

ILLINOIS POLLUTION CONTROL BOARD  
September 21, 2006

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

ORDER OF THE BOARD (by T.E. Johnson):

On May 8, 2006, American Bottom Conservancy (American Bottom) timely filed a petition pursuant to Section 40(e) of the Environmental Protection Act (Act) (415 ILCS 5/40(e) (2004)) asking the Board to review the Illinois Environmental Protection Agency's (Agency) issuance of a National Pollutant Discharge Elimination System (NPDES) permit. The permit was issued by the Agency on March 31, 2006, to the United States Steel Corporation Granite-City Works (U.S. Steel) for its steelmaking facility at 20th and State Streets, in Granite City, Madison County. The Board accepted the matter for hearing on May 18, 2006.

This case is before the Board today on a number of pleadings. U.S. Steel and the Agency filed motions to dismiss on May 26, 2006 and July 18, 2006, respectively. American Bottom responded to the U.S. Steel motion on June 16, 2006, and to the Agency motion on August 3, 2006. U.S. Steel filed a motion for leave to reply to American Bottom's response, along with the reply, on June 30, 2006. In addition to the pleadings concerning the motions to dismiss, American Bottom filed an unopposed motion for Edward J. Heisel, of the Interdisciplinary Environmental Clinic, to appear *pro hac vice* before the Board. The Agency filed an amended record on June 22, 2006. On July 14, 2006, American Bottom filed a motion to supplement the record. The Agency and U.S. Steel responded to the motion to supplement the record on July 28, 2006.

For the reasons outlined below, the Board grants the motions to dismiss in part and denies them in part, and directs the hearing officer to proceed to hearing on the issue of a request for a public hearing. The Board also grants American Bottom's motion for *pro hac vice*, and accepts the Agency's amended record. Further, the Board grants American Bottom's motion to supplement the record in part and denies it in part, as detailed below.

## **BACKGROUND**

On December 19, 2004, the Agency gave notice that it proposed to issue a renewal of the NPDES permit governing the discharge by U.S. Steel at its Granite City Works facility of certain pollutants into Horseshoe Lake. Petition at 3-4; Agency Record (AR) at 518. The Agency put the draft NPDES permit on 30-day public notice beginning on December 19, 2004, and ending on January 18, 2005. AR at 518. The Agency received draft permit comments from U.S. Steel on January 13, 2005. AR. at 530-31. The Agency received a request for public hearing from Kathleen Logan-Smith of Health & Environmental Justice in St. Louis on January 17, 2005. AR at 532.

On January 18, 2005, American Bottom filed with the Agency a comment that Horseshoe Lake is impaired and has a negative impact on the community that utilizes the lake for recreation and as a food source. American Bottom raised the following issues: (1) that allowing U.S. Steel to put additional lead and ammonia into the lake would be contrary to the federal Clean Water Act and the Agency's Bureau of Water's mission; (2) that U.S. Steel should be added to a list of potential contributors to the impairment of the lake; (3) that U.S. Steel had violated ammonia and "other" limits in the past; (4) that the Agency should hold a public hearing; and (5) that the public comment period should be extended 30 days if the Agency denied the request for a public hearing. AR at 533-39. American Bottom sent supplemental technical comments to the Agency in October 2005, and on December 9, 2005. AR at 607-09, 611-23.

On March 8, 2006, the Agency issued an NPDES permit to U.S. Steel. AR at 635-43. The Agency reissued the NPDES permit on March 31, 2006, after responding to the American Bottom comments filed after the comment period. AR at 648-57.

On May 8, 2006, American Bottom appealed to the Board on the grounds that (1) the Agency erred in setting various effluent limitations in the permit and granted exemptions not allowed by law; (2) the permit would allow discharges that violate water quality standards and effluent limitations; (3) the permit would fail to require adequate pollutant monitoring; (4) the permit does not include a compliance schedule to address a history of non-compliance; (5) the permit does not establish effluent limitations on the discharge of pollutants present in the facility's effluent discharges; and (6) the Agency issued the permit without first addressing public comments and holding a requested public hearing.

## **APPLICABLE LAW AND BOARD RULES**

Section 40(e)(1) of the Act (415 ILCS 5/40(e)(1) (2004)) allows certain third parties to appeal Agency determinations to grant or deny NPDES permits. The third party's petition to the Board must contain:

[A] demonstration that the petitioner raised the issues 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; and

[A] demonstration that the petitioner is so situated as to be affected by the permitted facility. 415 ILCS 5/40(e)(2) (2004); *see also* 35 Ill. Adm. Code 105.210(d).

