BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

AMERICAN BOTTOM CONSERVANCY,	)
	)
Petitioner,	) PCB 2006-171
	) (3rd Party NPDES Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES STEEL CORPORATION - GRANITE CITY WORKS	)
	)
Respondents.	)

NOTICE OF FILING

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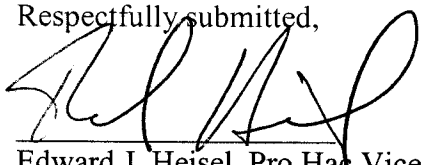
PLEASE TAKE NOTICE that on December 8, 2006, there was filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of **Petitioner's Post-Hearing Brief**.

Respectfully submitted,



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

PETITIONER'S POST-HEARING BRIEF

I. INTRODUCTION

This appeal challenges the Illinois Environmental Protection Agency's ("IEPA" or "Agency") denial of a public hearing for a permit authorizing a major industrial discharge into a lake located within a state park that is visited by hundreds of thousands of people each year. Despite the heavy use of the lake, and the fact that several organizations requested a public hearing and identified serious concerns with the draft permit, IEPA apparently found (although it never provided an explanation to Petitioner) that there was not a "significant degree of public interest" in the permit. IEPA thus issued a permit, which allows United States Steel Corporation (U.S. Steel) to dump literally hundred of tons of pollution into Horseshoe Lake each year, without first offering a public hearing or otherwise addressing the concerns raised in comment letters.

The Board's regulations state that IEPA "shall" hold a public hearing whenever there exists a "significant degree of public interest in the proposed permit" and create a presumption in favor of such hearings by also requiring IEPA to hold hearings in

"instances of doubt." IEPA's denial of a public hearing for the U.S. Steel permit is not supported by substantial evidence in the record and should be overturned by the Board.

II. FACTUAL BACKGROUND

On December 19, 2004, IEPA put on public notice a proposed NPDES permit for U.S. Steel's Granite City Works. (AR 518-28).[1] According to the notice, U.S. Steel's plant is a major point source discharger that dumps twenty-five million gallons per day of wastewater into Horseshoe Lake (AR 518), a lake which has no outflow during dry periods. (AR 312). The draft permit attached to the public notice (AR 524-28) and the final permit that was issued some fourteen months later (AR 651-57) both allowed for hundreds of tons of pollutants to be discharged into the Lake each year.[2]

During the thirty-day comment period that ran from December 19, 2004, through January 18, 2005, five organizations submitted written comments. One of the letters was submitted by the organization Health & Environmental Justice-St. Louis (AR 532) and the other was jointly submitted by five organizations, including the American Bottom Conservancy, Sierra Club, Webster Groves Nature Study Society, Health & Environmental Justice-St. Louis, and the Neighborhood Law Office. (AR 537-39). Both comment letters requested a public hearing, asked for an extension of the comment period, and raised numerous concerns about the draft permit. Specifically, the letters cited "discharges of toxic heavy metals known to accumulate in biological organisms," the fact that Horseshoe Lake is already considered "impaired" by several pollutants, that

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[1] The designation "AR" refers to the administrative record for this appeal. The designation "Tr." refers to the transcript of the Board hearing that took place in this appeal on November 20, 2006.

[2] There were only two changes made to the final permit, both of which were in response to comments submitted by U.S. Steel. (AR 635).

academic studies had shown high levels of metals in the Lake's sediment, and that the U.S. Steel facility has a history of non-compliance. The letters also pointed out that the Lake is used heavily for recreation, including for birdwatching, hunting, and fishing, and that many people consume fish from the Lake, some for subsistence purposes.

There was no apparent action by IEPA on the permit for nearly ten months after the organizations submitted their comments. The American Bottom Conservancy (ABC) took this opportunity to engage the Washington University Interdisciplinary Environmental Clinic (IEC) to conduct a further review of the draft permit. The IEC thereafter submitted comment letters on October 3, 2005, and December 9, 2005, on behalf of ABC. (AR 607-09, 611-23). These letters reiterated the request for a public hearing and identified in a greater level of detail numerous concerns with the draft permit, including that it would allow U.S. Steel to discharge pollutants for which the Lake was already impaired, that the effluent limit for cyanide was double that recommended by IEPA's own permit writer, and that the permit would allow an unlawfully high level of ammonia in the discharge. (AR 611-23).

IEPA initially issued the permit to U.S. Steel on March 8, 2006, more than a year after the public comment period had closed. (AR 635-43). Despite this lengthy period of time, IEPA failed to respond to the comments prior to issuing the permit – an oversight that the Agency acknowledged was inconsistent with applicable regulations after ABC inquired – and it subsequently reissued the permit on March 31, 2006. (AR 648, 651-57). IEPA did not amend the draft permit in any respect in response to the public comment letters, nor did it ever provide an explanation to the commentors as to why it decided not to hold a public hearing. (AR 649-50).

On May 8, 2006, ABC filed its Petition for Review, which sought the Board's review of various effluent limits in the permit and of IEPA's decision to forego a public hearing. By Order dated September 21, 2006, the Board dismissed ABC's claims challenging the effluent limits because the claims were not based on comments submitted during the initial thirty-day comment period. The Board's Order, however, stated that ABC's Petition had "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." A Board hearing was thus held on November 20, 2006, at which testimony was heard on the issue of whether IEPA's decision not to hold a public hearing complied with the Board's regulations.

III. APPLICABLE REGULATIONS AND STANDARD OF REVIEW

The Board's regulations set forth the standard governing IEPA's determination on whether to hold a public hearing on an NPDES permit:

> The Agency shall hold a public hearing on the issuance or denial of an 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. Admin. Code § 309.115(a)(1) (2005) (emphasis added).

