

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JUL 18 2006

STATE OF ILLINOIS
Pollution Control Board

AMERICAN BOTTOM CONSERVANCY)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY and UNITED STATES STEEL)
CORPORATION – GRANITE CITY WORKS,)
)
Respondents.)

PCB 06-171
(3rd Party NPDES Permit
Appeal)

NOTICE OF FILING

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


Ted Heisel
Interdisciplinary Environmental Clinic
Washington University School of Law
One Brookings Drive – Campus Box 1120
St. Louis, MO 63130-4899

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Ave. East
P.O. Box 19274
Springfield, IL 62794-9274

Carolyn S. Hesse
Erika K. Powers
David T. Ballard
Barnes & Thornburg LLP
One North Wacker Drive
Suite 44000
Chicago, IL 60606

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board an original and four (4) copies the MOTION TO DISMISS and MEMORANDUM IN SUPPORT OF MOTION TO DISMISS of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: 
Sanjay K. Sofat
Assistant Counsel
Division of Legal Counsel

Dated: July 17, 2006
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62794-9276
(217) 782-5544

THIS FILING PRINTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN BOTTOM CONSERVANCY

Petitioner,

v.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY and UNITED STATES STEEL
CORPORATION – GRANITE CITY WORKS,

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STATE OF ILLINOIS
Pollution Control Board PCB 06-171

(3rd Party NPDES
Permit Appeal)

MOTION TO DISMISS FOR LACK OF JURISDICTION

NOW COMES the Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by one of its attorneys, Sanjay K. Sofat, Assistant Counsel, and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, hereby requests that the Illinois Pollution Control Board ("Board") **DISMISS** the American Bottom Conservancy's ("ABC") petition for review of decision ("Petition) by the Illinois Environmental Protection Agency ("Agency" or "Illinois EPA") with prejudice. In support of this motion, the Agency states as follows:

1. On May 11, 1998, the Agency issued the National Pollution Discharge Elimination System (“NPDES”) permit (Permit No. IL0000239) to National Steel Corp. – Granite City Works, now United States Steel- Granite City Works (“US Steel”) for a duration of five years (5) with expiration on April 30, 2003. Agency Record (hereinafter “Record”) at 545.

2. On October 17, 2002, the Agency received the US Steel’s request to renew its NPDES permit that was expiring on April 30, 2003. *Record at 135-155.*

3. On May 23, 2003, permit engineer Ukanno Foxworth began the review of the US Steel’s renewal application. For the next seven months, Mr. Foxworth requested supplemental information from US Steel as well as a water quality standards evaluation from the Bureau of Water’s Standards Unit. *Record at 261-271; 371-373.*

4. In February 2004, permit engineer Ukanno Foxworth left the Bureau of Water.

5. After Mr. Foxworth’s departure, a new engineer, Beth Burkard, was assigned to work on the US Steel’s renewal application. On July 8, 2004, the Agency met with US Steel to discuss the permit renewal issues. *Record at 423; 431; 433-440; 477; and 489-491.*

6. On November 4, 2004, the Agency sent a 15-day notice to US Steel on the draft NPDES permit. *Record at 495.* US Steel provided its comments on the draft permit on November 16, 2004. *Record at 507.*

7. The Agency put the draft NPDES permit on a 30-day public notice beginning on December 19, 2004. The public comment period ended on January 18, 2005. *Record at 518.*

8. On January 13, 2005, the Agency received the draft permit comments from US Steel. *Record at 530-531.*

9. In a letter dated January 17, 2005, from Kathleen Logan-Smith of the Health & Environmental Justice- St. Louis, requested a public hearing and a three-week extension to public comment period. *Record at 532.*

10. In the letter dated January 18, 2005, ABC's presented a concern that Horseshoe Lake is impaired, and thus has a negative impact on the community that utilizes the Lake for recreation and for a food source. Specifically, ABC raised the following issues:

1) Allowing US Steel to put additional lead and ammonia into Horseshoe Lake would be contrary to the federal Clean Water Act and the Illinois Bureau of Water's mission;

2) US Steel should be added to a list of potential contributors to the impairment of Horseshoe Lake;

3) US Steel had violated ammonia and "other" limits in the past;

4) Requested the Agency hold a public hearing; and

5) Asked for a 30-day extension of the public comment period if the Agency denied its request for a public hearing.

