

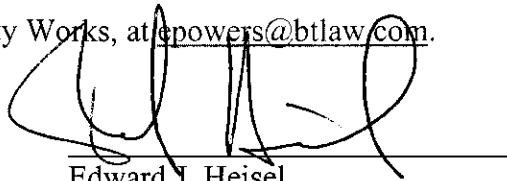
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN BOTTOM CONSERVANCY,)
)
Petitioner,)
) Case No. PCB 2006-171
) (3rd Party NPDES Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY, and UNITED STATES STEEL)
CORPORATION - GRANITE CITY WORKS)
)
Respondents.)

NOTICE OF FILING

PLEASE TAKE NOTICE that on August 3, 2006 I filed with the Office of the Clerk of the Pollution Control Board the Memorandum of American Bottoms Conservancy in Opposition to the Illinois Environmental Protection Agency'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. 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, and Erika K. Powers, counsel for respondent United States Steel Corporation – Granite City Works, at epowers@btlaw.com.



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)	(NPDES Permit Appeal)
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**MEMORANDUM OF AMERICAN BOTTOM CONSERVANCY
IN OPPOSITION TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
MOTION TO DISMISS**

Pursuant to 35 Ill. Adm. Code 101.500(d), petitioner American Bottom Conservancy (“ABC”) files this Memorandum in Opposition to the Motion to Dismiss filed by respondent Illinois Environmental Protection Agency (“IEPA”).

INTRODUCTION

The U.S. Steel-Granite City Works facility is a large steel mill located in Granite City that discharges its process wastewater into Horseshoe Lake, which is part of Horseshoe Lake State Park. Petition for Review (“Petition”) ¶¶ 4, 5, and 7 and Ex. A attached thereto. Area residents use Horseshoe Lake and Horseshoe Lake State Park for recreation including fishing, hunting, boating, bird watching, hiking, nature walks, camping, and picnicking. Petition ¶ 8. Since 1998, IEPA has listed Horseshoe Lake as impaired under § 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), because it is polluted in excess of water quality standards for several pollutants. Petition ¶ 10.

Granite City Works 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 being told by IEPA staff that no decision had been made on the permit, ABC retained the Interdisciplinary Environmental Clinic at Washington University and submitted two additional comment letters that highlighted technical and legal flaws in the draft permit. Petition ¶¶ 16-17 and Ex's D and E attached thereto; Record at 607-624. ABC's final two comment letters were submitted to IEPA in October and December 2005, more than five and three months, respectively, before IEPA made its decision on the final permit. 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.

IEPA initially issued a permit to Granite City Works on March 8, 2006. Record at 635-36. However, IEPA issued this initial permit before responding to any of the public comments that had been submitted. After ABC pointed out that federal law requires such a response,¹ IEPA rescinded the March 8th permit and reissued the permit on March 31, 2006. Record at 644. Nonetheless, IEPA responded to only one of ABC's three comment letters before reissuing the permit, waiting until a week later to respond to ABC's other comments.² Moreover, IEPA has never provided a response of any kind to ABC's multiple requests for a public hearing. This appeal was timely filed after IEPA reissued the permit.

In its Motion to Dismiss, IEPA seeks to dismiss ABC's substantive challenges to the erroneous permit limit calculations on the ground that these points were not raised during the first 30 days after IEPA published the draft permit. IEPA also seeks to dismiss ABC's challenge to its failure to hold a public hearing by arguing that ABC did not raise "meaningful" issues in its

¹ See Exhibit E to ABC's Motion to Supplement the Record (filed July 14, 2006). IEPA does not object to including this March 24, 2006, letter from ABC to IEPA in the Record, but Granite City Works does.

² See Exhibit A to ABC's Motion to Supplement the Record (filed July 14, 2006). Both Granite City Works and IEPA have objected to including the agency's response to comments dated April 8, 2006, in the Record.

comments, and that ABC has not presented any evidence to show that IEPA abused its discretion in not holding a public hearing. IEPA's 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 IEPA 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. *Id.*

II. ABC's Substantive Technical Claims Should Not Be Dismissed Because They Were Submitted To IEPA More Than Three Months 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 early December 2005 – some three-and-one-half months (over 100 days) before IEPA made its final permit decision.

IEPA seeks to dismiss ABC's claims addressing the substantive flaws in the permit 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 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. *Id.*

IEPA's actions during the 14 months following ABC's first comment letter (i.e., from the January 2005 comment letter to the March 31, 2006 permit reissuance) 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 in October and December of 2005. Record at 607-624. 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. ABC submitted its October and December 2005 letters only after communicating with IEPA staff to determine that no permit

decision had been made. Petition ¶¶ 16-17. Moreover, IEPA has conceded by putting all three of ABC's comment letters in the Record that they were before the agency at the time it made its decision on the permit. Record at 607-623.

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).