The presumption in the Board's regulation favoring public hearings tracks the requirements of the federal Clean Water Act. The U.S. Supreme Court has noted that, although a public hearing is not required when a party does not request one, public 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, at 72 (1971)). Moreover, at least one other state's environmental review board, in overturning an agency's denial of a public hearing request, has noted the importance of being responsive to the public interest. *See Queen v. Div. of Environmental Protection*, Appeal No. 621, 1996 WL 738740 (W. Va. Envtl. Quality Bd. Aug. 13, 1996) (holding that the state agency improperly denied a request for a public hearing on an NPDES permit) (copy attached).

IEPA's decision to issue the permit without a public hearing must be "'supportable by substantial evidence.'" *Des Plaines River Watershed Alliance v. Illinois EPA*, PCB 04-88, 2005 WL 3270426, at *15 (IPCB Nov. 17, 2005) (*quoting Prairie Rivers Network v. IEPA and Black Beauty Coal Co.*, 2001 WL 950017, PCB 01-112, at *7 (IPCB Aug. 9, 2001)). The substantial evidence standard requires "more than a mere scintilla" of evidence and demands "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Finnerty v. Personnel Bd. of the City of Chicago*, 303 Ill. App. 3d 1, 11, 70 N.E.2d 600, 608 (Ill. App. 1st Dist. 1999) (*quoting Richardson v. Perales*, 402 U.S. 389, 401 (1971)). The substantial evidence standard is "not nearly" as deferential to an agency's decision as the "manifest weight of the evidence" standard. *Id.* at 11-12.

IV. ARGUMENT

A public hearing was required for the U.S. Steel permit because there was clearly a significant degree of public interest in the permit. Comment letters from organizations representing thousands of members cited heavy public use of Horseshoe Lake and raised serious concerns about the draft permit. IEPA's decision to forego a public hearing is not supported by substantial evidence and the permit should, therefore, be remanded to the

Agency with instructions to hold a public hearing and modify the permit as warranted by the information that is gathered.

A. There Was a Significant Degree of Public Interest in the U.S. Steel Permit.

1. Horseshoe Lake is Used Heavily by the Public.

It is hard to imagine a permit more deserving of a public hearing than one for a major industrial discharge into an impaired lake, located within a popular state park, where people fish and eat their catch. (AR 532, 537). That is the exact situation here. Horseshoe Lake is located within a state park that is used heavily for birdwatching, fishing, hunting, and other forms of outdoor recreation. (AR 532, 537-39). IDNR's website touts the fishing opportunities at Horseshoe Lake for species such as "channel catfish, bass, crappie, bluegill, carp, and buffalo." (AR 532).

At the hearing on this appeal, representatives of organizations that submitted comment letters offered testimony that elaborated upon the issues raised in the letters. A summary of that testimony is provided below.

Kathy Andria is President of ABC and primary author of the organizations' joint comment letter. (Tr. 25:1-3; 29:10-13). Ms. Andria stated that she uses the Lake about once per week for birdwatching and other outdoor recreation. (Tr. 25:11-24). She testified that Horseshoe Lake is a "spectacular" place to birdwatch and that some birds found at the Lake are considered endangered. (Tr. 26:3-12). Ms. Andria also stated that she has observed large numbers of people at the Lake engaged in fishing, picnicking, running and biking. (Tr. 26:18-24). On some days there may be 1,000 or more people at the Lake, and total attendance at the state park in 2005 was 358,000. (Tr. 49:20-50:5). She also explained the basis of her written comments about consumption of fish from the

Lake, noting that she sees people with fish on stringers or in coolers (Tr. 50:6-51:15) and has seen people eat fish from the Lake. (Tr. 65:21-24). In light of all of this public use, Ms. Andria testified that she believes members of the public are concerned about Horseshoe Lake and would have attended a public hearing on the U.S. Steel permit. (Tr. 57:16-20; 58:9-18; 61:10-17).

Yvonne Homeyer was President and Conservation Chair of the Webster Groves Nature Study Society (WGNSS) at the time the joint comment letter was submitted (Tr. 109:15-18; 110:12-20). She testified about her use of the Lake (Tr. 112:21-113:5), as well as its use by other WGNSS members. She testified that WGNSS members visit the Lake "almost daily" because it is considered "one of the most outstanding areas in the St. Louis area for birds." (Tr. 111:14-22). *See also* Tr. 115:9-16. More bird species have been seen at Horseshoe Lake than at any other place in the St. Louis region, 308 species in total. (Tr. 113:12-114:3). WGNSS members use the Lake both as individuals and as participants in WGNSS-sponsored outings. (Tr. 111:14-22). There are three weekly birdwatching group outings led by WGNSS members that collectively visit the Lake on a regular basis. (Tr. 112:6-20). Two members of WGNSS maintain an official list of "all the bird species that have been seen at the Lake". (Tr. 113:8-11). In addition to birdwatching, WGNSS members use the Lake and surrounding state park to observe butterflies. (111:23-112:5; 114:19-115:8).

Representatives of both the Sierra Club and Health & Environmental Justice-St. Louis also testified at the hearing. Christine Favilla is on staff with the Illinois Chapter of the Sierra Club. (Tr. 130:14-15). In this capacity, she has organized cleanups at Horseshoe Lake to remove debris that washes in from surrounding areas. The cleanups

are held on an annual or semi-annual basis and attract approximately thirty participants. (Tr. 125:16-126:23). Kathleen Logan Smith also offered brief testimony about Health & Environmental Justice's comment on the Permit. (Tr. 144:5-24).

