ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Pollution Control Board

PC#11

AMERICAN BOTTOM CONSERVANCY Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and UNITED STATES STEEL CORPORATION – GRANITE CITY WORKS, Respondents.	)	PCB 06-171 (3rd Party NPDES Permit Appeal)

NOTICE OF FILING

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board an original of the **Motion For Leave To File Post-Hearing Brief Instanter** and **Post-Hearing Brief** of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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

Dated: January 12, 2007
Illinois Environmental Protection Agency
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THIS FILING PRINTED ON RECYCLED PAPER

ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN BOTTOM CONSERVANCY	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 06-171
	)	(3rd Party NPDES
	)	Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and UNITED STATES STEEL CORPORATION – GRANITE CITY WORKS,	)	
	)	
Respondents.	)	

MOTION FOR LEAVE TO FILE AGENCY'S BRIEF INSTANTER

NOW COMES the Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") by and through its attorney, Sanjay K. Sofat, Assistant Counsel and Special Assistant Attorney General, moves the Illinois Pollution Control Board ("Illinois PCB") to allow the filing of the Agency's Post-Hearing brief in the above matter. In support thereof, the Illinois EPA states as follows:

1. In the November 22, 2006 order, the Hearing Officer Carol Webb directed that Respondents' briefs are due on December 18, 2006.

2. On December 18, 2006, the Agency filed its Post-Hearing brief via electronic mail with the Hearing Officer, American Bottom Conservancy, and United States Steel Corporation – Granite City Works. *See* Attachment I.

3. The undersigned attorney misunderstood the Hearing Officer's instructions at the Board hearing and did not file the Agency brief with the Clerk.

4. On January 11, 2007, the assigned attorney was apprised that the Agency's Post-Hearing brief is not on the Board's docket file.

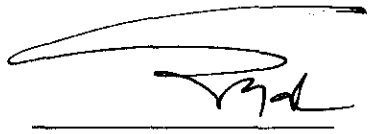
5. On January 11, 2007, the undersigned attorney contacted the attorneys for American Bottom Conservancy and United States Steel Corporation.

6. Both attorneys stated that they have no objection to the Agency's motion for leave to file Post-Hearing brief instanter.

7. No harm will result to American Bottom Conservancy or United States Steel Corporation as, via electronic mail, they have received the Agency's Post-hearing brief on the due date, December 18, 2006.

Therefore, the Illinois EPA moves the Board to allow the filing of the Agency's Post-Hearing brief instanter.

Respectfully Submitted



Sanjay K. Sofat
Assistant Counsel
Division of Legal Counsel

Dated: January 12, 2007

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Attachment I

Mail Envelope Properties (45872765.BB3 : 23 : 62072)

Subject:	Re: PCB 06-171, ABC v IEPA and USS - Post-Hearing Brief
Creation Date	12/18/2006 5:42:29 PM
From:	Sanjay Sofat
Created By:	Sanjay.Sofat@illinois.gov

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN BOTTOM CONSERVANCY Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and UNITED STATES STEEL CORPORATION – GRANITE CITY WORKS, Respondents.	)	PCB 06-171 (3rd Party NPDES Permit Appeal)

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board an original of the **Post-Hearing Brief** of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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

Dated: December 18, 2006
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN BOTTOM CONSERVANCY	)	
	)	
Petitioner,	)	
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v.	)	PCB 06-171
	)	(3rd Party NPDES
	)	Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and UNITED STATES STEEL CORPORATION – GRANITE CITY WORKS,	)	
	)	
Respondents.	)	

POST-HEARING BRIEF IN SUPPORT OF AGENCY'S RESPONSE TO PETITIONERS' THIRD-PARTY PERMIT APPEAL

NOW COMES the Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") by and through its attorney, Sanjay K. Sofat, Assistant Counsel and Special Assistant Attorney General, pursuant to the Hearing Officer Order dated November 22, 2006, hereby submits this brief in response to American Bottom Conservancy (hereinafter "ABC" or "Petitioners") third party National Pollution Discharge Elimination System ("NPDES") permit appeal.