Section 101.506 of the Board's procedural rules provides that all 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, unless the Board determines that material prejudice would result. 35 Ill. Adm. Code 101.506.

### **STANDARD OF REVIEW**

For purposes of ruling on a motion to dismiss, all 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. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). A petition 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 petitioner to relief. Lone Star Industries, Inc. v. IEPA, PCB 03-94 (Mar. 6, 2003); Shelton v. Crown, PCB 96-53 (May 2, 1996).

### **MOTION TO APPEAR PRO HAC VICE**

In the motion to appear *pro hac vice*, Edward J. Heisel asserts as follows: (1) he has been a member in good standing of the bar of the State of Missouri since 2000; (2) he is a member in good standing of the bar of a number of federal courts; (3) he has never been disbarred or the subject of disbarment proceedings; (4) no disciplinary proceedings are currently pending, nor have any disciplinary proceedings ever been brought against him; and (5) he is familiar with the Illinois Code of Civil Procedure, the rules of the Illinois Supreme Court, and the procedural rules of the Board. Motion to Appear at 1-2. As stated earlier, no response to this motion has been filed.

The Board grants this motion to appear *pro hac vice* and enters the appearance of Edward J. Heisel on behalf of American Bottom in this matter.

### **MOTIONS TO DISMISS**

The motions to dismiss filed by the Agency and U.S. Steel are substantially similar. The Board will summarize each motion and response thereto separately, but discuss the merits of the two motions concurrently.

### **U.S. Steel Motion to Dismiss**

In its memorandum accompanying its motion, U.S. Steel asserts that many of the issues included in the petition were not raised by American Bottom during the public notice period before the Agency, and should be dismissed. Memorandum at 4. U.S. Steel contends that only the request for a public hearing was timely asserted. *Id.* at 5. U.S. Steel argues that the allegation that the Agency wrongfully denied a public hearing should also be dismissed with

prejudice, because the Agency did not abuse its discretion in deciding not to hold the hearing. *Id.* at 6.

### **American Bottom's Response to U.S. Steel's Motion to Dismiss**

American Bottom asserts that its substantive technical claims should not be dismissed because they were submitted to the Agency well before the permit decision was made. Response (Resp.) at 3. In addition, American Bottom argues that the Agency extended the comment period by its actions during the 14 months following American Bottom's first comment letter. *Id.* at 4-5. Specifically, American Bottom notes that the Agency received three submittals from U.S. Steel after what it refers to as the initial public comment period. *Id.* at 5. American Bottom argues that the Agency conceded the relevance of American Bottom's later-filed comments by including them in the record filed herein. *Id.*

American Bottom contends that the clear purpose of Section 40(e)(2) of the Act is to require parties to raise concerns about a draft permit with the Agency so that the Agency can address those concerns and thereby avert a potential appeal proceeding. Resp. at 6. American Bottom argues that it satisfied this statutory purpose. *Id.* American Bottom asserts that nothing precludes the Agency from considering comments submitted after the public comment period, and that it is not uncommon for permit applicants to submit additional information to the Agency after the period is over. *Id.*

American Bottom contends that its public hearing claim is not subject to dismissal. Resp. at 7. American Bottom acknowledges that the Agency has discretion in the matter, but argues that instances of doubt are to be resolved in favor of holding the hearing. *Id.* at 7, citing 35 Ill. Adm. Code 309.115(a)(1). American Bottom asserts that the facts alleged in the petition demonstrate that the Agency abused its limited discretion in not holding a hearing. Resp. at 7.

### **U.S. Steel Reply**

U.S. Steel argues that in support of American Bottom's argument that the Agency *de facto* extended the comment period, American Bottom states that U.S. Steel submitted comments after the 30-day comment period ended, allegedly demonstrating that the period was extended. Reply at 2. U.S. Steel asserts that the documents cited by American Bottom were not public comments on the draft permit, but rather were sent to the Agency with specific information to assist the Agency as it was writing the final NPDES permit. *Id.* U.S. Steel seeks leave to file the reply in order to address this narrow issue and to prevent the material prejudice that will result from the misleading description of U.S. Steel's submissions. *Id.* The Board grants U.S. Steel's unopposed motion for leave to file the reply.

