

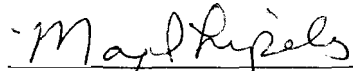
**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

AMERICAN BOTTOM CONSERVANCY	)	
	)	
Petitioner	)	
	)	
v.	)	
	)	PCB 06-171
ILLINOIS ENVIRONMENTAL PROTECTION	)	(NPDES Permit Appeal)
AGENCY and UNITED STATES STEEL	)	
CORPORATION - GRANITE CITY WORKS	)	
	)	
Respondents	)	

**NOTICE OF FILING**

PLEASE TAKE NOTICE that on June 16,2006, I filed with the Office of the Clerk of the Pollution Control Board the following document: MEMORANDUM OF AMERICAN BOTTOM CONSERVANCY IN OPPOSITION TO UNITED STATES STEEL CORPORATION'S MOTION TO DISMISS.

I filed the above document electronically with the Clerk of the Pollution Control Board and with Carol Webb, Hearing Officer, at [webbc@ipcb.state.il.us](mailto:webbc@ipcb.state.il.us). In addition, I served copies of the foregoing electronically upon Sanjay K. Sofat, counsel for respondent Illinois Environmental Protection Agency, at [Sanjay.Sofat@epa.state.il.us](mailto:Sanjay.Sofat@epa.state.il.us), and Erika K. Powers, counsel for respondent United States Steel Corporation – Granite City Works, at [epowers@btlaw.com](mailto:epowers@btlaw.com).



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June 16,2006



U.S. Steel submitted a National Pollution Discharge Elimination System ("NPDES") permit renewal application to IEPA on October 17, 2002. Record at 136-155. In mid-December 2004, IEPA published a draft renewal NPDES permit for public notice and comment. Petition ¶¶ 12; Record at 512 – 529. On three occasions thereafter, ABC submitted comments on the draft permit. ABC submitted its first comment letter during the initial 30-day public comment period. Petition ¶¶ 13-15 and Ex. C attached thereto; Record at 533-539. After retaining the Interdisciplinary Environmental Clinic to assist with its evaluation of technical and legal aspects of the permit, and several months before the IEPA made its decision on the final permit, ABC submitted its second and third comment letters in October and December 2005. Petition ¶¶ 16-17 and Ex's D and E attached thereto; Record at 607-624. In its December 2005 letter, ABC pointed out several technical flaws in the draft permit, including:

- IEPA calculated monthly load limits by using maximum daily flow, rather than highest monthly average flow, as is required. The result is illegally-high permit limits;
- IEPA set the permit limit for cyanide nearly twice as high as the limit calculated by IEPA's permit writer;
- IEPA failed to include a compliance schedule to redress Granite City Works' history of noncompliance with its cyanide discharge limit, as required by 35 Ill. Adm. Code § 309.148;
- IEPA set an ammonia discharge limit for the month of March at a level higher than that allowed by governing regulations, 35 Ill. Adm. Code § 302.212(e); and
- IEPA failed to set discharge limits and/or monitoring requirements for several pollutants discharged by Granite City works into Horseshoe Lake.

In each of its three submissions, ABC requested a public hearing. In ABC's first comment letter, it also requested that, if IEPA did not hold a public hearing, it should at least extend the public comment period. Without holding a public hearing or explaining why it was not doing so, IEPA ultimately issued the final permit on March 31, 2006. This appeal was timely filed thereafter.

In its Motion to Dismiss, Granite City Works seeks to dismiss ABC's substantive challenges to IEPA's erroneous permit limit calculations on the ground that these points were not raised during the first 30 days after IEPA published the draft permit. Granite City Works also seeks to dismiss ABC's challenge to IEPA's failure to hold a public hearing by arguing that the facts alleged in the Petition do not demonstrate that IEPA abused its discretion in not holding a public hearing. Granite City Works' motion is misplaced, and should be denied.

### **ARGUMENT**

#### **I. Standard for Motions to Dismiss**

A party moving to dismiss a petition bears a heavy burden. As Granite City Works acknowledges in its memorandum, all well-pled allegations in the Petition are deemed true for purposes of evaluating this motion. *People of the State of Illinois v. Stein Steel Mills Services, Inc.*, PCB No 02-1,2001 Ill. Env. LEXIS 539 (Ill. Pollution Control Bd., Nov. 15, 2001). Moreover, the motion must be denied unless it is clear that no set of facts could be proved that would entitle ABC to relief. *Ibid.*

#### **II. ABC's Substantive Technical Claims Should Not Be Dismissed Because They Were Submitted To IEPA Well Before It Made Its Permit Decision.**

The Petition in this case highlights several substantive flaws in IEPA's calculation of permit limits for numerous pollutants discharged by Granite City Works into Horseshoe Lake, as well as IEPA's failure to include required effluent limits and/or monitoring requirements for

other pollutants. ABC presented all of the substantive claims in the Petition to IEPA by December 2005 – some three-and-one-half months (over 100 days) before IEPA made its final permit decision.