Record at 533-539.

11. The lead load limits in the US Steel's NPDES permit are based upon the increase in production at the facility and are consistent with 40 CFR 420, and 35 Ill. Adm. Code 302. US Steel, however, does not use lead in its steel manufacturing process. The new limits for Ammonia-N are based on the criteria at 35 Ill. Adm. Code 355. *Record at 545; 603.*

12. On May 13, 2005, US Steel requested a meeting with Agency staff to provide additional information regarding the comments received during the public comment period. *Record at 560-563; 602-605.*

13. Based on the comments provided by ABC in its letters dated January 17 and 18, 2005 and the additional information provided by US Steel, the Agency determined that holding a public hearing would not serve any public interest as the comments were not germane to the issuance of US Steel's NPDES permit. Nor did the Agency grant a 30-day extension of the public comment period.

14. Outside the public comment period, on October 6, 2005, the Agency received a comment letter from Washington University School of Law ("WUSL"). The letter requested the Agency to hold a public hearing and provided the following specific comments:

- 1) IEPA has been delinquent in failing to issue an NPDES permit for Granite City Steel on a timely basis, leaving Granite City Steel operating without a permit for more than two years;
- 2) Granite City Steel has a long history of Clean Water Act violations both before and after it was taken over by U.S. Steel;
- 3) Horseshoe Lake is an impaired water body widely used for recreation and subsistence fishing by many in the low-income community;
- 4) Horseshoe Lake is listed on the 303(d) list as being impaired for several of the substances the Draft Permit proposes to allow Granite City Steel to discharge into the Lake, including zinc;
- 5) The Draft Permit does not appear to address the control and treatment of stormwater at Granite City Steel, as would be required by a Stormwater Pollution Prevention Plan, which the agency has the authority to require; and
- 6) On its face, the Draft Permit is unclear about whether the landfill leachate addressed therein and processed by Granite

City Steel originates from landfills no longer owned or controlled by U.S. Steel.

Record at 607-609.

15. Permit Engineer Beth Burkard left the Agency on November 10, 2005.
16. Outside the public comment period, in a letter dated December 9, 2005,

WUSL provided the following supplemental comments:

- 1) Effluent limits contained in the Draft Permit are inadequate and inaccurate.
- 2) The Draft Permit improperly grants Granite City Steel exemptions and variances from applicable effluent standards.
- 3) The central treatment exemption for zinc should be revoked.
- 4) Granite City Steel should not have a section 301 (g) variance for ammonia.
- 5) The Draft Permit should include a compliance schedule for cyanide and other compounds.
- 6) IEPA should not compromise with a chronic Clean Water Law violator.
- 7) The Draft Permit fails to protect Horseshoe Lake.
- 8) The Draft Permit fails to comply with applicable Water Quality Standards.
- 9) The Draft Permit violates the letter and spirit of Section 303 (d) of the Clean Water Act.
- 10) The Draft Permit fails to adequately address stormwater.
- 11) The Landfill outfall should not be included in the Draft Permit.
- 12) ABC reiterates its request for a public hearing.

Record at 611- 623.

17. In emails dated March 3 and 7, 2006, Kenneth Page of the Agency invited ABC to discuss issues related to “subsistence fishing, PCB’s, and Horseshoe Lake, and EJ [environmental justice],” and not the NPDES permit related issues as suggested by ABC in its Petition. *Record at 630; 631; and 633-634.*

18. On March 8, 2006, the Agency issued to US Steel its NPDES Permit No. IL0000329. *Record at 635-643.*

19. After responding to the ABC’s comments received after the public comment period, the Agency reissued the March 8, 2006 permit to US Steel on March 31, 2006. *Record at 648-657.*

20. On May 4, 2006 ABC filed its Petition seeking the Board’s review of the Agency’s issuance of the US Steel’s NPDES permit. Except for the public hearing issue, all of the issues in paragraphs 20(b)-(g), raised in ABC’s Petition were raised outside the public comment period that ended on January 19, 2005.

21. Generally, motions to strike or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document. 35 Ill. Adm. Code 101.506. However, the rule provides an exception if material prejudice would result.

