

Starr

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IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CENTRAL FARMERS COOPERATIVE
NONSTOCK, a Nebraska Cooperative
Corporation,

Petitioner,

vs.

THE NEBRASKA DEPARTMENT
OF ENVIRONMENTAL QUALITY and
MIKE LINDER, Director,

Respondents.

Case Number: CI 01-1957

ORDER

DEPT. OF JUSTICE

JUL 26 2001

STATE OF NEBRASKA

The petitioner, a Nebraska Cooperative Corporation, has filed a petition for review pursuant to the Administrative Procedure Act. The petitioner seeks to have this court review a determination made by the Nebraska Department of Environmental Quality ("Department") that certain of the petitioner's facilities do not qualify as pollution-control "facilities" under the Nebraska Air and Water Pollution Control Tax Refund Act, NEB. REV. STAT. § 77-27,149 et seq. ("Refund Act"). The Department has demurred primarily on the grounds that this court has no jurisdiction of this matter.

A review of the Refund Act clearly shows that the hearing on this issue is before the state Tax Commissioner and any subsequent judicial review is from the decision of the Tax Commissioner. Section 77-27,150 provides that "[t]he Tax Commissioner shall offer an applicant a hearing upon request of such applicant." Section 77-27,152 provides for the "opportunity" for a hearing before the Tax Commissioner. Section 77-27,153 provides that "[a] party aggrieved by . . . the


refusal to issue, . . . of a pollution control tax refund may appeal from the finding and order of the Tax Commissioner, and the appeal shall be in accordance with the Administrative Procedure Act." (Emphasis added).

It is clear that the Department only makes recommendations to the Tax Commissioner who is then charged with conducting the proceedings, including a hearing, to determine whether the refund should be made. The Department does not hold hearings and, for this reason, there is no way its determinations can be reviewed under the Administration Procedure Act.

IT IS ORDERED that the demurrer be sustained. The petitioner is given 21 days to file an amended petition if it elects to do so. The respondent is given 14 days thereafter to plead. If the amended petition is not filed, this matter will be dismissed. The motion of the respondent to extend the time within which to file the record is sustained.

Dated July 25, 2001.

BY THE COURT:


Jeffrey Chevront
District Judge