 2012, the State filed a Motion for Leave to Reply to Petitioner's Response given the undue prejudice that may be rendered given the multiple factual and legal mischaracterizations in the Petitioner's Response to be filed no later than October 26, 2012.

On October 17, 2012, the Petitioner filed an objection on the State's Motion to Reply to Petitioner's Response, which the Board has not ruled as of the date of the filing of the State's Reply.

II. Permit Application History

On or about October 2005, NACME applied to the Agency for a 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, including the Contested Provision. (See a copy of the draft FESOP at Amended Petition Exhibit A, second document.)

Electronic Filing - Received, Clerk's Office, 10/26/2012

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 Amended 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 Amended 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 Amended 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 Amended 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 Amended 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 Amended Petition Exhibit G.)

III. Respondent's Reply

Complainant repeats and incorporates by reference herein its Motion to Dismiss Amended Petition filed on September 26, 2012, and further states that Petitioner mischaracterizes facts and law in its Response.

1. **The State's enforcement action against Petitioner in a separate matter is irrelevant to its Petition for Review.**

Petitioner attempts to confuse the factual issues of its premature Petition for Review of a FESOP application completed in February 2012, for which a permit has neither been issued nor denied, with an enforcement action against Petitioner for violations during a time period prior to the submittal by Petitioner of the FESOP and construction permit applications in February 2012. Once the Petitioner submitted its construction permit in February 2012 to the Agency, as requested by the agency repeatedly since December 2005 as necessary information to begin its review of the Petitioner's FESOP application, the agency issued a construction permit and began reviewing the Petitioner's FESOP application. These are clearly two separate time periods in the process of Petitioner's application for a FESOP. The State's enforcement matter is, therefore, not relevant to this Petition for Review of the Contested Provisions of a draft permit.

2. **The State clearly cites legal authority in its Motion, both statutory and caselaw that supports its position.**

Williamson Cty. v Kibler Dev. Corp., PCB 08-93 (July 10, 2008), represents the general premise that a Petitioner who lacks standing to Petition the Board for a Review of a permit, for whatever reason, results in the Board's lack of jurisdiction to hear the Petition. In this instance, the State has argued that a permit application and proposed draft permit which has neither been denied nor

issued is not a final action or decision by the Agency, under Section 40 of the Act, which authorizes the Board to set a hearing upon a permit applicant's request if the Agency refuses to grant or grants with conditions a permit under Section 39 of the Act (see 415 ILCS 5/40 (2010)). Clearly, under Section 40 (a)(1) of the Act, a permit applicant does not have standing to bring a Petition for Review on a permit application pending before the Agency, that the Agency has neither refused to grant nor has not granted with or without conditions. Thus, where a Petitioner does not have standing due to lack of ripeness for review of a FESOP which has not either been denied or granted by the Agency, the Board does not have jurisdiction to hear the matter. See *Williamson Cty. v Kibler Dev. Corp.*, PCB 08-93 (July 10, 2008) at 13.

Moreover, Petitioner conveniently neglects to address that the State cites Landfill, Inc. v. Pollution Control Board, 74 Ill. 2d 541, 387 N.E.2d 258 (1978), wherein the Supreme Court ruled that the Board lacks the statutory authority to review an Agency decision in regards to a permit absent a specific statutory grant of the authority to review. This, in conjunction with the statutory authority pursuant to Section 40 of the Act, 415 ILCS 5/40(a)(1) (2010), cited by the State in its Motion, authorizes the Board to hear a Petition where the Agency has either refused to grant or grants with or without conditions a permit under Section 39 of the Act.

Nowhere in the Amended Petition for Review is there a claim that the Agency has either refused to grant the Petitioner a FESOP or has granted the Petitioner a FESOP with conditions. In fact, the State provides an affidavit from the Agency specifically stating it has neither denied nor issued a FESOP to the Petitioner. Therefore, under this factual scenario, the Board has no authority under Section 40 of the Act to hear the Amended Petition for Review (Id.).