Granite City works seeks to dismiss the claims alleging substantive flaws by invoking 415 ILCS 5/40(e)(2)(A), which requires a petitioner to demonstrate that its claims were previously presented to IEPA "during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held." In this case, both the letter and the spirit of the statute were satisfied.

**A. IEPA In Effect Extended The Comment Period.**

There is no requirement that a third party commenter raise all objections to a draft permit within the first 30 days after the permit is published for public comment. Indeed, as reflected in the text of 415 ILCS 5/40(e)(2)(A), any additional comments subsequently submitted at a public hearing may also form the basis for a permit appeal. In this case, IEPA abused its discretion in not holding a public hearing. Had it held a hearing, ABC's substantive technical comments would have been submitted to the IEPA at the hearing.

Moreover, IEPA may extend the comment period beyond the initial 30-day period. 35 Ill. Adm. § 309.109(b). In this case, ABC's first comment letter, submitted within the 30 day-window, requested that IEPA extend the comment period if it did not hold a public hearing: "If you deny this request for a hearing, we ask for a meeting with you and your staff, followed by a 30-day extension of the public comment period." Ex. C attached to Petition; Record at 533-539. ABC was joined in this request to extend the public comment period by several other organizations: Sierra Club; Health & Environmental Justice – St. Louis; Neighborhood Law Office; and Webster Groves Nature Study Society. Ibid.

IEPA's actions during the 14 months following ABC's first comment letter (i.e., from the January 2005 comment letter to the March 2006 permit issuance) constitute a de facto extension of the comment period. Throughout this period, IEPA continued to receive comments not only from ABC, but also from Granite City Works. IEPA received two additional comment letters from ABC. Record at 607-624 (ABC letters of October and December 2005). ABC submitted its October and December 2005 letters after communicating with IEPA staff and determining that no permit decision had been made. Petition ¶¶ 16-17. IEPA did not issue the final permit until three-and-one-half months after receiving ABC's December 2005 letter, which identified several technical flaws in the calculation of permit limits that could readily have been corrected by IEPA prior to issuing the permit.

During this 14-month timeframe between the initial 30-day comment period and the issuance of the permit, IEPA also received three submittals from Granite City Works. Record at 553-558 (Granite City Works letter of April 2005), 565-600 (Granite City Works letter of May 2005 and attachments), and 625-627 (Granite City works fax of January 2006 and attachment).

At no time did IEPA indicate to ABC or to the public that it was no longer receiving input regarding the Granite City Works permit.

Ultimately, after issuing the permit, IEPA responded to ABC's substantive technical comments. Petition ¶ 25 and Exhibit K attached thereto. Moreover, IEPA conceded the relevance of ABC's later-filed comments by including them in the Record filed herein. Record at 533-539 and 607-624.

The cumulative effect of its actions throughout the period indicate that, in effect, IEPA extended the comment period until at least January 13, 2006 – the last Granite City Works

submission, which was one month after ABC submitted its technical comments and two-and-one-half months before IEPA issued the final permit.

**B. ABC Satisfied the Statutory Purpose.**

The clear purpose of 415 ILCS 5/40(e)(2) is to require parties to raise concerns about a draft permit directly with IEPA so that IEPA can address those concerns and thereby avert a potential appeal proceeding. In short, issues not presented to IEPA before it makes its permit decision may not be raised for the first time on appeal.

The most structured opportunities for public input on a proposed NPDES permit are during the formal 30-day public comment period and at public hearings, as reflected in 415 ILCS 5/40 (e)(2). However, nothing precludes IEPA from considering comments submitted after the public comment period. Indeed, it is not uncommon for permit applicants to submit additional information to IEPA after the public comment period. In this case, as noted above, Granite City Works made at least three additional submissions to IEPA after the initial 30-day comment period.