In addition to these formal witnesses, three members of the public provided oral comments at the hearing. Robert Johnson is an environmental consultant from Collinsville who has worked for a duck club that owns Canteen Lake, which adjoins Horseshoe Lake. He indicated that members of the duck club would be interested in participating in a public hearing on the U.S. Steel permit. Mr. Johnson also testified that he regularly uses Horseshoe Lake and would be interested in such a public hearing himself. (Tr. 101:17-107:9). Cathy Copley is a resident of Madison County who uses Horseshoe Lake. She testified that she supports holding a public hearing now that she knows the Lake is used as a discharge point for U.S. Steel's waste. (Tr. 107:17-108:12). Finally, Jason Warner, a Sierra Club volunteer and a user of the trails around Horseshoe Lake, offered comments on behalf of the Sierra Club about the importance of public participation in the permitting process. (Tr. 140:21-143:12).

2. The Organizations that Submitted Written Comment Letters Have a Sincere Interest in the Health of Horseshoe Lake and Collectively Represent Thousands of Members.

The organizations that submitted comment letters requesting a public hearing have a concrete interest in the health of Horseshoe Lake and collectively represent thousands of members. (AR 537-39). The organizations signing on to the joint letter included the American Bottom Conservancy, Sierra Club, Webster Groves Nature Study Society, Health & Environmental Justice-St. Louis, and the Neighborhood Law Office.

Health & Environmental Justice-St. Louis also submitted a comment letter of its own. (AR 532).

ABC is an organization that works to protect the natural and cultural resources of the American Bottom, which is that part of the Mississippi River floodplain that extends from just below Alton, Illinois, south to the Kaskaskia River. (Tr. 23:17-24:1; 24:13-18). ABC monitors and participates in government decisions that might affect the American Bottom, including decisions of IEPA, IDNR, and local entities. (Tr. 24:2-12). It also works with neighborhood organizations to address local issues. (Tr. 24:8-9). ABC has approximately 100 members. (Tr. 24:22-24).

WGNSS has over 400 members and has been in existence since 1920. (Tr. 110:3-11). It is primarily an organization dedicated to nature study, but it gets involved in permitting actions that impact wildlife habitat. (Tr. 110:24-111:4). Its members regularly use the Lake and surrounding state park as described above. Its Conservation Chair, Yvonne Homeyer, testified that the organization has an interest in U.S. Steel's permit because any discharge that affects wildlife would affect the activities of WGNSS's members. (Tr. 116:2-17). Based on these interests, Ms. Homeyer testified that WGNSS members would have attended a public hearing on the U.S. Steel permit had there been one. (Tr. 116:18-21).

The Sierra Club, which has 26,000 members in Illinois and 650 members in the area around Horseshoe Lake, was also a signatory to the joint comment letter. (AR 539; Tr. 126:24-127:3). The Sierra Club engages in cleanups at Horseshoe Lake and has an interest in its overall health. Health & Environmental Justice, an organization that has approximately 500 members and works on environmental justice issues in the St. Louis

metropolitan region, also signed on to the joint comment letter and submitted a comment letter of its own. (AR 532; Tr. 144:9-24).

Collectively, these organizations represent thousands of members. The organizations chose to express their interest in the U.S. Steel permit by submitting group comment letters rather than asking their members to send in numerous individual comments. A public hearing would have allowed the organizations' members to provide IEPA information about Horseshoe Lake and to ask questions about the terms of the permit.

B. The Comment Letters Raised Significant Concerns About the Draft Permit, Which IEPA Made Little Effort to Address.

The need for a public hearing is demonstrated further by the significant issues raised in the public comment letters, which IEPA almost completely failed to investigate before issuing the permit. The joint comment letter raised at least two issues that could have – one of which definitely should have – affected the terms of the Permit. First, the letter pointed out that a Southern Illinois University at Edwardsville (SIUE) professor had conducted studies of the bottom sediment in Horseshoe Lake and had found high levels of heavy metals, including zinc and lead. IEPA's permit writer noted in her records that obtaining a copy of these studies would be "beneficial," yet the Agency never even took that meager step. Second, the letter brought to IEPA's attention reports of fish being caught from Horseshoe Lake with melanoma. Again, the Agency noted that "[m]ore information is needed," but it never took any action to determine whether pollution might be causing diseased fish in the Lake.

1. IEPA Failed to Address Concerns Raised in the Comment Letters About Heavy Metal Contamination of Horseshoe Lake Sediments.

The January 18, 2005 joint comment letter pointed out to IEPA that Professor Richard Brugam at SIUE had studied the bottom sediments at Horseshoe Lake. (AR 537). The letter indicated that the studies had been obtained only recently and had not been reviewed thoroughly by the commentors. (AR 539). Copies of the studies were not submitted, but the letter suggested that IEPA hold a public hearing to address this issue. *Id.* The comment letters also raised a concern about heavy metals in the U.S. Steel discharge (AR 532, 537) and mentioned that Horseshoe Lake was already impaired for a number of pollutants.[3] (AR 537).

Despite the fact that the joint comment letter raised this concern, IEPA took virtually no action to investigate whether U.S. Steel's discharge was contributing to the contamination of bottom sediments. The IEPA permit writer's notes state: "A copy of the SIU-E study would be beneficial to determine its relevance in this matter." (AR 603). Further, the notes state: "The commentors did not provide a copy of the study, and thus it is not possible to know the nature of the study." (AR 604).