22. Requiring the Board to hear and the Respondents to defend issues on appeal that are barred by Section 40(e) of the Illinois Environmental Protection Act (“Act”) would constitute material prejudice.

23. Also, this Motion to Dismiss is exempt from the time limitation set forth at 35 Ill. Adm. Code 101.506 because the Motion “purports to challenge the Board’s authority to issue a final decision in this case.” *People of the State of Illinois v. Michel*

Grain Company, Inc., et al., PCB 96-143, 2003 WL 22334782 (October 2, 2003), citing *Ogle County Board v. PCB*, 272 Ill. App. 3d 184, 196-7, 649 N.E. 2d 545, 554 (2nd Dist. 1995).

24. The decision to hold a public hearing lies solely within the discretion of the Agency. *Borg-Warner Corp v. Mauzy*, 100 Ill. App. 862, 867, 427 N.E. 2d 415, 419 (3rd Dist. 1981); *Marathon Oil Co. v. Illinois EPA*, PCB No. 92-166, 1994 Ill. Env. LEXIS 488, *19-20 (Ill. Pollution Control Bd., March 31, 1994). Here, the Agency's decision to not hold a public hearing was based on the lack of significant NPDES permit related issues raised by ABC within the comment period. Further, ABC has failed to present evidence to show that the Agency abused its discretion in declining to hold a public hearing. Consequently, the Board should dismiss the ABC's public hearing claim.

25. Section 40(e)(1) of the Act requires that the third party's petition to the Board must contain "a demonstration that the petitioner raised the issue contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held." 415 ILCS 5/40 ILCS (e)(2) (2004) (*emphasis added*); *see also* 35 Ill. Adm. Code 105.210(d).

26. The Board lacks jurisdiction over the issues raised in paragraphs 20(b)-(g) of the ABC's Petition as these issues were raised after the close of the public comment period. In *Wesley Brazas v. Illinois EPA et al.*, PCB 06-131 (May 4, 2006), the Board held that, "material prejudice to both the Board and the parties would result from proceeding to hearing on issues not within the Board jurisdiction." Specifically, the Board lacks jurisdiction for the following issues:

- 1) The Agency incorrectly calculated monthly effluent load limits, and thus set monthly effluent limits at levels that are illegally high.
- 2) The Agency made a gross error in setting the concentration-based effluent limits for cyanide.
- 3) The Agency failed to enter a compliance schedule for cyanide limits.
- 4) The Agency improperly granted a special effluent limit for ammonia for the month of March.
- 5) The Agency failed to include effluent limits for sulfate, total phosphorus, and fecal coliform.
- 6) The Agency failed to require US Steel to monitor its effluent for naphthalene, BAP, and tetrachloroethylene at Outfall 001.

26. The Agency files concurrently herewith its Memorandum in Support of its Motion to Dismiss.

WHEREFORE, the Agency respectfully requests that the Board grant its Motion to Dismiss, dismiss the Petition with prejudice, and grant all other relief that the Board deems fair and just.

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AMERICAN BOTTOM CONSERVANCY)
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**AGENCY’S MEMORANDUM IN SUPPORT OF MOTION TO DIMISS FOR
LACK OF JURISDICTION**

Respondent, Illinois Environmental Protection Agency (“Illinois EPA or “Agency”), by its attorneys, Sanjay K. Sofat, Assistant Counsel, and Special Assistant Attorney General, pursuant to 35 Ill. Adm. Code 101.500, files its Memorandum in Support of its Motion to Dismiss for Lack of Jurisdiction, which seeks the dismissal of the American Bottom Conservancy’s (“ABC”) Petition for Review of a Decision by the Agency with prejudice. In support of its Memorandum, the Agency states as follows:

RELEVANT FACTS

On October 17, 2002, the Agency received the US Steel’s timely request to renew its NPDES permit that was expiring on April 30, 2003. *Record at 135-155.* Permit engineer Ukanno Foxworth was assigned to review the US Steel’s renewal application in May 2003. Mr. Foxworth, however, left the Bureau of Water in February 2004. Prior to

leaving the Bureau of Water, Mr. Foxworth compiled additional information from US Steel. *Record at 261-271; 371-373.*