Pursuant to Section 40(e) of the Illinois Environmental Protection Act ("Act"), ABC has the burden of proof. ABC thus must prove that at the close of the comment period on January 18, 2005, the Agency record contained substantial evidence to show that a significant degree of public interest existed in the proposed permit. As the Agency's decision to hold a hearing under Section 309.115 (35 Ill. Adm. Code 309.115) of the Illinois Pollution Control Board ("Board") regulations is discretionary, ABC also

must prove that the Agency's decision to not grant a hearing in this case was clearly erroneous or was an abuse of discretion. In support, the Agency argues the following:

I. RELEVANT FACTS

On October 17, 2002, the Agency received United States Steel City Works' ("US Steel") request to renew its NPDES permit that was expiring on April 30, 2003. (Agency Record hereinafter "*Record*" at 135-155.) On May 23, 2003, permit engineer Ukanno Foxworth began the review of US Steel's renewal application. From May 23, 2003- December 17, 2003, Mr. Foxworth requested additional information from the applicant as well as a water quality standards evaluation from the Standards Unit at the Agency. *Record* at 261-271; 371-373. In February 2004, permit engineer Mr. Foxworth left the Bureau of Water.

In July of 2004, permit engineer Beth Burkard was assigned to work on US Steel's renewal application. From July- November 2004, Ms. Burkard met with US Steel to discuss permit renewal issues, conducted a site visit, prepared permit review notes, responded to US Steel's NPDES permit renewal issues, and evaluated the draft permit. *Record* at 423; 431; 433-440; 477; and 489-491.

On November 4, 2004, the Agency issued a 15-day notice to US Steel on draft NPDES permit. *Record* at 495. US Steel provided timely comments on the draft NPDES permit on November 16, 2004. *Record* at 507. After the 15-day notice to US Steel, next the Agency ordered a public notice to Granite City Press. *Record* at 512-513. On December 14, 2004, Agency sent draft permit to Municipal Clerk, Granite City; U.S. Fish

& Wildlife Service, Rock Island Field Office; Missouri Department of Natural Resources; and US Steel. *Record* at 514-528.

The Agency put the draft US Steel NPDES permit on a 30-day public notice beginning on December 19, 2004. The public comment period ended on January 18, 2005. *Record at 518.* During the comment period, the Agency received comments from US Steel, the Health & Environmental Justice-St. Louis, and a group letter from ABC and other environmental groups. *Record at 530-531; 532; and 533-539.* The first letter received was dated January 17, 2005, from Kathleen Logan-Smith of the Health & Environmental Justice- St. Louis, requesting a public hearing and a three-week extension to public comment period. Other issues were also raised in the letter include concerns of the discharge of lead. *Record at 532.*

The second letter (and only other letter received during the comment period) was dated January 18, 2005 from the ABC and other environmental groups. ABC's presented a concern that Horseshoe Lake is impaired, and thus has a negative impact on the community that utilizes the Lake for recreation and for a food source. Specifically, ABC raised the following issues:

> 1) Allowing US Steel to put additional lead and ammonia into Horseshoe Lake would be contrary to the federal Clean Water Act and the Illinois Bureau of Water's mission;
> 2) US Steel should be added to a list of potential contributors to the impairment of Horseshoe Lake;
> 3) US Steel had violated ammonia and "other" limits in the past;
> 4) Requested the Agency hold a public hearing; and
> 5) Asked for a 30-day extension of the public comment period if the Agency denied its request for a public hearing.
> *Record at 533-539.*

On January 22-January 31, 2005, permit engineer Beth Burkard composed 30-day Public Notice Review Notes. *Record* at 549-552. In a letter dated April 25, 2005 from

US Steel, it stated that, "the comments submitted to IEPA are largely irrelevant." *Record* at 553-557. On May 13, 2005, the US Steel requested meeting with Agency staff to provide additional comments regarding public comment period. On May 20, 2005 Ms. Burkard responded to comments received during the public comment period. *Record* at 560-563 and 602-605. On November 10, 2005, permit engineer Beth Burkard left the Agency, after committing 15 months to the US Steel's NPDES renewal application.