Although IEPA did not visit a library to obtain the study, nor apparently pick up a phone and talk with Professor Brugam, it did download an abstract of the study from the Internet. (AR 604). That abstract only served to highlight the relevance of the issue and should have spurred further inquiry by IEPA. The abstract, which is in the record, states: "A record of metal contamination exists in the sediment of Horseshoe Lake . . . . Lead, cadmium and zinc concentrations increased in the sediment after the 1940's. This

[3] The IEPA public notice erroneously omitted zinc from the list of pollutants causing impairment. (AR 519). Zinc was identified on both the 2004 and 2006 303(d) lists as a potential cause of impairment.

increase in heavy metals is probably related either to increased input to the lake from local industrial activities or the use of lead shot by local waterfowl hunters."[4] (AR 604-05).

IEPA's failure to investigate the contamination of Horseshoe Lake sediments is troubling because U.S. Steel discharges significant quantities of two of the pollutants – zinc and lead – identified in the abstract of the SIUE study. The load limits in the permit allow U.S. Steel to discharge up to 4,380 pounds of zinc and 2,044 pounds of lead into the Lake each year.[5] (AR 652).

Moreover, the record indicates that the IEPA permit writer was unaware that the Agency in 2004 listed Horseshoe Lake as "impaired" due to high levels of zinc in its sediment. The permit writer's notes as late as May 2005 state that "Horseshoe Lake is not impaired for Lead or heavy metals" (AR 601) even though zinc is identified as a pollutant of concern on both the 2004 and 2006 Illinois 303(d) lists. The permit writer also appears to have been under the misimpression that "industrial sources" had been ruled out as a source of impairments at Horseshoe Lake. To the contrary, the abstract of the SIUE study indicates that industrial sources are a probable source of metals in the sediment (AR 604-05), and the 2006 303(d) list has now identified industrial sources as a possible cause of the impairment for zinc. (Tr. 38:8-11).

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[4] Unfortunately, complete copies of the SIUE studies were never obtained by IEPA and therefore are not included in the record. At the hearing, U.S. Steel attempted to inject one passage from one of the studies that identifies a closed lead smelter as the likely "major source" of the lead in the Lake. (Tr. 77:21-83:1). This was a clear attempt to distort the record. Nevertheless, the cited passage does not address U.S. Steel's plant as being a possible contributor to the lead contamination, nor does it say anything about where the zinc is coming from.

[5] These figures are calculated using the permit's 30-day average for the daily load limit. (AR 652). For zinc, 12 pounds per day X 365 days = 4,380 pounds per year. For lead, 5.6 pounds per day X 365 days = 2,044 pounds per year.

Ultimately, IEPA neither investigated this issue nor wrote a permit that prevents additional contamination of the sediments with heavy metals. There is no indication in the record that IEPA considered whether U.S. Steel's discharge is causing or contributing to the contamination of Horseshoe Lake sediments by zinc and lead. In fact, instead of tightening permit limits to prevent additional contamination of Horseshoe Lake sediments, IEPA issued a permit that has weaker than usual limits for zinc. U.S. Steel has for years operated under what is known as the "central treatment exemption" that allows it to discharge more zinc into Horseshoe Lake than would otherwise be permitted by federal effluent guidelines. (AR 375-377, 477). The Granite City facility is apparently the only one in the country to continue to make use of this exemption, which was first granted to some steel mills in the early 1980s. (AR 627). IEPA used the exemption to intentionally set zinc load limits in the Permit at a level slightly *higher than the highest actual zinc discharges* at the plant in recent years (i.e., the Permit basically has no regulatory effect). (AR 375-377, 477). Moreover, IEPA has impermissibly granted U.S. Steel so-called "background credits" for zinc, which allow it to subtract the amount of zinc in its intake water from the Mississippi River when determining whether it is meeting the load limits in its Permit.[6] (AR 521, 654 (Special Condition 6)).

[6] Federal and state regulations prohibit use of background credits where pollution is drawn from one body of water and put into another, such as the situation at the U.S. Steel plant where water is drawn from the Mississippi River and dumped into Horseshoe Lake. Federal regulations explicitly prohibit the use of background credits when intake water is drawn from a body of water different from the receiving water. 40 C.F.R. § 122.45(g)(4) (2005). Illinois regulations evidence a similar intent, stating that permitees are not usually required to clean up pollution from "upstream" sources. 35 Ill. Admin. Code § 304.103 (2005). As the Mississippi River is not "upstream" of Horseshoe Lake (they are distinct bodies of water), the state regulation also does not sanction the use of background credits in the U.S. Steel permit.

The unanswered questions relating to contaminated sediments show that substantial issues were raised in the joint comment letter that should have been investigated by IEPA through a public hearing. IEPA has a legal duty to ensure that NPDES permits comply with both numeric and narrative water quality standards. 35 Ill. Admin. Code § 309.143(a) (2005). Although Illinois has no numeric criteria for heavy metals in sediment, the narrative criteria prohibit "bottom deposits" that are of "other than natural origin." 35 Ill. Admin. Code § 302.203 (2005). IEPA did nothing to ensure that U.S. Steel's discharge is not causing or contributing to high levels of heavy metals in the bottom of Horseshoe Lake, despite substantial indications that a problem exists. Contrary to what IEPA and U.S. Steel are likely to argue, this clearly was a concern relating to the *permit* and not a general grievance that must be addressed in other forums.[7] Moreover, it was a concern that IEPA could have gathered information about if it had held a public hearing.

2. IEPA Failed to Address Questions Raised in the Joint Comment Letter About Diseased Fish Being Caught in Horseshoe Lake.