In July of 2004, permit engineer Beth Burkard was assigned to work on the US Steel's renewal application. Ms. Burkard worked on the renewal application for approximately fifteen (15) months prior to leaving the Agency in November of 2005. In the first six months, Ms. Burkard conducted a site-visit, prepared permit review notes, responded to US Steel's NPDES permit renewal issues, and evaluated the draft permit. *Record at 423; 431; 433-440; 477; and 489-491.*

On November 4, 2004, the Agency issued a 15-day notice to US Steel on draft NPDES permit. *Record at 495.* The US Steel provided timely comments on the draft NPDES permit on November 16, 2004. *Record at 507.* After the 15-day notice to US Steel, the draft NPDES permit was put on a 30-day public notice beginning on December 19, 2004. *Record at 518.* During the comment period, the Agency received comments from US Steel, the Health & Environmental Justice-St. Louis, and a group letter from ABC and other environmental groups. *Record at 530-531; 532; and 533-539.*

In a letter dated January 17, 2005, Kathleen Logan-Smith of the Health & Environmental Justice- St. Louis, requested a public hearing and a three-week extension to public comment period. Other issues were also raised in the letter, include concerns of the discharge of lead. *Record at 532.* In a group letter dated January 18, 2005, ABC raised the following issues:

- 1) Allowing US Steel to put additional lead and ammonia into Horseshoe Lake would be contrary to the federal Clean Water Act and the Illinois Bureau of Water's mission;
- 2) US Steel should be added to a list of potential contributors to the impairment of Horseshoe Lake;

- 3) US Steel had violated ammonia and “other” limits in the past;
- 4) Agency hold a public hearing; and
- 5) Asked for a 30-day extension of the public comment period if the Agency denied its request for a public hearing. *Record at 533-539.*

The public comment period also ended on January 18, 2005. *Record at 518.* On May 13, 2005, US Steel met with the Agency staff to provide additional information on the comments received during the public comment period. *Record at 560-563.* After reviewing the comments and information received during the comments period, the Agency determined that the NPDES permit adequately and appropriately addressed the issues that were raised, and there were not significant issues pending. The Agency, thus, neither granted a public hearing¹ nor extension of time to file additional comments

Eight months after the close of the public comment period, on October 6, 2005, the Agency received a comment letter from Washington University School of Law. With the exception of a request for a public hearing on the permit, the remaining issues were not raised in the original comment letter, submitted within the public comment period.

Over eleven months after the close of the public comment period, in a letter dated December 9, 2005, ABC raised the following issues on the US Steel’s draft NPDES permit:

- a. Effluent limits contained in the Draft Permit are inadequate and inaccurate;
- b. The Draft Permit improperly grants Granite City Steel exemptions and variances from applicable effluent standards;

¹ Kenneth Page, Illinois EPA, Office of Compliance Assistance and Environmental Justice, in his emails offered ABC a chance to discuss issues related to the topics on subsistence fishing, PCBs, Horseshoe Lake quality, and environmental justice. *See Record at 630-31, 633-634.* The Record shows that the Agency’s offer to meet with ABC was not related to the US Steel’s NPDES permit.

- c. The central treatment exemption for zinc should be revoked;
- d. Granite City Steel should not have a section 301 (g) variance for ammonia;
- e. The Draft Permit should include a compliance schedule for cyanide and other compounds;
- f. IEPA should not compromise with a chronic Clean Water Law violator;
- g. The Draft Permit fails to protect Horseshoe Lake;
- h. The Draft Permit fails to comply with applicable Water Quality Standards;
- i. The Draft Permit violates the letter and spirit of Section 303 (d) of the Clean Water Act;
- j. The Draft Permit fails to adequately address stormwater; and
- k. The Landfill outfall should not be included in the Draft Permit.

Record at 611- 623.

All of the above-mentioned issues were raised outside the public comment period that ended on January 18, 2005.

The Agency issued the NPDES Permit No. IL0000329 to US Steel on March 8, 2006. *Record at 635-643.* After the issuance, the Agency noticed its oversight in not responding to the ABC's timely submitted comment letter. After providing the response, the Agency re-issued the March 8 NPDES permit to US Steel on March 31, 2006.

On May 4, 2006, under Section 40(e) of the Act, ABC filed a petition challenging the Agency's decision to issue the NPDES permit No. IL0000329; thus, ensuring ABC had the full statutory time to determine if it intended to appeal the permit.

