ILLINOIS POLLUTION CONTROL BOARD
November 15, 2012

NACME STEEL PROCESSING, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 13-7
	)	(CAAPP Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by D. Glosser):

On September 10, 2012, NACME Steel Processing, LLC (NACME) filed an amended petition for hearing (Pet.) asking the Board to review a June 27, 2012 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2010); 35 Ill. Adm. Code 101.300(b), 105.206. The determination concerns NACME's steel pickling facility located at 429 West 127th Street, Chicago, Cook County. On September 25, 2012, the Agency filed a motion to dismiss the amended petition arguing that the Board lacked jurisdiction to hear the appeal. The Agency asserts that the petition is premature as the Agency's decision is not final. For the reasons discussed below, the Board finds that the filing of an appeal is premature and dismisses the appeal. NACME may refile this appeal if the issue remains when Agency issues a final permit.

PROCEDURAL HISTORY

On August 1, 2012, NACME filed a petition for hearing (Pet.) asking the Board to review a June 27, 2012 determination of the Agency. *See* 415 ILCS 5/40(a)(1) (2010); 35 Ill. Adm. Code 101.300(b), 105.206. On August 9, 2012, the Board accepted as timely NACME's petition for hearing, but directed NACME to file an amended petition demonstrating the presence of final agency action. Section 105.210(a) of the Board's procedural rules requires that a petition include "[t]he Agency's final decision or issued permit." 35 Ill. Adm. Code 105.201(a). In that order, the Board noted:

> In the typical permit appeal filed with the Board, the Agency determination is written and delivered to the permit applicant by U.S. Mail, or is contained in a final permit. NACME Steel Processing, LLC v. IEPA, PCB 13-7, slip op. at 2 (Aug. 9, 2012).

Acknowledging that Agency practice may differ when processing an application for a Federally Enforceable State Operating Permit (FESOP), the Board directed NACME either to file the "final decision or issued permit" or verify that the draft permit and subsequent e-mail

correspondence (Pet., Exhs. A, G) are the only documents it possesses that convey the Agency's final determination appealed by the petition. *Id*.

On September 4, 2012, the Agency filed a motion to dismiss petition for hearing. On September 10, 2012, NACME filed an amended petition for hearing (Am. Pet.). On September 25, 2012, the Agency filed a motion to dismiss the amended petition for hearing (Mot.), and on October 9, 2012, NACME filed a response to the Agency's motion to dismiss (Resp.).

On October 12, 2012, the Agency filed a motion for leave to file a reply by October 26, 2012. On October 16, 2012, NACME filed an objection to the motion for leave to file a reply. On October 26, 2012, the Agency filed a reply to NACME's response to the Agency's motion to dismiss (Reply).

PRELIMINARY MATTERS

The Board first notes that the Agency filed a motion to dismiss the original petition and followed with a motion to dismiss the amended petition. The Board finds the motion to dismiss the original petition mooted by the filing of the motion to dismiss the amended petition.

Next, the Board will address the request to file a reply. NACME objects asserting that Agency did not assert that failure to allow a reply would result in material prejudice, nor did the Agency specifically identify "factual and legal mischaracterizations" in the response. The Board finds that the Agency sufficiently argued for leave to file a reply and the motion is granted.

PARTIES' ARGUMENTS

Both parties have addressed the issue of whether the Agency's determination on the FESOP is final and therefore an action appealable to the Board. First, the Board will summarize NACME's arguments contained in its amended petition for hearing. Second, the Board will summarize the Agency's arguments found in its motion to dismiss the amended petition. Third, the Board will summarize NACME's response to the Agency's motion to dismiss. Finally, the Board will summarize the Agency's reply to NACME's response to the Agency's motion to dismiss.

NACME's Amended Petition

NACME's amended petition summarizes NACME's objection to a special "metal coating" condition that the Agency included in a draft FESOP for NACME's facility and defended in multiple correspondences between the parties. In the petition, NACME maintains that the FESOP at issue constitutes final Agency action in its current form. NACME argues that the Agency's June 27, 2012 email "made clear that after two rounds of negotiation the Agency's decision to impose the Metal Coating standard was final." Am. Pet. at 4. NACME includes the relevant language of the Agency's letter, which states "[t]he Illinois EPA continues to consider NACME protective oil application operations as being subject to NSPS Subpart TT requirements." *Id*. NACME argues that at this point, they are left with "no further recourse to gain the Agency's agreement but to file this Petition." *Id*., citing ESG Watts, Inc. v. IPCB, 326

Ill. App. 3d 432; 760 N.E.2d 1004 (4th Dist. 2001). NACME confirms that the cited documents are the only ones they possess that convey the final determination by the Agency. Am. Pet. at 4.