The joint comment letter also raised a concern about fish with melanoma being caught in Horseshoe Lake. (AR 537). Again, the IEPA permit writer suggests that the Agency should investigate this issue, stating:

> More information is needed on the fish with melanoma issue-was this reported as part of an IDNR study, or did one fish appear with melanoma, and was confirmed by an IDNR fish biologist?

[7] Statements at the hearing indicate that U.S. Steel will likely argue in its brief that limits in the Permit for zinc and lead comply with criteria for the *water column* and that IEPA need not worry about whether the plant is contaminating the Lake's *sediment*. This argument clearly ignores the requirement that permits ensure compliance with narrative criteria that guard against contamination of bottom sediments. 35 Ill. Admin. Code §§ 302.203, 309.143(a) (2005). Moreover, the central treatment exemption referred to above does not obviate the requirement that permits comply with water quality standards. (AR 626-27) (indicating that the exemption applies in the context of technology-based effluent limits, not water quality-based effluent limits).

(AR 603). IEPA did not follow up on this question.

The health of resident fish populations is of heightened importance due to the fact that many people consume fish from Horseshoe Lake, some for subsistence purposes, and that the Lake is already impaired by numerous pollutants. (AR 532, 537; Tr. 50:8-51:20). IEPA, however, may have doubted whether people eat fish from Horseshoe Lake (AR 561), despite the fact that its sister agency IDNR publicizes fishing opportunities on its website. (AR 532). IEPA could have found out more about public uses of the Lake like fishing if it had held a public hearing on the permit.

Moreover, the record shows that U.S. Steel's effluent has failed chronic toxicity tests in the past. (AR 158, 168). Early drafts of the U.S. Steel permit contained chronic toxicity testing requirements (AR 396), perhaps in light of the earlier indications of a problem, but the final permit eliminated this requirement. (AR 651-57). The permit writer noted that this removal of human health and chronic toxicity requirements from the final permit "significantly reduces the burden of toxicity testing". (AR 478-79). The removal of this testing requirement also runs counter to concerns raised in the comment letters about the U.S. Steel facility's history of non-compliance with its permit. (AR 537-39).

IEPA never followed up with ABC or anyone else to investigate the seriousness of fish diseases at Horseshoe Lake nor to determine the extent to which people eat the fish from the Lake and how much fish is consumed by those fishing for subsistence

purposes. (Tr. 39:19-21). These are exactly the types of issues that could have generated important information through a public hearing.[8]

C. IEPA Failed to Offer Any Contemporaneous Explanation for Its Decision Not to Hold a Public Hearing and Appears to Have Misinterpreted the Board's Regulation on Public Hearings.

There was ample time in which to hold a public hearing had IEPA any interest in doing so. Nearly fourteen months passed from the time of the public comment period until IEPA first issued the permit on March 8, 2006. (AR 518, 637). Another three weeks passed by the time the permit was reissued on March 31. (AR 648). Nevertheless, IEPA did not hold a public hearing and offered little more than a cursory response to the written comments, which gave no explanation whatsoever for why the Agency had apparently decided not to hold a public hearing. (AR 646-47, 649-50). In fact, even though the joint comment letter and the letter submitted solely by Health & Environmental Justice raised different issues, the IEPA responses were identical, indicating that little attention had actually been paid to the contents of the comment letters. (AR 646-47, 649-50).

IEPA's failure to provide an explanation for its decision not to hold a public hearing violates administrative law principles requiring agencies to offer a rationale for their decisions. The Illinois Court of Appeals has stated, "[A]n administrative agency is

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[8] There were numerous other concerns with the proposed permit raised in ABC's subsequent comment letters and the Petition for Review that could have been addressed at a public hearing. For example, IEPA staff recommended a monthly average effluent limit for WAD cyanide of 0.0052 mg/L (AR 475-76), whereas the limit in the final permit is 0.01 mg/L, nearly double the recommended value. (AR 652). Curiously, the permit writer's notes acknowledge that the actual amount of cyanide in U.S. Steel's discharge in recent years is higher than the recommended limit of 0.0052 mg/L. (AR 475). In addition, U.S. Steel was granted a higher ammonia limit for the month of March. Similar to the situation with cyanide, the ammonia limit for March was weakened only after U.S. Steel indicated that its discharge would violate the limit in an early draft of the permit that was shared with the company. (AR 507).

required to examine relevant facts and articulate a sufficient explanation for its action. . . . There must be a rational connection between the facts considered and the decision made." *Lewis v. Hayes*, 152 Ill. App. 3d 1020, 1024, 505 N.E.2d 408, 411 (Ill. App. 3rd Dist. 1987). In the absence of any stated Agency rationale, effective review by the Board is hindered severely as it is difficult if not impossible to determine whether the Agency's decision was carefully reasoned and based on the evidence.

It is also 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 rationales offered by counsel. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (stating that a "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 Mfr's Assn v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."). The Board should thus disregard any post-hoc rationales offered by respondents' counsel in their post-hearing briefs.

Moreover, IEPA's failure to offer an explanation for its decision leaves room for doubt about its application of the correct legal standard in determining whether to hold a public hearing. This doubt is exacerbated by the fact that IEPA badly misconstrued the standard for a public hearing in the public notice for the permit. The notice states: "If written comments or requests indicate a significant degree of public interest in the draft permit, the permitting authority may, at its discretion, hold a public hearing." (AR 518, 522). IEPA's discretion under the Board's regulation is not nearly so unfettered. The

regulation actually states that IEPA "shall" hold a public hearing if it finds a significant degree of public interest, not that it "may." This clearly erroneous legal interpretation should be reviewed de novo by the Board. *City of Kankakee v. County of Kankakee*, PCB No. 03-125, 2003 Ill. Env. LEXIS 462, at *34-35 (IPCB Aug. 7, 2003).