DISCUSSION

I. Standard for Motions to Dismiss

A party moving to dismiss a petition bears a heavy burden. “[A]ll well-pled facts contained in the pleading must be taken as true, and all inferences from them must be drawn in favor of the non-movant.” *People v. Pattison Ass’n., LLC*, PCB No. 05-181, 2005 Ill.Env.LEXIS 580, 9 (Sept. 15, 2005). Moreover, “a complaint 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 that would entitle the complainant to relief.” *Id.*

II. The Issues in Paragraphs 20(b)-(g) of the ABC’s Petition Should be Dismissed For Lack of Jurisdiction

Section 40(e)(1) of the Act authorizes the Board to hear third party permit appeals with certain limitations. 415 ILCS 5/40(e). One such limitation set by Section 40(e)(2)(A) of the Act is that the petition must include, “a demonstration that the petitioner raised the issue contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held.” 415 ILCS 5/40(e)(2)(2004)(*emphasis added*). This demonstration that the issues raised contained within the petition were raised during the public notice period is what is required to “confer standing to a third party under Section 40(e)(2).” *Wesley Brazas v. Illinois EPA et al.*, PCB 06-131 (May 4, 2006).

ABC fails to comply with the standing requirement of Section 40(e)(2) of the Act. Except for the request to grant a hearing issue, all the remaining issues contained in paragraphs 20(b)-(g) of the Petition were not raised during the public notice period. The

US Steel's draft NPDES permit was put on a 30-day public notice beginning on December 19, 2004. This public notice indicated that the public comment period would close on January 18, 2005. The issues raised in paragraphs 20(b)-(g) of the Petition are based on the ABC's comment letter dated December 9, 2005 received over eleven months after the close of public comment period ended. Pursuant to Section 40(e)(2)(A) of the Act, the Agency contends that the Board does not have jurisdiction to hear the issues contained in paragraphs 20(b)-(g) of the ABC's Petition.

ABC argues that because US Steel was in correspondence with the Agency well after the comment period, ABC should too be given this privilege. It is common for a facility seeking the renewal of an NPDES permit to communicate with the Agency after the comment period. Under Section 40(e)(2) of the Act, ABC must raise its issues contained in the Petition within the comment period to avail a third party standing.

ABC states that since the Agency did not issue the final NPDES permit until March 2006, and during this time period was still receiving comments from US Steel, it was in essence a de facto extension of the public comment period. ABC, however, fails to provide any provision of the Act or the Board regulations to support its assertion. The Agency could not issue the US Steel's NPDES permit until March 2006 as two of the permit engineers working on the permit left the Bureau during this time. Under the ABC's assertion, the Agency would have a procedural nightmare in issuing NPDES permits as there is always a possibility that an interested party has a comment on the pending NPDES permit. Further, it will violate an applicant's right to have a speedy permit where the applicant has met its burden under Section 39(a) of the Act.

An administrative agency such as the Agency is a “creature of statute,” and, therefore, has only the authority given to it by the Act. *Granite City Div. Of Nat. Steel Co. v. PCB*, 155 Ill.2d 149, 171, 613 N.E.2d 719, 729 (1993). The Agency thus must act within the bounds of authority granted by the Act. Neither the Act nor the Board regulations allow the Agency to accept public comments received after the close of the public comment period where no extension of time has been granted.

The Agency moves the Board to dismiss the issues raised in paragraphs 20(b)-(g) of the ABC’s Petition for lacks jurisdiction, as these issues were raised in a letter dated December 9, 2005, over eleven months outside of the public comment period.

III. The Agency’s Motion to Dismiss is Timely

Generally, motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document. 35 Ill. Adm. Code 101.506. However, the rule provides an exception if material prejudice would result.

Here, requiring the Board and the Respondents to defend issues that were raised plainly and affirmatively barred by Section 40(e) of the Act would constitute material prejudice. The Board’s statutory jurisdiction to hear third party permit appeals is strictly limited to issues raised during the comment period, and cannot be broadened merely by the action or inaction of another party to the appeal. In *Wesley*, the Board affirmed that, “a challenge to jurisdiction can be made any time prior to a final decision on the merits.” *Wesley at 3*. Thus, the Agency’s this Motion to Dismiss is timely.