In this case, ABC initially raised a few technical issues and requested a public hearing or, at least, an extension of the comment period. After obtaining legal and technical assistance, ABC noted significant flaws in the calculation of permit limits and communicated with IEPA on several occasions, including the submission of written comments on October 3 and December 9, 2005. Thus, ABC clearly raised the technical claims in this appeal with IEPA well before the agency made its permit decision. Put differently, the appeal raises no new issues that were not presented to IEPA well before it made its permit decision.'

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<sup>1</sup> This case therefore differs materially from *Brazas v. Magnussen*, PCB No. 06-131, 2006 Ill. Env. LEXIS 265 (Ill. Pollution Control Bd., May 4, 2006), where the Board granted IEPA's unopposed motion to dismiss claims that petitioner attempted to raise for the first time on appeal.

### **III. ABC's Public Hearing Claim Is Not Subject To Dismissal.**

Granite City Works asks the Board to dismiss ABC's claim challenging IEPA's failure to hold a public hearing prior to issuing the Permit. Granite City Works claims that ABC has not alleged sufficient facts to support its claim. That claim is wrong, both on the facts and on the law.

The governing regulation authorizes IEPA to hold a public hearing where there exists "a significant degree of public interest in the proposed permit to warrant the holding of such a hearing." 35 Ill. Adm. § 395.115(a)(1). Furthermore, although IEPA has some discretion in the matter, the regulation significantly limits the exercise of that discretion by directing that "instances of doubt shall be resolved in favor of holding the hearing." Ibid.

ABC's Petition alleges facts sufficient to demonstrate that IEPA abused its limited discretion in not holding a public hearing in this case:

- ABC, as well as Sierra Club, Health & Environmental Justice – St. Louis, Neighborhood Law Office, and Webster Groves Nature Study Society, requested a public hearing. Petition ¶¶ 13-15.
- That request was made during the initial 30-day comment period, and then reiterated by ABC on numerous occasions, including in ABC's October and December 2005 comment letters. Petition ¶¶ 13-19.
- Granite City Works discharges its polluted wastewater into Horseshoe Lake, which is part of Horseshoe Lake State Park. Petition ¶¶ 5, 7.
- The public actively uses Horseshoe Lake and Horseshoe Lake State Park for recreation, including fishing, hunting, boating, bird watching, hiking and nature walks, camping, and picnicking. Petition ¶ 8.



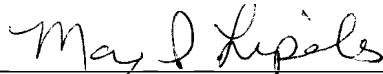
- A portion of Horseshoe Lake State Park is a designated Waterfowl Management Area managed by the Illinois Department of Natural Resources. The Waterfowl Management Area provides nesting sites and habitat for more than 300 species of birds. Petition ¶ 9.
- Horseshoe Lake is not meeting the state's water quality standards for several of the pollutants discharged by Granite City Works. Petition ¶¶ 10-11.

In sum, ABC pled sufficient facts to demonstrate that the public has a significant stake in ensuring that Granite City Works' water pollution discharge complies with applicable law, and that the Permit does not allow any pollution beyond applicable limits. Moreover, ABC's Petition demonstrates that several organizations – including the Sierra Club, a large membership organization – requested a public hearing in this case. Because on motions to dismiss all well-pled facts are considered true, *People v. Stein Steel Mills Services, Inc.*, supra, there is no basis for dismissing ABC's public hearing claim.

### CONCLUSION

American Bottom Conservancy respectfully requests that the Pollution Control Board deny the Motion to Dismiss submitted by Granite City Works.

Respectfully submitted,

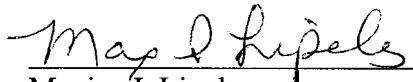


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Certificate of Service

I, Maxine I. Lipeles, certify that on June 16, 2006, I filed the above MEMORANDUM OF AMERICAN BOTTOM CONSERVANCY IN OPPOSITION TO UNITED STATES STEEL CORPORATION'S MOTION TO DISMISS electronically with the Clerk of the Pollution Control Board and with Carol Webb, Hearing Officer, at [webbc@ipcb.state.il.us](mailto:webbc@ipcb.state.il.us). In addition, I served copies of the foregoing electronically upon Sanjay K. Sofat, counsel for respondent Illinois Environmental Protection Agency, at [Sanjay.Sofat@epa.state.il.us](mailto:Sanjay.Sofat@epa.state.il.us), and Erika K. Powers, counsel for respondent United States Steel Corporation – Granite City Works, at [epowers@btlaw.com](mailto:epowers@btlaw.com).

  
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