### **Agency Motion to Dismiss and Accompanying Memorandum**

The Agency asserts that the draft NPDES permit was put on 30-day public notice beginning on December 19, 2004, and ending on January 18, 2005. Motion (Mot.) at 2. The Agency contends that based on the comments provided by American Bottom in its letters dated January 17 and 18, 2005, and the additional information provided by U.S. 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 U.S. Steel's NPDES permit. *Id.* at 4.

The Agency argues that except for the public hearing issue, all of the issues in American Bottom's petition were raised outside of the public comment period. Mot. at 6, Memorandum (Mem.) at 5. The Agency contends that the Board lacks jurisdiction over these issues because they were raised after the close of the public comment period. Mot. at 8. The Agency asserts that American Bottom failed to present evidence to show the Agency abused its discretion in declining to hold a public hearing, and that the Board should therefore dismiss the petition for review. Mot. at 7, Mem. at 8.

The Agency argues that American Bottom failed to provide any provision of the Act or Board regulations to support its argument that the Agency *de facto* extended the public comment period. Mem. at 6. The Agency notes that its motion to dismiss is timely as it is a challenge to the jurisdiction of the Board to hear the case. *Id.* at 7.

### **American Bottom's Memorandum in Opposition to the Agency Motion**

American Bottom reasserts that its substantive technical claims should not be dismissed because they were submitted to the Agency more than three months before the permit decision was made. Memorandum (Mem.) at 4. American Bottom next reasserts the arguments, detailed above, that the Agency effectively extended the comment period and that American Bottom satisfied the statutory purpose of Section 40(e)(2) of the Act. *Id.* at 5-7.

American Bottom contends that it has pled facts demonstrating the need for a public hearing, including that the public has a significant stake in ensuring that U.S. Steel's water pollution discharge complies with the applicable law and that the permit should not allow any pollution beyond applicable limits, and that several organizations – including the Sierra Club – requested a public hearing in this case. Mem. at 10.

### **Discussion**

The Board has consistently, and recently, held that to have standing in an NPDES permit appeal as a third-party petitioner under Section 40(e)(2) of the Act (415 ILCS 5/40(e)(2) (2004)), a petitioner must show that he or she raised the issues contained in the petition during the public comment period. Wesley Brazas v. IEPA, PCB 06-131, slip op at 3-4 (May 4, 2006). The record shows that public comments to the Agency were due on or before January 18, 2005, in this matter. AR at 518. American Bottom did submit a timely public comment. The technical issues raised in that comment, however, were not raised in American Bottom's petition for hearing. The only issue raised in the comment and contained in the petition is the request for a public hearing.

American Bottom does not argue that the technical comments other than the request for a public hearing were timely made within the public comment period set by the Agency. Instead, American Bottom argues that the claims should not be dismissed because they were submitted well before the Agency ultimately made its permit decision, and that the Agency effectively

extended the comment period. The Board is not persuaded by these arguments to ignore the clear language of the Act and prior Board precedent. Accordingly, the issues contained in the petition, other than the issue concerning the request for a public hearing, are improperly before the Board, and will be dismissed.

The Agency and U.S. Steel both argue that Agency did not abuse its discretion in deciding not to hold a public hearing, and that this issue should also be dismissed. American Bottom met the requirements of Section 40(e)(2) of the Act regarding this issue. The petition does contain a demonstration that American Bottom raised the issue during the public notice period, and that American Bottom is so situated as to be affected by the permitted facility. *See* 415 ILCS 5/40(e)(2) (2004). Further, when taking all well-pled facts contained in the petition as true, a set of facts can be proven that would entitle the petitioner to relief.

Section 309.115(a) of the Board regulations sets forth the criteria for holding a public hearing, providing that the Agency shall hold a public hearing whenever the Agency determines that there exists a significant degree of public interest in the proposed permit to warrant the holding of the hearing. *See* 35 Ill. Adm. Code 309.115(a). American Bottom has asserted facts that if proven true would show a significant degree of public interest in the proposed permit to warrant the holding of a hearing.

Accordingly, the motions to dismiss are granted in part and denied in part. The Board hereby dismisses the petition as to all the issues save American Bottom's assertion that the Agency improperly denied the request for a public hearing.

### **MOTIONS TO SUPPLEMENT THE RECORD**

Both the Agency and American Bottom have filed motions to amend or supplement the record in this case. The Board will summarize each motion and response.