The delay in issuance of the US Steel's NPDES permit until March 2006 was due to the fact that two of the permit engineers working on the permit left the Bureau during this time. The Final NPDES Permit N. IL0000329 was re-issued to US Steel Corporation on March 31, 2006.

Then on May 8, 2006 ABC filed its Petition seeking the Board's review of the Agency's issuance of the US Steel's NPDES permit. ABC appealed 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.

On September 21, 2006, the Board ruled on various motions filed by parties including motions to dismiss. The Board granted the motions to dismiss in part and denied them in part, and further directed the hearing officer to proceed to hearing on the issue of a request for a public hearing.

A Board hearing was held on November 20, 2006, at which testimony was heard on the issue of whether the Agency's decision to hold a public hearing complied with the Board's regulations.

II. APPLICABLE STAUTORITY AND REGULAOTRY PROVISIONS

Statutory Authority

Petitioners bring the permit appeal pursuant to Section 40(e) of the Act. This section allows a third party to appeal the Agency's decision of an NPDES permit to the Board. Section 40(e)(3) of the Act further provides:

> If the Board determines that the petition is not duplicitous or frivolous and contains a satisfactory demonstration under subdivision (2) of this subsection, the Board shall hear the petition ... (ii) exclusively on the basis of the record before the Agency. The burden of proof shall be on the petitioner.... 415 ILCS 5/40(e) (2004) (*emphasis added*)

Section 39(a) of the Act provides that the Agency has a duty to issue a permit upon proof that the facility will not cause a violation of the Act or Board regulations. *See* 415 ILCS 5/39(a) (2004).

> (a) When the Board has by regulation require a permit ... the applicant shall apply to the Agency for such permit and is shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility ... will not cause a violation of the Act or of regulations hereunder.... 415 ILCS 5/39(a) (2004) (*Emphasis added*)

Applicable Board Regulations

The Board's regulations at 35 Ill. Adm. Code 309.115 set forth the standard governing the Agency's determination on whether to hold a public hearing on an NPDES permit. Section 309.115(a) provides:

> The Agency shall hold a public hearing on the issuance of 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. Adm. Code 309.115(a)(1) (2005) (*emphasis added*).

Any person, including the applicant, may submit to the Agency a request for a public hearing or a request to be a party at such a hearing to consider the proposed permit or group of permits. Any such request for public hearing shall be filed within the 30-day public comment period and shall indicate the interest of the part filing such a request and the reasons why a hearing is warranted. 35 Ill. Adm. Code 309.115(a)(2) (2005) (*emphasis added*).

Section 302.203 Offensive Conditions

Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. The allowed mixing provisions of Section 302.102 shall not be used to comply with the provisions of this Section.

***

40 C.F.R. § 124.12(a) Public hearings.

(1)"The Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s).

III. STANDARD AND SCOPE OF REVIEW

A. Section 309.115(a) Presents Mixed Questions of Fact and Law

"Whether a finding is an ultimate fact or conclusion of law depends upon whether it is reached by natural reasoning or by the application of fixed rules of law." *Weyauwega v. Industrial Commission*, 180 Wis. 168, 192 N.W. 452, 452 (Wis. 1923). "Where ultimate conclusions can be determined only by applying rules of law, result reached embodies 'conclusion of law,' not 'findings of fact.'" *Mallinger v. Webster City Oil Co. et al.*, 211 Iowa 847, 234 N.W. 254, 256, Supreme Court of Iowa (1931). The question

of whether the facts in a particular case fulfill a particular legal standard is a question of law. *See Hennekens v. River Falls Pol. & Fire Comm.*, 124 Wis.2d 413, 424, 369 N.W.2d 670 (1985).