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 date of 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. IEPA did not issue the final permit until three-and-one-half months after receiving ABC's final comment letter in December 2005, which identified several technical flaws in the calculation of permit limits that could have been corrected by IEPA prior to issuing the 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. As noted above, Granite City Works made at least three additional submissions to IEPA after the initial 30-day comment period. Moreover, ABC checked with the agency before submitting its last two comment letters to ensure that the decision was still pending.

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, and ensuring that no decision had been made, 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. IEPA has even conceded by putting all of ABC's comment letters in the record that they were before the agency when it made its decision on the permit. In sum, ABC's appeal raises no new issues that were not presented to IEPA well before it made its permit decision, thereby complying with the purpose of the procedural provisions of the Illinois Environmental Protection Act.³

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

Board regulations state that IEPA "shall" 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. § 309.115(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." *Id.*⁴

³ 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.

⁴ The presumption in the Board's regulation favoring public hearings is consistent with federal law. The U.S. Supreme Court has noted that, while public hearings are not required when not requested, public

A. IEPA Failed to Respond to the Multiple Requests for a Public Hearing and Cannot Now Rely on Post Hoc Rationales for its Erroneous Decision.

IEPA asks the Board to dismiss ABC's public hearing claim, arguing that ABC did not raise any "relevant and meaningful" issues in its comments and that there was a "lack of significant public interest." IEPA's motion asserts that it decided not to hold a public hearing for these reasons. In fact, IEPA never responded to the requests for a public hearing from several significant environmental organizations. Instead, the agency's counsel has developed a classic post-hoc rationale for an erroneous agency action that went unexplained during the administrative process.

It is a well established principle of administrative law that an agency's decision can only be upheld based on rationales actually offered by the agency at the time of its decision, and not on the basis of post-hoc rationalizations offered by counsel. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)("simple but fundamental rule of administrative law" is that court must evaluate an administrative action "solely by the grounds invoked by the agency"); *Motor Vehicle Manufacturers Assn v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)("an agency's action must be upheld, if at all, on the basis articulated by the agency itself").

The public's ability to exercise its right to challenge administrative decisions – and the regard it holds for such decisions – is greatly diminished where agencies fail to provide a response to requests or justification for their actions. At least one other state's environmental review board, in overturning a denial of a public hearing request, has noted the importance of being responsive to public interest. *See Queen v. Div. Env. Prot'n.*, Appeal No. 621, 1996 WL

participation is an "essential element" of the NPDES program and Congress intended for the public to have a "genuine opportunity to speak on the issue of protection of its waters." *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 216 (1980)(quoting S. Rep. No. 92-414, p.72 (1971)).

738740 (W.Va. Env. Quality Bd. Aug. 13, 1996)(holding that the state agency improperly denied a request for a public hearing on a NPDES permit).

IEPA's motion to dismiss ABC's public hearing claim must fail because it offered no response to the multiple requests for a public hearing and cannot rely on post hoc rationales crafted by its counsel.

B. ABC Has Pled Facts Demonstrating the Need for a Public Hearing.

IEPA also argues that ABC has "failed to present any evidence" to support its claim that a public hearing should have been held. IEPA thus misconstrues the burden on ABC at this stage of the proceedings. All well-pled allegations in the Petition are deemed true for purposes of evaluating motions to dismiss and such motions must be denied unless it is clear that no set of facts would entitle the petitioner to relief. *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).

ABC's Petition alleges facts demonstrating that IEPA abused its limited discretion by 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.
- These requests were 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.

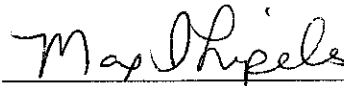
- The public actively uses Horseshoe Lake and Horseshoe Lake State Park for recreation, including fishing, hunting, boating, bird watching, hiking and nature walks, camping, and picnicking. Petition ¶ 8.
- A portion of Horseshoe Lake State Park is a designated Waterfowl Management Area managed by the 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.
- That all of the above facts – comments on the permit, requests for a public hearing, public use of Horseshoe Lake, and the polluted condition of the Lake – clearly demonstrate a significant degree of public interest in the Permit. Petition ¶ 20.

In sum, ABC pled facts demonstrating that the public has a significant stake in ensuring that Granite City Works' water pollution discharge complies with applicable law and that the Permit should 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 IEPA.

Respectfully submitted,

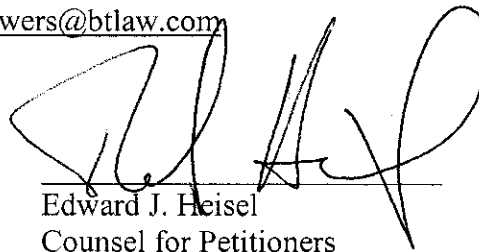


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Certificate of Service

I, Edward J. Heisel, certify that on August 3, 2006, I filed the above MEMORANDUM OF AMERICAN BOTTOM CONSERVANCY IN OPPOSITION TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'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. 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, and Erika K. Powers, counsel for respondent United States Steel Corporation – Granite City Works, at epowers@btlaw.com



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