More specifically, the Board's rulemaking Order and Opinion dated December 2, 1993, explains the Board's intention for Petition Reviews under Section 40(a)(1) of the Act as follows:

In general the Board will entertain review of an Agency action only when that action is a final action, complete as regards Agency decision in all respects except for consequences that flow from exercise of appeal rights. In the instant context, an appeal to the Board will not be ripe until the Agency has taken final action by

- (a) denying a permit outright,
- (b) denying a permit based on a determination of insufficiency of information in the application or failure of the applicant to supplement the application as requested by the Agency, [FN11] or
- (c) issuing a permit with conditions.

IN THE MATTER OF: SMALLER SOURCE PERMIT RULES:
AMENDMENTS TO 35 ILL. ADM. CODE PARTS 201 AND 211 1993
WL 13007887, 4 (December 2, 1993)

At the time of filing of the Amended Petition for Review, in no instance has the Agency denied the permit outright, denied a permit based on a determination of insufficiency of information in the application or failure of the applicant to supplement the application as requested, or issued a permit with conditions. Accordingly, the Board does not have statutory authority to review the Petition for Review, which is based on an Agency opinion and not a final action of the Agency.

3. ***ESG Watts, Inc. and Village of Fox River* are readily distinguishable from this matter.**

Petitioner improperly cites *ESG Watts, Inc.* as authority for the Board's jurisdiction to review a FESOP under Section 39 of the Act, 415 ILCS 5/39 (2010). *ESG Watts, Inc.* specifically refers to the Board's authority to review an action under Section 21.1 of the Act, where a Petitioner may bring an appeal of the Agency's decision to disapprove a performance bond or other security, and where

an Agency's decision accordingly was enough to be determined a final decision under that specific Section of the Act.

Here, the Board's authority to review the Agency's action under Section 39 is clearly defined as a final action rendering one of 3 scenarios: the denial of the FESOP permit outright, the denial of a permit based on a determination of insufficiency of information in the application or failure of the applicant to supplement the application as requested, or the issuance of a permit with conditions (See IN THE MATTER OF: SMALLER SOURCE PERMIT RULES: AMENDMENTS TO 35 ILL. ADM. CODE PARTS 201 AND 211 1993 WL 13007887, 4 (December 2, 1993)). The Petitioner has not made an allegation of any of the above 3 scenarios and therefore no final action has been rendered by the Agency that would allow the Board the statutory authority to hear the Amended Petition for Review.

In *Village of Fox River Grove*, the Agency had issued a renewal National Pollution Discharge and Elimination System ("NPDES") permit to the Village effective March 1, 1997, which set more restrictive effluent limits from its earlier Agency approved NPDES permits (See *Village of Fox River Grove*, 1997 WL 796640 (Ill.Pol.Control.Bd.)). Clearly, the *Village of Fox River Grove* Petition for Review was based on an issued permit, which was clearly a final action by the Agency. (Id.) In this matter, Petitioner requests a review of a FESOP not yet denied nor granted by the Agency, which is not a final agency action that the Act allows the Board to review.

IV. CONCLUSION

Where the Petitioner fails to provide any evidence that the Agency denied the permit outright, denied a permit based on a determination of insufficiency of information in the

application or failure of the applicant to supplement the application as requested, or issued a permit with conditions, the Petitioner's matter is not ripe for review by the Board. Thus, the Petitioner lacks standing to request a hearing on its Amended Petition for Review that it is not authorized by statute to request a hearing before the Board. Thus, the Petitioner's lack of standing to petition the Board for review of its draft FESOP correspondingly results in the Board's lack of jurisdiction and statutory authority to hear the Petitioner's Amended Petition for Review. Resultantly, the Board should grant the State's Motion to Dismiss the Amended Petition.

WHEREFORE, Respondent, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, requests that the Board dismiss Petitioner NACME Steel Processing, L.L.C.'s Amended Petition for Hearing, 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. TIKALSKY

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