"And administrative agency's findings and conclusions on questions of fact are deemed to be *prima facie* true and correct." *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill.2d 191,2004, 229 Ill.Dec. 522, 692 N.E.2d 295, 302 (1998); 735 ILCS 5/3-110 (West 1994).

On the other hand, mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. *Crocker National Bank v. City & County of San Francisco*, 49 Cal.3d 881,888, 782 P.2d 278 (Cal. 1989); (See generally *People v. Louis* (1986) 42 Cal.3d 969, 985-987, 232 Cal.Rprt. 110, 728 P.2d 180.)

A mixed question of law and fact is present "when there is a dispute both as to the inferences drawn from the raw facts and the meaning of a statutory term." *Korte v. Employment Sec. Dept.*, 47 Wash.App. 296, 300, 734 P.2d 939 (Wash.App.Div.1 1987) (quoting from *Vergeyle v. Department of Empl. Sec.*, 28 Wash.App. 399, 623 P.2d 736 (1981).

When a court reviews an agency's decision involving a mixed question of law and fact, the court determines the law independently and applies it to the facts as found by the agency unless the findings are clearly erroneous. *Korte v. Employment Sec. Dept.*, 47 Wash.App. 296, 300, 734 P.2d 939 (Wash.App.Div.1 1987) (quoting *Renton Educ. Ass'n v. Public Empl. Relations Comm'n*, 101 Wash.2d 435, 441, 680 P.2d 40 (1984)).

Section 309.115(a) of the Board regulations directs that the Agency to hold a

public hearing only when it finds that there is a "significant degree of public interest in a draft permit." This involves a two step process. The first step requires the Agency to review and evaluate the facts presented by the interest groups during the comment period. The second step requires the Agency to apply the significant degree of public interest standard to the facts to determine if the standard is satisfied. Under Section 309.115(a), what constitutes a "significant degree of public interest in the draft permit" is a question of law; whereas, inference of facts contained in the comments received during the comment period involve a question of fact. The Board independently determines the meaning of the phrase "significant public interest in the draft permit," as it is a question of law, however, the Board must apply this meaning of the phrase to the facts as found by the Agency, unless it finds the findings as clearly erroneous.

B. The Agency's Decision Under Section 309.115(a) Is Discretionary

The criteria for holding a public hearing set forth in the Board's regulations at 35 Ill. Adm. Code 309.115(a) is identical to the criteria stated in the federal regulations at 40 C.F.R. §124.12(a). One Illinois court and several the Environmental Appeals Board ("EAB") cases have repeatedly concluded that the Agency's decision to hold a public hearing is a discretionary one.

The decision to hold a public hearing lies within the discretion of the Agency. *Borg-Warner Corp v. Mauzy*, 100 Ill. App. 862, 867, 427 N.E. 2d 415, 419 (3rd Dist. 1981). (The decision to hold a public hearing "is a discretionary decision to be made by the Agency").

In *In re: Sunoco Partners Marketing & Terminals, LP* 2006 WL 1806987, (June 2, 2006), the EAB held that, "[a]s we have expressed on many occasions, the Region's decision to hold a pubic hearing is a largely discretionary one." See, e.g., *In re City of Forth Worth*, 6 E.A.D. 392, 407 (EAB, 1996); In re Avery Lake Prop. Owners Ass'n, 4 E.A.D. 251, 252 (EAB 1992); In re Osage (Pawhuska, Okla.), 4 E.A.D. 395, 399 (EAB 1992).

