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JAN 28 2003

STATE OF ILLINOIS  
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LONE STAR INDUSTRIES, INC.,

Petitioner,

v.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

PCB No. 2003-094  
(CAAPP Permit Appeal)

**NOTICE**

To: Dorothy Gunn, Clerk  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

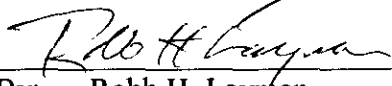
Carol Sudman  
Hearing Officer  
600 S. Second Street  
Suite 402  
Springfield, Illinois 62704

Katherine D. Hodge and N. Ladonna Driver  
Hodge Dwyer Zeman  
3150 Roland Avenue  
P.O. Box 5776  
Springfield, Illinois 62705-5776

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an original (1) and ten (10) copies of an **APPEARANCE** and a **MOTION TO DISMISS** of the Respondent, Illinois Environmental Protection Agency, a copy of which is herewith served upon the assigned Hearing Officer and the attorneys for the Petitioner, Lone Star Industries, Inc.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

  
By: Robb H. Layman  
Special Assistant Attorney General

Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
(217)524-9137  
Dated: January 22, 2003

ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS  
Pollution Control Board

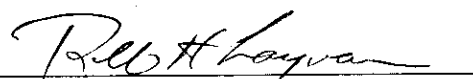
LONE STAR INDUSTRIES, INC.,	)	
	)	
Petitioner,	)	
	)	PCB No. 2003-094
vi.	)	(CAAPP Permit Appeal)
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**APPEARANCE**

NOW COMES Robb Layman, as a Special Assistant Attorney General, and enters his appearance on behalf of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, in the above-captioned matter.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

  
By: Robb H. Layman  
Special Assistant Attorney General

Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
(217)524-9137  
Dated: January 22, 2003

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STATE OF ILLINOIS  
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PCB No. 2003-094  
(CAAPP Permit Appeal)

**MOTION TO DISMISS**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorneys, and moves the Illinois Pollution Control Board ("Board") to dismiss the Petitioner's, LONE STAR INDUSTRIES, INC., ("Lone Star"), Petition for Review in the above-captioned matter for want of sufficiency and the failure to state a claim upon which relief can be granted.

1. The Illinois EPA issued a Clean Air Act Permit Program ("CAAPP") permit and Title I permit to Lone Star on November 22, 2002, authorizing the operation of Portland Cement manufacturing at the Oglesby, Illinois facility.
2. On December 27, 2002, Lone Star filed a Petition for Review with the Board challenging the Illinois EPA's November 22, 2002, CAAPP permitting decision.
3. In its Petition for Review, Lone Star primarily appears to take issue with the Illinois EPA's formatting of the CAAPP permit. Lone Star contends that the Illinois EPA's approach in incorporating prior permits and establishing applicable requirements in the CAAPP permit is not supported by the administrative record or existing law. This

premise apparently rests upon Lone Star's belief that the CAAPP permit contains "inconsistencies" with respect to its permit conditions and with respect to the applicable regulations cited by the permit conditions. Petition for Review, paragraph 5, page 2. Without offering any details, Lone Star summarily concludes that the CAAPP permit does not mirror the current operations or applicable requirements for the facility. Petition for Review, paragraph 6, Page 3.

4. Section 105.304 of Title 35 of the Board's procedural regulations provides that a petition for appeal of a CAAPP permit, including the issuance of a CAAPP permit with one or more conditions or limitations, must contain a "statement of the Agency's decision or part thereof to be reviewed." 35 Ill. Adm. Code 105.304(a)(2).

5. Where an appeal challenges the Illinois EPA's denial of a permit, it is usually acceptable for a petition seeking that appeal to speak only in terms of the Illinois EPA's decision (i.e., permit denial). In such instances, the issues for the appeal are framed by the Illinois EPA's permit denial letter and consequently, there is usually little uncertainty about the scope of the Board's review of the permit denial decision.

6. In contrast, an appeal that challenges the imposition of permit conditions has its controversy drawn from the specific conditions of the issued permit. A petitioner seeking an appeal from permit conditions should be required to plead, with some degree of specificity, the identity and/or substance of the challenged permit conditions. If this reading is not afforded to the Board's petition content requirements, then the "part thereof" language of 35 Ill. Adm. Code 105.304(a)(2) might well be rendered superfluous.

7. In this instance, the mere statement that the Illinois EPA's decision contains "inconsistencies" does not identify the part of the decision for which an appeal is being sought. For this reason, Lone Star's petition cannot be said to comply with the petition content requirements of Section 105.304 of Title 35.