NACME then addresses the Agency's motion to dismiss the original petition. Am. Pet. at 4. NACME argues that in its motion, the Agency "merely argues that it did not use the word 'final' in its comment correspondence with NACME" and states that the Agency's attached affidavit "merely states a legal conclusion that the Agency's last correspondence on the issue of applicability of Subpart TT requirements was not 'final.'" *Id*. Specifically, NACME states:

> Although the Agency's cited correspondence shows that it is adamant about imposing the Metal Coating standard, in its Motion to Dismiss it hints but never states that its position might change. It argues that it has not said that it will not consider "other reasons" for removing the contested condition but does not say that it is considering any such other reasons or that any have been raised. In contrast, the dispositive reasons for non-application of the Metal Coating standard that have been raised by NACME have been unambiguously rejected by the Agency. *Id*. at 4-5.

Finally, NACME contends that the Agency's determination in this case is analogous to the final determination in ESG Watts, Inc., where additional information from petitioner was rejected and there was "no allusion to further negotiation." *Id*. at 5, citing 326 Ill. App. 3d at 437. NACME states that the "Agency's argument that its final decision on this matter must be included in a signed permit exalts form over substance and is in any event inconsistent with Illinois law as noted in ESG Watts, Inc." *Id*.

Agency's Motion

The Agency first sets out the procedural background of the case, then argues that in light of these facts, it is apparent that no final determination has been made. The Agency notes that in October 2005, NACME applied to the Agency for a FESOP for its steel pickling facility, and at that time the Agency "requested additional information in the form of a construction permit application." Mot. at 1-2. On February 22, 2012 NACME submitted a construction permit, and 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." *Id*. at 2. On or about May 15, 2012, NACME responded to the Agency in a letter and set out its objections to certain contested provisions. *Id*. On May 23, 2012, the Agency responded by email to NACME's objections, and on June 14, 2012, NACME submitted additional comments in a letter regarding its objection. *Id*. at 3. On June 15, 2012, the Agency responded to NACME by email, rejecting NACME's reasoning for removal of the contested provision while "providing additional explanation." *Id*. On June 26, 2012, NACME responded to the Agency's June 15 email by "repeat[ing] its assertion that the Contested Provision was not applicable to its process with additional explanation for its reasoning." *Id*. Finally, on June 27, 2012, the Agency responded to NACME once more by email, stating that "it continued to consider that the Contested Provision was applicable to NACME's coating operation." *Id*. The Agency asserts that "[t]here was no indication in the [June 27, 2012] email correspondence that the Agency's

opinion was a final determination or that it would not consider other reasons for removing the Contested Provision." *Id*.

The Agency cites Section 105.108(d) of the Board's Procedural Rules (35 Ill. Adm. Code 105.108(d)), which states that a petition for review of an Agency decision will be dismissed 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." *Id*. If the petitioner lacks standing, the Agency argues, then the Board "correspondingly lacks jurisdiction to hear the Petitioner's appeal." *Id*. at 4, citing Williamson Cty v. Kibler Dev. Corp., PCB 08-93 slip op at 13 (July 10, 2008). The Agency then cites Section 40(a) of the Environmental Protection Act (Act) (415 ILCS 5/40 (2010)), which authorizes the Board to review Agency denials of permits pursuant to Section 39 of the Act (415 ILCS 5/39 (2010)), and reads as follows:

> 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. 415 ILCS 5/40(a)(1) (2010).

In light of these provisions, the Agency argues that NACME's amended petition has been filed prematurely and should therefore be dismissed by the Board for lack of ripeness and standing and lack of jurisdiction by the Board. Mot. at 4. The Agency states that it has not issued a final decision reviewable by the Board under Section 40 of the Act (415 ILCS 5/40 (2010)), and that NACME is merely contesting "the Agency's statement of its legal opinion in its June 27, 2012 email correspondence discussing the Contested Provision." *Id*. The Agency references the affidavit of Ed Bakowski, Agency Manager for the Bureau of Air (Aff.), where Mr. Bakowski states that prior to issuance of a FESOP, the Agency provides notice of the permit to the public and prepares and signs a final permit under the Permit Section Manager's authority on behalf of the Director of the Agency. Aff. at 2. Mr. Bakowski continues to state that the Agency, to date, "has not completed its application review nor provided notice of [NACME's FESOP permit application] to the public." *Id*. He states that "a permit has not been signed and a final permit decision on the request for FESOP has not been made." *Id*. Mr. Bakowski concludes by stating that the email correspondence between the parties on June 27, 2012 was not a formal written final determination, but rather "a response to a request from [petitioner] for additional comments on discussions regarding the applicability of a Condition in the draft FESOP. . .". *Id*.

