

ILLINOIS POLLUTION CONTROL BOARD

March 6, 2003

LONE STAR INDUSTRIES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-94
	)	(CAAPP Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by N.J. Melas):

On January 28, 2003, the Illinois Environmental Protection Agency (Agency) filed a motion to dismiss this petition for failure to state a claim upon which relief can be granted (Mot.). The Agency issued a Clean Air Act Permit Program (CAAPP) operating permit and Title I permit to Lone Star Industries, Inc. (Lone Star) on November 22, 2002. The permit authorized the operation of Portland Cement manufacturing at the Oglesby, Illinois facility. On December 27, 2002, Lone Star filed this petition for review challenging the Agency's CAAPP permitting decision. Lone Star specifically challenges certain conditions of the permit that Lone Star claims result in inconsistencies and actual conflicts within the permit itself. On February 10, 2003, Lone Star responded to the Agency's motion to dismiss (Resp.).

The Agency issued a CAAPP permit to Lone Star for its Portland Cement manufacturing facility in Oglesby. The Oglesby facility is classified as a major source for purposes of Title V of the Clean Air Act and Section 39.5 of the Environmental Protection Act (Act). Lone Star appeals on the following grounds: (1) the Agency did not give Lone Star an opportunity to review the draft permit prior to its public notice; (2) there are several inconsistencies and conflicts between the conditions of the CAAPP permit and the regulations and permits referenced therein (Lone Star specifically refers to conditions 7.1.3(c), (d), and (e), and Section 7.1.6(a) of the CAAPP permit); and (3) the Agency did not include revisions to special conditions discussed between Lone Star and the Agency and contained in several of the previously issued State Operating and Construction Permits in the CAAPP permit.

The Agency moves to dismiss Lone Star's petition on the grounds that it does not meet the content requirements of the Board's procedural rules, 35 Ill. Adm. Code 105.304. The Agency claims that Lone Star has failed to: (1) plead facts sufficient to enable the Agency to prepare an adequate legal defense; and (2) state a cause of action. The Board denies the Agency's motion and directs the Agency to file the entire record of the CAAPP permit application with the Board.

## **MOTION TO DISMISS**

For purposes of ruling on a motion to dismiss, all well plead facts contained in the pleading must be taken as true and all inferences from them must be drawn in favor of the nonmovant. People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). A petition should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings which would entitle petitioner to relief. Shelton v. Crown, PCB 96-53 (May 2, 1996).

## **THE PARTIES' ARGUMENTS**

### **Failure to Plead Facts Sufficient to Allow the Agency to Prepare a Legal Defense**

The Agency argues that Lone Star has failed to plead facts sufficient to allow the Agency to prepare an adequate legal defense. The Agency relies on Section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5.2-612(b)) and the standard of review found in caselaw that discusses the standard Illinois courts apply when considering a motion to dismiss a complaint. Mot. at par. 10. The Agency contends that Lone Star's petition is "vague and elusive" because it does not specify any particular condition or part of the CAAPP permit that is being contested in this appeal. *Id.*

In response to the Agency's argument that Lone Star failed to plead sufficient facts, Lone Star argues that the Agency applies the wrong legal standard. Resp. at 7. Lone Star contends that at issue here is the sufficiency of a petition for review in an appeal of an administrative decision, not a complaint subject to the civil practice requirements of Illinois courts. *Id.* Lone Star emphasizes that the Board has recognized that: "case law is consistent in finding that pleading requirements for administrative review are less exacting than for other causes of action." Mueller v. Board of Fire and Police Commissioners of the Village of Lake Zurich, 267 Ill. App. 3d 726, 643 N.E.2d 255 (2nd Dist. 1994).