8. Courts in Illinois favor fact-pleadings over notice-pleadings in civil practice. *Jackson v. South Holland Dodge, Inc.*, 755 N.E.2d 462, 471 (Ill. 2001); *Raintree Homes, Inc., v. Village of Long Grove*, 2002 WL 31689299 (2<sup>nd</sup> Dist. 2002); *Kozak v. Armstrong World Industries, Inc.*, 572 N.E.2d 279, 282 (4<sup>th</sup> Dist. 1991). Fact-pleading requires a complainant to set forth an "adequate factual foundation" for its cause of action. *Kozak*, 572 N.E.2d at 213. Although a complainant need not actually prove its case in the initial pleading, that pleading should convey facts that are sufficient to state the elements of the cause of action. *Raintree Homes, Inc., v. Village of Long Grove*, 2002 WL 31689299; *Bianchi v. Savino Del Bene International Freight Forwarders, Inc.*, 770 N.E.2d 684, 692 (1<sup>st</sup> Dist. 2002). Fact-pleading ensures that a respondent is informed with enough facts to prepare a defense to the lawsuit. *Kozak*, 572 N.E.2d at 213.

9. The policies underlying the petition content requirements of 35 Ill. Adm. Code 105.304 were surely intended to mirror, or at least be consistent with, the civil practice requirements observed by Illinois courts.

10. In this instance, the petition is vague and elusive with respect to those conditions of the CAAPP permit that Lone Star has found objectionable. By not specifying any particular condition or part of the CAAPP permit that is being contested in this appeal, Lone Star has failed to plead facts sufficient to enable the Illinois EPA to prepare an adequate legal defense. *See*, 735 ILCS 5/2-612(b). Because the petition falls

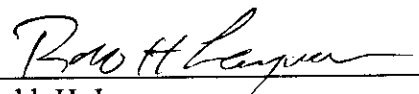
short of pleading sufficient facts, it is properly subject to dismissal. *See*, 735 ILCS 5/2-615(a); *Cummings v. City of Waterloo*, 683 N.E.2d 1222, 1225 (5<sup>th</sup> Dist. 1997)(dismissal is appropriate under Section 2-615 where the pleading fails to “allege sufficient facts essential to the cause of action”).

11. In addition, the failure to identify the source(s) of Lone Star’s alleged “inconsistencies” with respect to the CAAPP permit also renders the petition insufficient as a matter of law and is arguably subject to dismissal on the same afore-mentioned basis. *Wieseman v. Kienstra, Inc.*, 604 N.E.2d 1126, 1127 (5<sup>th</sup> Dist. 1992)(a pleading which “fails to state a cause of action because of factual or legal insufficiency must be dismissed” under Section 2-615).

WHEREFORE, the Illinois EPA respectfully requests that the Board dismiss Lone Star’s Petition for Review or, in the alternative, order such relief as may be deemed appropriate.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

  
Robb H. Layman  
Special Assistant Attorney General

Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
(217)524-9137

**CERTIFICATE OF SERVICE**

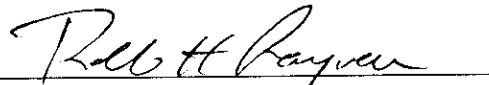
I hereby certify that on the 22<sup>nd</sup> day of January, 2003, I did send, by First Class Mail, with postage thereon fully paid and deposited into the possession of the United States Postal Service, one (1) original and ten (10) copies of the following instruments entitled **APPEARANCE** and **MOTION TO DISMISS** to:

Dorothy Gunn, Clerk  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

and a true and correct copy of the same foregoing instruments, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

Carol Sudman  
Hearing Officer  
600 S. Second Street  
Suite 402  
Springfield, Illinois 62704

Katherine D. Hodge and N. Ladonna Driver  
Hodge Dwyer Zeman  
3150 Roland Avenue  
P.O. Box 5776  
Springfield, Illinois 62705-5776

  
By: Robb H. Layman  
Special Assistant Attorney General

This filing is submitted on recycled paper.



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276

RENÉE CIPRIANO, DIRECTOR

217-524-9137

January 22, 2003

Dorothy Gunn, Clerk  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601-3286

Re: *Lone Star Industries, Inc. v. Illinois EPA*  
PCB No. 2003-094 (CAAPP Permit Appeal)

Dear Ms. Gunn:

Please find enclosed the original (1) and ten (10) copies of an APPEARANCE and a MOTION TO DISMISS of the Respondent, Illinois Environmental Protection Agency, for filing with the Pollution Control Board in regards to the above-captioned matter. If it's not too inconvenient, I request that a file-stamped copy of the documents be returned to my office in the enclosed self-addressed stamped envelope.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, reading "Robb H. Layman".

Robb H. Layman  
Special Assistant Attorney General  
Illinois EPA

Rod R. Blagojevich, Governor