The Agency argues that since it has not provided notice of the FESOP to the public as required under Section 40 of the Act (415 ILCS 5/40 (2010)), has not signed a FESOP permit and has not made a final permit decision regarding NACME's application, the July 27, 2012 email should not be considered a "formal written final determination from the Agency. . ." Mot. at 5. The Agency contends that since no final determination has been made, the Board does not have authority under Section 40 of the Act (415 ILCS 5/40 (2010)) to review the Agency's opinion as it now stands. *Id*.

NACME's Response

First, NACME argues that it has standing to bring this petition, contrary to the Agency's assertions. Resp. at 3. While the Agency cited Williamson County v. Kibler Development Corp., PCB 08-93 (July 10, 2008) in support of its proposition that the Board lacks jurisdiction to hear the petitioner's appeal if the petitioner lacks standing (*see* Mot. at 3-4), NACME argues that this case instead supports its argument that NACME has standing. While the Board in Williamson ruled that the State's Attorney had no standing as a third party to object to the modification of a landfill permit, NACME demonstrates that the Board in the Williamson case also held that under the Act, "appeal rights lay solely with the permit applicant and not with a third party. . .." Resp. at 3. Therefore, NACME argues that since the appeal provision in that case is "nearly identical" to the one at issue here, "NACME's standing as a permit applicant to bring its Petition is unquestionable." *Id*.

Next, NACME addresses the issue of ripeness and states that the Agency both failed to present a single case showing the petition at hand is not ripe, and failed to rebut NACME's reference to ESG Watts, Inc., which ruled that a statement by an Agency with no allusion to further negotiation constitutes final agency action. *Id*. at 3, citing 326 Ill. App. 3d at 437. NACME also contends that the Agency ignored other precedential cases which demonstrate that the petition at issue here is ripe for review. Specifically, NACME cites Village of Fox River Grove v. IPCB, (299 Ill.App.3d 869; 702 N.E. 2d 656 (2nd Dist. 1998)) where the Board heard an applicant's petition regarding "a draft permit issued by the Agency containing more stringent effluent permit conditions than prior permits." Resp. at 3-4.

Finally, NACME points out that while the Agency argues it has not made an appealable final decision regarding the permit application, "[the Agency] has directed the attorney general to file suit seeking penalties for NACME's failure to have a FESOP permit. . ." *Id*. NACME concludes by suggesting "[s]urely 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." *Id*.

Agency's Reply

In its reply, the Agency first argues that the "State's enforcement action against [NACME] in a separate matter is irrelevant to its Petition for Review." Reply at 4. In support of this argument, the Agency states as follows:

> Petitioner attempts to confuse the factual issues of its premature Petition for Review of a FESOP application completed in February 2012. . . with an enforcement action against Petitioner for violations [which occurred] during a time period prior to the submittal by Petitioner of the FESOP and construction permit applications in February 2012. . . These are clearly two separate time periods in the process of Petitioner's application for a FESOP. *Id*.

Given these separate time periods, the Agency argues that the State's enforcement matter is "not relevant to this Petition for Review of the Contested Provisions of a draft permit." *Id*.

Next, the Agency focuses on the case law and statutory authority it cited in its motion. The Agency first addresses Williamson, which it states "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." Reply at 4, citing PCB 08-93 (July 10, 2008). The Agency argues that a proposed draft permit that has neither been denied nor issued is not final agency action which, under Section 40 of the Act (415 ILCS 5/40 (2010)), would allow the Board to set a hearing upon a permit applicant's request. Reply at 4-5. Under this Section, the Agency argues that "a permit applicant does not have standing to bring a Petition for Review on a permit application. . . that the Agency has neither refused to grant nor has granted with or without conditions." *Id*. at 5. Therefore, the Agency contends that "where a Petitioner does not have standing due to lack of ripeness for review of a FESOP. . . the Board does not have jurisdiction to hear the matter." *Id*.

The Agency next addresses its prior citation to Landfill, Inc. v. IPCB (74 Ill. 2d 541 (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." Reply at 5, citing 74 Ill. 2d 541 (1978). The Agency argues that this case, in conjunction with the authority found under Section 40 of the Act, 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. *Id*. The Agency insists that "[n]owhere 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." *Id*. Additionally, the Agency in an affidavit specifically states that it has neither denied nor issued a FESOP to NACME. The Agency notes that the Board has addressed the nature of final agency action, and states:

> 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. *Id*. at 6, citing In the Matter of: Smaller Source Permit Rules: Amendments to 35 Ill. Adm. Code Parts 201 and 211 R19-11, slip op at 4 (Dec. 2, 1993).

Therefore, the Agency argues that the Board has no statutory authority to hear the amended petition for review. Reply at 6.