IV. The Agency's Denial of a Public Hearing Was Not an Abuse of Discretion

Section 309.115 of the Board regulations sets forth the criteria for holding a public hearing. Specifically, it provides:

The Agency shall hold a public hearing on the issuance or denial of the an [sic] NPDES Permit or group of permits whenever the Agency determines that there exists a significant degree of public interest in the proposed permit or group of permits (instances of doubt shall be resolved in favor of holding the hearing), to warrant the holding of such a hearing.

35 Ill. Adm. Code 309. 115(a)(1) (*emphasis added*).

It is clear from the Section 309.115(a)(1) language that the Agency's decision to hold a public hearing must be based on the finding that there exist a significant degree of public interest in the permit. Section 309.115(a)(2) places the burden on the party requesting a public hearing to show why hearing is warranted.

ABC failed to raise meaningful NPDES permit related issues in its January 18, 2005 comment letter to convince the Agency that a public hearing is warranted. Most of the issues raised in that letter were irrelevant to the issuance of the US Steel's NPDES permit. Due to the ABC's inability to raise relevant and meaningful NPDES permit related issues during the comment period, and lack of significant public interest, the Agency did not grant the public hearing. Nor did it extend the public comment period.

The decision to hold a public hearing lies within the discretion of the Agency. *Borg-Warner Corp v. Mauzy*, 100 Ill. App. 862, 867, 427 N.E. 2d 415, 419 (3rd Dist. 1981). (The decision to hold a public hearing "is a discretionary decision to be made by the Agency."). Further, ABC failed to present any evidence to show that the Agency abused its discretion in not granting the public hearing. *See Marathon Oil Co. v. Illinois EPA*, PCB No. 92-166, 1994 Ill. Env. LEXIS 488, * 19-20 (Ill. Pollution Control Bd., March 31, 1994) ("Marathon presents no argument that would allow this Board to

conclude that the Agency abused this discretion or otherwise failed to comport with the requirements pertaining to NPDES hearing.”). ABC has failed to present any evidence in the Record to show that the Agency abused its discretion in not granting a public hearing. Consequently, the ABC’s public hearing claim should be dismissed.

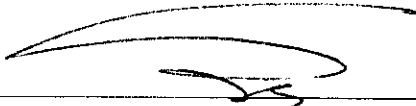
CONCLUSION

Petitioner has clearly failed to raise NPDES permit related issues during the public notice period, as is required by the Act and Board rules. 415 ILCS 5/40(e)(2)(A); 35 Ill. Adm. Code Section 105.210. Issues not previously raised in the permitting process are not eligible for appeal, and the Board lacks statutory authority to hear such novel issues.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board **DISMISS** with prejudice the issues raised in paragraphs 20(a)-(g) of the Petition.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: _____


Sanjay K. Sofat
Assistant Counsel
Division of Legal Counsel

DATED: July 17, 2006
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

THIS FILING PRINTED ON RECYCLED PAPER

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON) SS

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached **APPEARANCE and AGENCY RECORD** upon the persons to whom it is directed, by placing a copy in an envelope addressed to:

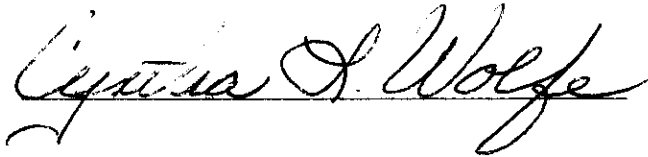
Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph Street
Chicago, IL 60601

Ted Heisel
Maxine I. Lipeles
Interdisciplinary Environmental Clinic
Washington University School of Law
One Brookings Drive – Campus Box 1120
St. Louis, MO 63130-4899

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Ave. East
P.O. Box 19274
Springfield, IL 62794-9274

Carolyn S. Hesse
Erika K. Powers
David T. Ballard
Barnes & Thornburg LLP
One North Wacker Drive
Suite 4400
Chicago, IL 60606

and mailing it from Springfield, Illinois on July 17, 2006, with sufficient postage affixed as indicated above.



SUBSCRIBED AND SWORN TO BEFORE ME
this day of July 17, 2006.





Notary Public