D. Other Forums Cannot Substitute for a Public Hearing on the Permit.

Respondents appear to now argue that the commentors had other forums in which to raise their concerns and that these other forums were an adequate substitute for a public hearing on the permit. For example, at the Board hearing, counsel for U.S. Steel questioned Ms. Andria at length about whether she could have raised her concerns at a meeting on a draft TMDL for Horseshoe Lake and other waterbodies that occurred three months *after* the permit was issued. (Tr. 84:8-86:15). They also asked Ms. Andria why she declined a private meeting with IEPA in Springfield that the Agency attempted to schedule for March 15, 2006, which would also have been *after* IEPA first issued the permit on March 8. (Tr. 98:7-13). *See also* AR 633 and emails attached to ABC's Motion to Supplement (filed July 14, 2006). IEPA has already acknowledged that this planned meeting in March 2006 was not to discuss the U.S. Steel permit and therefore could not have been a substitute for a public hearing. (IEPA Motion to Dismiss, ¶ 17 (filed July 18, 2006)). Clearly, a public meeting on a different subject that took place after the permit was issued could not substitute for a public hearing on the NPDES permit, nor could a private meeting with Agency officials on a different subject held nearly 100 miles from Horseshoe Lake.

V. CONCLUSION

IEPA's decision to forego a public hearing on the U.S. Steel permit is not supported by substantial evidence in the record, nor was any rationale provided to those who requested a hearing. The written comments demonstrated that a significant degree of public interest existed in the U.S. Steel permit. Five organizations with collective memberships in the tens of thousands requested a hearing and presented evidence of heavy public use of Horseshoe Lake and raised serious concerns about the draft permit. The permit itself is flawed as it does not account for the already contaminated status of the Lake's sediment and allows for excess amounts of cyanide and ammonia to be discharged. At a minimum, the circumstances of this case constitute an "instance of doubt," a situation under which the IEPA *shall* hold a public hearing. IEPA not only failed to hold a public hearing, but expended little effort to investigate on its own the serious concerns that were raised. As a result, the public was, in effect, excluded from any meaningful participation in the permitting process, and the permit that was issued fails to adequately protect Horseshoe Lake.

For the foregoing reasons, ABC respectfully requests that the Board remand the U.S. Steel permit to IEPA with instructions to hold a public hearing and make any changes to the permit that are warranted by the information obtained.

Respectfully submitted,

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Environmental Quality Board
State of West Virginia

***1** MICHAEL L. QUEEN, APPELLANT
v.
DEPUTY DIRECTOR MARK A. SCOTT, DIVISION OF ENVIRONMENTAL PROTECTION, APPELLEE
Appeal No. 621
August 13, 1996

FINAL ORDER

This case is before the Environmental Quality Board (the Board) on an appeal by Michael L. Queen of a denial of a public hearing on NPDES Permit Modification No. WV007595 issued by the Office of Water Resources to Monongahela Power Company. The Board heard this appeal on March 15, 1996 before two members of the Board. The parties agreed to waive the requirement of a quorum of the Board if an additional member of the Board read the transcript before participating in the final decision.

On the date of the hearing, the Board determined that an authorized court reporter was present, and proper notice was duly served on all parties and timely filed with the Secretary of State. Public notice of the hearing was published in Volume XIII, Issue 7 of the West Virginia Register on February 16, 1996. The Appellant represented himself. Scott D. Goldman and Matthew B. Crum, Office of Legal Services of the Division of Environmental Protection, represented the Appellee.

The Board, having carefully reviewed the certified file, relevant law and regulations, the Notices of Appeal, all written filings and memoranda, the testimony of the witnesses, all exhibits and arguments by counsel and being duly advised in the premises, hereby

ORDERS that a public hearing be held on NPDES Permit Modification No. WV007595.

BASIS OF DECISION

Prior to the issuance of NPDES Permit Modification No. WV007595, the Office of Water Resources published a Notice that a draft modified permit was issued on an application by Monongahela Power Company in Fairmont, West Virginia. The Notice stated that any interested person could comment on the draft permit. Also in the Notice was the statement that comments on the draft permit should include the name, address and phone number of the writer along with a "concise statement of the nature of the issues raised." A separate statement concerning public hearings states that "a public hearing may be held if the Chief considers a significant degree of public interest on the issues relevant to the draft permit." The Notice does not explain how to make a request for a public hearing that would actually be "considered" by the agency in its determination about a public hearing. It is not clear what a person who wants a public hearing must do to succeed in getting one.

If a request must include a "concise statement of the nature of issues requiring a hearing," the Appellee should tell the public of this requirement. Apparently, the Appellee has certain criteria it uses to decide whether to hold a public hearing. However, they have failed to inform the public of that criteria. Therefore, the public is left to guess how to proceed.

Besides the problem of providing no guidance to the public, the other major problem with the Notice is that it incorrectly translates the rule which governs public hearings. The rule, 47 C.S.R. 10-12.3, states:

***2** The Chief shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest on issues relevant to the draft permit. The Chief also may hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one (1) or more issues involved in the permit decision.

(Emphasis added.) It is not clear from the Notice that requests for public hearings must include a statement concerning an issue that relates to water quality or that is otherwise addressable in the permit.