Finally, the Agency contends that ESG Watts, Inc. and Village of Fox River Grove are distinguishable from this matter. Reply at 6. The Agency argues that ESG Watts, Inc. refers to the Board's ability to review an Agency's final decision under Section 21.1 of the Act, not Section 39 of the Act as NACME alleges. *Id*. The Agency states that under Section 39, a final agency action occurs in one of three ways: 1) "the denial of the FESOP permit outright," 2) "the denial of a permit based on a determination of insufficiency of information. . ." or 3) "the issuance of a permit with conditions." *Id*. at 7. The Agency reasons that since NACME has not alleged any of these three scenarios, no final action has been rendered by the Agency. *Id*. Lastly, the Agency points out that in Village of Fox River Grove, the Agency had in fact issued a renewal National Pollution Discharge and Elimination System permit. *Id*., citing Village of Fox

River Grove v. Agency, PCB 97-156 (Dec. 18, 1997). The Agency distinguishes this "issued" permit, which it contends was "clearly a final action by the Agency" from the FESOP in this case, which has not yet been denied nor granted by the Agency. *Id*.

DISCUSSION

NACME is asking the Board to review a decision by the Agency included in an email correspondence and made in the context of the permitting process for a FESOP permit. The Agency maintains that the decision on the permit is not final and therefore the Board cannot hear the appeal. Both parties rely on case law and the statute to support their arguments. After reviewing the cited authorities, the Board agrees with the Agency that the filing of an appeal by NACME is premature and the Board dismisses the petition.

The Board is unpersuaded by NACME's arguments. While the Board has the general authority to review Agency decisions under Section 5 of the Act (415 ILCS 5/5 (2010)), NACME is seeking review under Section 40 of the Act (415 ILCS 5/40 (2010)) of a decision made under Section 39 of the Act (415 ILCS 5/39.5 (2010))[1]. *See* Mot. Aff. at ¶9. Section 39 of the Act (415 ILCS 5/39.5 (2010)) sets forth specific steps to be taken by the Agency before a permit can issue. Section 40(a)(1) of the Act provides in part:

> 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. 415 ILCS 5/40(a)(1) (2010).

The Board is an administrative agency and "'an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created.'" Granite City Div. of Nat'l Steel Co., 155 Ill. 2d 149, 171 (1993), quoting Bio-Medical Laboratories, Inc. v. Trainor, 68 Ill. 2d 540, 551 (1977). In this case, there is no evidence that the Agency has refused to grant or is granting a permit with conditions. What NACME is appealing is the possible imposition of a condition. Until such time as the Agency "refuses to grant or grants with conditions a permit", the Board cannot hear an appeal under Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2010)). Therefore, the Board finds that the filing of this appeal is premature.

Furthermore, the Board is not persuaded by NACME's reliance on Fox River Grove and ESG Watts, Inc.. Neither of those cases supports NACME's appeal. Fox River Grove was a permit appeal and the Agency had issued its final decision. *See* Fox River Grove, PCB 97-156 (Dec. 18, 1997). The Agency included a condition with the final permit that the petitioner challenged. *Id*. Thus, without question there was a final decision, which could properly be appealed under Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2010)).

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[1] The original petition indicates that the appeal is seeking review under Section 40.2 of the Act (415 ILCS 5/40.2 (2010)) of an Agency decision pursuant to Section 39.5 of the Act (415 ILCS 5/39.5 (2010)). The amended petition also references the appeal language of Section 40.2 of the Act (415 ILCS 5/40.2 (2010)). Am. Pet. at 3.

ESG Watts, Inc. involved an appeal of an Agency decision made under Section 21.1(e) of the Act (415 ILCS 5/21.1(e) (2010)). ESG Watts, Inc., 760 N.E.2d at 1006. The petitioner was specifically asking the Board to direct the Agency to approve financial assurance. *Id*. The court found that the Agency's letter was a denial under Section 21.1 of the Act and an appeal was appropriate. *Id* at 1008. The Board had considered the Agency's action to be preenforcement for the lack of appropriate financial assurance. ESG Watts, Inc. is factually distinguishable. The Agency is not attempting to enforce the condition that is at issue and the condition has not been placed on a final permit. Therefore, NACME's reliance on ESG Watts, Inc. is misplaced.

The Board finds that the Agency has not made a final decision on the issuance of a permit. As there is no final decision by the Agency, the filing of an appeal is premature; however, once the Agency issues a permit, if the condition at issue is included, NACME may appeal that decision. The Board dismisses the petition and closes the docket.

IT IS SO ORDERED.

Board Member J. O'Leary abstains.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2010); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 15, 2012, by a vote of 4-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board