Furthermore, Lone Star notes that Section 105.304(a) of the Board's procedural rules specifies exactly what must be included in a petition for review of a CAAPP permit. Resp. at 3. The petition must include a description of the CAAPP source for which the permit is sought, the part of the Agency's decision to be reviewed, a reason why the Agency's decision was in error, and any other materials upon which the Agency relies in its petition. 35 Ill. Adm. Code 105.304(a). Finally, Lone Star argues that its petition meets all the factual and legal requirements under both the Board's standard of review of administrative decisions and Board procedural rules. Resp. at 8, n. 3.

### **Failure to State a Cause of Action**

The Agency argues that Lone Star did not seek an appeal from permit conditions with requisite specificity. Mot. at par. 6. Section 105.304(a)(2) of the Board's procedural rules provides: "The petition must include: a statement of the Agency's decision . . . to be reviewed." The Agency contends that because Lone Star failed to identify the sources of the alleged

“inconsistencies” with respect to the CAAPP permit, the petition is insufficient as a matter of law. Mot. at par. 11.

Lone Star argues that it in fact identified the particular parts and conditions of the CAAPP permit that it contests in this appeal. Resp. at 4. Lone Star reiterated that it opposes specifically the conditions set forth in Sections 7.1.3(c), (d), and (e), as well as Section 7.1.6(a) of the CAAPP permit. *Id.* Lone Star argues these conditions are not supported by law or the record, and create inconsistencies and actual conflicts within the CAAPP permit itself. Pet. at par. 5; Resp. at 4. Lone Star contends that these factual allegations satisfy the Board’s petition content requirements and, thus, Lone Star’s petition is legally sufficient.

### **DISCUSSION**

The Board agrees that the proper standard of review applicable to this petition for appeal is that found in Board precedent and the Board’s procedural rules. The Board’s procedural rules require only a description of the CAAPP source for which the permit is sought, the parts of the Agency’s decision to be reviewed, an explanation as to why the Agency’s decision was in error, and any other materials on which the petitioner relies in its petition. 35 Ill. Adm. Code 105.304(a).

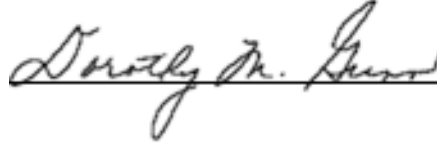
Lone Star identified the CAAPP source for which the permit is sought as its Oglesby facility. Pet. at 1. Lone Star also identified the parts of the Agency’s decision to be reviewed: permit conditions 7.1.3(c), (d), and (e) and 7.1.6(a) and the previously issued State Operating and Construction Permits incorporated by reference into the CAAPP permit. Pet. at 2. Lone Star submitted comments during the 45-day public comment period. Pet. Exh. A. Most of the suggestions that the Agency did not incorporate were suggestions that exempted the North Quarry at the Oglesby facility from the requirements of 40 C.F.R. 60 Subpart OOO, Standards of Performance for Nonmetallic Mineral Processing Plants. *See* Pet. Exh. A, B. Lone Star explained that the Agency’s permitting decision was in error because it created conflicts between the CAAPP permit conditions and referenced regulations. Pet. at 2. Finally, Lone Star attached materials to which it referred in its petition for review, including Lone Star’s comments and the CAAPP permit for its Oglesby facility. Pet. Exh. A, B.

The Board finds that Lone Star pled the facts of its appeal with adequate specificity meeting all of the requirements set forth by Section 105.304(a)(2) of the Board’s rules. The Board expects that additional facts and evidence regarding the alleged inconsistencies and conflicts between the conditions of Lone Star’s various permits and the referenced regulations will be disclosed at hearing and in further pleadings. Accordingly, the Board denies the Agency’s motion to dismiss.

The Agency was required to file an answer consisting of the entire Agency record of the CAAPP permit application including the CAAPP permit application, the hearing record, the CAAPP permit issuance letter and any correspondence with Lone Star concerning the CAAPP permit application within 30 days after service of the petition. 35 Ill. Adm. Code 105.302(f). The Board notes the Agency is late in filing the record and directs the Agency to file the record along with a motion to file *instantly*. 35 Ill. Adm. Code 105.116.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 6, 2003, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board