The Notice states that: "[a] public hearing may be held if the Chief considers a significant degree of public interest on issues relevant to the draft permit." (Emphasis added.) It does not provide any guidance to the public as to what action they should take if they want a public hearing. Reading this sentence literally, one could conclude that if the Chief does not consider any of the public interest, she will not hold a public hearing. That would make public involvement meaningless. This is probably not what the agency intends. If the Notice focussed upon what the public must do and the evaluation process that the agency (Chief) conducts, the message would be much clearer.

When evaluating the requests for a public hearing, the Appellee must remember that the public has varying degrees of expertise which may or may not include a background in engineering, chemistry, biology, wildlife, hydrology and the many other scientific and technical fields. The Appellee should strive not to read the requests so narrowly that it would be impossible for the average citizen, who does not have a technical degree, to receive a public hearing. The Chief should be sensitive to the public's concerns and interests even though they may lack technical expertise.

Some requests that the agency received on this permit did address water quality issues. For instance, ten (10) letters referred to the fact that the discharge stream was a tributary to the West Fork River which serves as the primary water source for several communities. This is a water quality issue that is addressable and must be considered in writing a permit.

A letter from the Harrison County E.C.O. organization requested a public hearing. They said that they were "engaged in a dialog" with the permittee on "many of the NPDES related issues." The E.C.O. group seemed concerned that the permit might conflict with some issues they had negotiated with the permittee. While the group did not detail which "NPDES related issues" concerned them, their request was pertinent. The Appellee should also take the fact that the letter represented an organization

into account. The letter should probably receive more weight than a single letter from an individual. If the agency feels that it cannot "weigh" requests from organizations differently than requests from individuals, the public and organizations deserve to know this. Organization members could submit requests to the agency individually.

***3** In all, the Appellee received about fifty-seven requests for a public meeting. Thirty-five of these were on a petition which "fell through the cracks" according to the public information officer. Organizations made two of these requests - E.C.O. and the Shinnston Woman's Club. Thus, while only two letters appear in the file for these groups, the organizations behind the letters may represent the interests of dozens of citizens. The Appellee should consider this.

The Board believes that large numbers of signatures alone do not necessarily meet the threshold by which the Chief must hold a public hearing. However, when there are large numbers of requests for a public hearing, the Chief should be cognizant that there may be a real need for a hearing. While the Board does note the problems agencies encounter when flooded with petitions, there is a public perception that these documents are meaningful to agencies. If the Appellee is not going to place much weight or emphasis on requests made by petition, they should strive to let the public know this. Perhaps the Appellee could make sure that the public information office and environmental advocate are aware of the policy and they can inform the public. Also, it may be possible to get the message across in the Public Notice that is published Alternatively, the Appellee could consider petitions on equal footing with individual letters. If there is a reasoned, consistent approach, of which the public is made aware, the Appellee's eventual decision about holding a public hearing will be much more supportable.

In the present case, there was a significant degree of public interest. While some requests did not specify issues that were addressable in the permit, enough did address such issues. One letter that addressed relevant issues was E.C.O. request. Since it represented an organization, it may have deserved more weight than just being counted as a single request. Furthermore, the Notice itself was inaccurate and failed to state that a request for a public hearing must include a statement of an issue relevant to the draft permit. Denying a public hearing because requests failed to identify an issue addressable in the permit was not a supportable decision.

It was commendable that the Appellee held a "public meeting." However, no provision allows for an off-the-record meeting to substitute for a "public hearing." The public hearing process has some beneficial aspects or else it would never be requested nor required. Although the Appellee believes that public meetings are more beneficial than public hearings, there is no statute or rule that makes this a fact. While this is beyond the scope of this appeal, perhaps the format of public hearings could be restyled so that some dialog between agency and public can occur. Perhaps the two formats can be blended so that the public can receive the benefits of both.

RULINGS ON PROPOSED FINDINGS OF FACT

After due consideration of each and every Finding of Fact proposed by the Appellee (the Appellant did not submit any proposed Findings of Fact), the Board hereby rejects, accepts, incorporates, or modifies each such proposed Finding of Fact and adopts its own Findings of Fact as set forth below:

FINDINGS OF FACT

***4** 1. On May 24, 1995, the Appellee issued a draft modified permit for the Monongahela Power Company - Waste/NPDES Water Pollution Control Permit No. WV0075795.

2. A Public Notice of the permit was published twice from May 25, 1995 through June 1, 1995. The Notice stated that people could submit written comments on the draft permit and could request a public hearing.

3. The notice mentioned that the public may submit comments on the draft permit. The notice then stated that "[c]orresondence should include the name, address and the telephone number of the writer and a concise statement of the nature of the issues raised." Next, the Notice addressed public hearings. This sentence incorrectly restated the rule pertaining to public hearings.

4. The Notice does not give the public any guidance as to what they must do to receive a public hearing.

5. OWR received ten copies of a form letter individually signed and each requesting a public hearing to discuss the permit. Among other things the letter states that "[w]ater released from the Harrison Power landfill is discharged into the Piggott's Run tributary of the West Fork River. West Fork is the primary water source for the city of Shinnston and northern Harrison County as well as the entire area of Marion County." (Certified File p. 84.)

6. The Appellee received another letter signed by eight people requested a public hearing but did not state any specific issue. (Certified File p. 106)

7. Two petitions signed by a total of thirty-five (35) people, stated that they "opposed out-of-state dumping of any kind of waste in our local area" and they requested a public hearing. The Appellee received this on June 23, 1995. (Certified File p. 107.) Public Information officer Jim Waycaster stated that he was not aware of this letter until he was "going through the certified file" and that the letter was not part of their decision not to have a hearing. (Transcript p. 56.) The petitions "fell through the cracks."