#### **Agency June 22, 2006 Motion to Amend**

In the accompanying motion for leave to amend, the Agency asserts that although it timely filed the record, three documents were overlooked. Motion to Amend at 1-2. The Agency asserts that no prejudice will result from the amendment. *Id.* at 2. The Agency provides three documents for inclusion in the record. No response to the June 22, 2006 motion was filed. The Board grants the Agency leave to amend the record and accepts the documents listed as part of the record.

#### **American Bottom July 14, 2006 Motion to Supplement**

American Bottom asserts that five documents have been erroneously excluded from the record. Motion to Supplement at 1. The documents in question are:

1. correspondence dated April 10, 2006, from the Agency to counsel for American Bottom that is the Agency's response to American Bottom's December 9, 2005 comments;

2. correspondence dated April 5, 2006, from the Agency to counsel for American Bottom that is the Agency's response to correspondence dated March 24, 2006, from American Bottom's counsel to the Agency;
3. correspondence dated March 7, 2006, from American Bottom to the Agency that reiterates the request for a public hearing;
4. e-mail correspondence dated March 7, 2006, and March 14, 2006, between the Agency and American Bottom continuing an e-mail string already in the record; and
5. correspondence dated March 24, 2006, from American Bottom's counsel to the Agency that discusses purported procedural irregularities in the issuance of the permit. *Id.* at 2-4.

American Bottom asserts that the documents relate directly to the permit at issue in this appeal and must be included in the record. *Id.* at 3-4.

#### **Agency Response to the Motion to Supplement**

The Agency objects to the first two documents being included in the record because the documents were not before the Agency at the time the permitting decision was made on March 31, 2006. Agency Response at 2-3. The Agency does not object to the inclusion of the documents dated prior to March 31, 2006. *Id.* at 4.

#### **U.S. Steel Response to the Motion to Supplement**

U.S. Steel objects to supplementing the record with any of the documents attached to the motion to supplement because they were not before the Agency for its issuance of the permit. U.S. Steel Response at 1. U.S. Steel adopts the reasoning of the Agency in opposition to supplementing the record with documents dated April 5, 2006 and April 10, 2006. *Id.*

#### **Discussion**

The Board grants American Bottom's motion to supplement in part and denies it in part. The three documents dated prior to March 31, 2006, will be accepted as part of the record. However, the documents that post-date the date of the Agency's decision will not be accepted. The Board has long held that in permit appeals, it is limited to the record before the Agency at the time the permitting decision was made. *See, e.g., Pandhandle Eastern Pipe Line v. IEPA*, PCB 98-102 (Jan. 21, 1999). Only information the Agency relied upon while making its final decision should be included in the record. Section 40(e)(3) of the Act specifically provides that when the Board hears a third-party NPDES permit appeal, the Board must hear the petition "exclusively on the basis of the record before the Agency." 415 ILCS 5/40(e)(3)(ii) (2004). Thus, the Board denies the motion as to the documents dated April 5, 2006 and April 10, 2006, and will not accept those documents as part of the record.

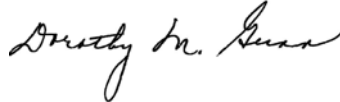
### CONCLUSION

The Board grants the motions to dismiss in part and denies them in part, and directs the hearing officer to proceed to hearing on the issue of a request for a public hearing. The Board also grants American Bottom's motion for *pro hac vice*, and accepts the Agency's amended record. Further, the Board grants American Bottom's motion to supplement the record in part and denies the motion in part, accepting only those documents that pre-date the Agency's decision of March 31, 2006.

The Board directs the parties to proceed expeditiously to hearing on the remaining issue of the request for hearing. The Board reminds the parties that Section 40(e)(3) of the Act places the burden of proof on the petitioner. *See* 415 ILCS 5/40(e)(3) (2004). As the petitioner, American Bottom bears the burden of proving that the permit, as issued, would violate the Act or Board regulations. *See Prairie Rivers Network v. PCB*, 335 Ill. App. 3d 391, 400-01, 781 N.E.2d 372, 378-80 (4th Dist. 2002) (affirming the Board's decision on, among other things, the third-party NPDES permit appeal petitioner's burden of proof). Hearings "will be based exclusively on the record before the Agency at the time the permit or decision was issued." 35 Ill. Adm. Code 105.214(a); *see also* 415 ILCS 5/40(e)(3)(ii) (2004).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 21, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board