8. Mark Scott testified that the agency would not have "made the decision either to hold or not to hold the hearing simply on the basis of the number of people that had signed the petition, or written in ... in the past ... people have attempted to slow up processes simply by filing a whole lot of petitions and not raising any substantive issues." (Transcript p. 76.)

9. A letter from E.C.O. requested a public hearing and stated that they had "been engaged in a dialog with Monongahela Power on many of the NPDES related issues." E.C.O. indicated that the draft NPDES permit may contradict some negotiated agreements they reached with the facility. (Certified File p.109.)

10. The Appellee received two other letters from individuals requesting a public hearing. (Certified File pp. 110, 112.)

11. The Chairman of Conservation of the Shinnston Woman's Club submitted a letter

for the club. This letter requested a hearing. (Certified File p. 111.)

***5** 12. While some of the letters and comments did not address issues that the Appellee could address in the permit, some of the letters did address water quality issues. Perhaps the water quality issues addressed in the letters were not highly technical issues nor were they described in great detail, but they did contain water quality issues that are addressable in a permit.

13. The record of requests for a public hearing shows that there was significant public interest on issues relevant to the draft permit.

14. On August 8, 1995 the Appellee wrote a letter to the Appellant. This letter included a denial of the Appellant's request for a public hearing. This letter was signed by Mr. Mark A. Scott, Deputy Director of the Division of Environmental Protection.

15. A letter from the Appellee to the Appellant on August 15, 1995 was the Appellee's response to the Appellant's "request for appeal procedures related to the agency's public hearing denial." The Appellee told the Appellant that he could appeal "via the Environmental Quality Board." (Certified File pp. 191-192.)

16. The Board recognizes that the Appellee has no authority to ban out-of-state waste from the permitted landfill solely because it is generated outside West Virginia.

17. The Appellee decided to hold a public "meeting" rather than a formal public "hearing." The rules do not allow the Appellee to substitute a "meeting" for a "hearing" when the criterion for a hearing is met.

18. A public "meeting" is not necessarily more beneficial than a public "hearing." The rules do not state that public "hearings" must be conducted such that the agency does not respond to citizens' questions and comments.

19. One reason the agency decided to hold an informal meeting was to deal with some public misinformation that was prevalent at the time. The Appellee could address this problem in a public hearing.

20. At the Board's evidentiary hearing, the Appellee's public information officer, Mr. Waycaster, described the way in which the agency determines whether to hold a hearing. He stated that they: "gather all the comments, evaluate them according to whether or not there are water quality issues involved, and how many people comment. Also, if groups are represented, if political bodies and/or politicians themselves are requesting meetings, we take all those in consideration and have a round table discussion ... having input from both the technical side and from the public information office." (Transcript at p. 40.)

21. Mr. Waycaster testified that "rarely do we hold public hearings because in many cases the issues raised, although very much at interest to the people requesting, requesting us to hold the hearing, the fact of the matter remains that the areas that they're concerned with falls outside our purview. We have no legal authority to act in those areas." (Transcript at p. 44.)

22. The permit was issued October 23, 1995 and the Appellee responded to the Appellant's comments on November 8, 1995. The Appellant submitted these comments June 20, 1995. The responses were not timely.

RULINGS ON PROPOSED CONCLUSIONS OF LAW

***6** After due consideration of each and every Conclusion of Law proposed by the Appellee (the Appellant did not submit proposed Conclusions of Law), the Board hereby rejects, accepts, incorporates, or modifies each such proposed Conclusion of Law by adoption of the Board's own Conclusions of Law as they are set forth below:

CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear and rule on this matter in accordance with West Virginia Code § 22-11-21.

2. The Board conducted this appeal and review procedures in accordance with West Virginia Code §§ 22-11-21; 22B-1 et seq.; 22B-3 et seq.; 29A-5-1, and 46 C.S.R. 4.

3. After hearing and considering all of the testimony, evidence and record in this case, the Board is required by statute to make and enter an order affirming, modifying, or vacating the order of the Chief, or to make and enter such an order as the Chief should have entered; or to make and enter an order approving or modifying the terms and conditions of any permit issued. W. Va. Code § 22B-1-7(g).

4. "The Chief shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest on issues relevant to the draft permit." 47 C.S.R. 10-12.3. (Emphasis added.) This provision is not discretionary.

5. The Chief "may hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one (1) or more issues involved in the permit decision." 47 C.S.R. 10-12.3. (Emphasis added.) This provision is discretionary.

6. The Appellee improperly denied a public hearing on this permit. Based upon the evidence of requests, there existed a significant degree of public interest on issues relevant to the draft permit.

7. There are no rules governing the format of a public hearing under these circumstances.

8. No rule or statute allows a public "meeting" to substitute for a public "hearing."

9. There is no requirement that the Chief hold a public hearing for every permit that is granted nor that a public hearing be held whenever there is a request for such.

10. The Board recognizes that the Appellee has no authority to ban out-of-state waste from the permitted landfill solely because it is generated outside West Virginia.

11. The rules require the agency to respond to comments at the same time the final permit issued. "At the time that any final permits [sic] is issued, the Chief shall issue a response to comments." 47 C.S.R. 10-12.5. The rule also details the substantive requirements of the agency's response to comments.

Dr. David E. Samuel

Vice-chair

1996 WL 738740 (W.Va.Env.Quality.Bd.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 8th day of December 2006, one copy of the foregoing was sent via electronic communication to the following:

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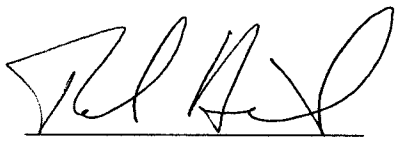

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