Also, in *In re: Weber # 4-8, Underground Injection Control* 2003 WL 23177505 (December 11, 2003), the EAB held that, "we do not reach that issue, notwithstanding the broad discretion afforded to the "shall hold a public hearing whenever [it] finds, on the basis of requests, a significant degree of public interest in a draft permit(s)."); *In re City of Fort Worth*, 6 E.A.D. 392, 407 (EAB 1996); *In re Avery Lake Prop. Assoc.*, 4 E.A.D. 251, 252 & n.2 (EAB 1992)."

Further, in *In the matter of: Osage*, 4 E.A.D. 395 (November 24, 1992), the EAB held that, "[i]n this type of permit proceeding, the Region's decision to hold a public hearing is largely discretionary."

Consequently, the Agency's decision to grant or not grant a request for a public hearing under Section 309.115(a) of the Board regulations is discretionary[1].

C. Abuse of Discretion Is Not An Error of Judgment, It Must Amount to An Arbitrary and Unreasonable Action by the Agency

[1] ABC cites to a case *Queen v. Scott*, 1996 WL 738740 (W.Va. Env. Quality Bd.) (August 13, 1996) holding that the Agency's decision to hold a hearing is not discretionary. The Board in this case held that the agency's decision in this case was not discretionary. The Agency argues that this two-board member holding is inapplicable, as well as, not persuasive as it is contrary to the applicable holdings of one Illinois case and several EAB's decisions.

The courts have long held that it is only the alleged abuse of discretion, not discretion itself that is reviewable on appeal. *McFarlan V. Fowler Bank City Trust Co.*, 214 Ind. 10, 14, 12 N.E.2d 752 (Ind. 1938).

The courts have interpreted the phrase, an "abuse of discretion," in various manners; however, have maintained the focus on the same central inquiry. Some courts have defined the phrase as "[a]n abuse of discretion is an erroneous conclusion and judgment, only clear against the logic and effect of the facts and circumstances." *Id.*

Other courts have defined the same phrase as, "[a]n abuse of discretion is defined by an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court." *First Nat. Bank of Crosby v. Bjorgen*, 398 N.W.2d 789, 794 (N.D. 1986) (quoting *Dvorak v. Dvorak*, 329 N.W.2d at 870 (N.D. 1983); *Avco Financial Services v. Schroeder*, 318 N.W.2d 910, 912 (N.D. 1982).

And other courts have defined it as, "abuse of discretion connotes more than an error of judgment, rather, it implies a decision that is without a reasonable basis and is clearly wrong." 35 Ohio App.3d 121, 122, 519 N.E.2d 868, 869 (Court of Appeals, 10th Dist., 1987); also see *Landry v. Travelers Insurance Company*, 458 S.W.2d 649, 651 (Tex.1970).

The courts have regularly required that in order for an abuse of discretion to be present, it must amount to more than an error of judgment and that the decision is arbitrary and unreasonable, or is clearly wrong. The Agency thus asserts that the Board applies the same legal principle in the case at hand. Further, the appropriate test for abuse of discretion is whether the Agency exceeded the bounds of reason. *Nestlé v. City of Santa Monica*, 6 Cal.3d 920, 101 Cal.Rptr. 568, 496 P.2d 480 (Cal. 1972).

An abuse of discretion is not shown by the mere fact that one or more of the judges of this court would have exercised the discretion differently if sitting as a trial court. *Halliday v. Diehm*, 11 Ohio App.398 (1919). The courts have required the moving party to show that the lower court made more than a "poor decision." *First Nat. Bank of Crosby v. Bjorgen*, 398 N.W.2d 789 (N.D. 1986) (the moving party must also show more than that the lower court made a "poor" decision, but that it positively abused the discretion it has in administering the rule.) (quoting *Bender v. Liebelt*, 303 N.W.2d 316, 318 (N.D. 1981). In determining the abuse of discretion standard, the courts have viewed the evidence in the "light most favorable to the action of the court below." *Parks v. U.S. Home Corp.*, 652 S.W.2d 479, 485(Tex.App.-Houston[1st Dist.] 1983, writ dism'd).

The EAB has also required that an abuse of discretion must be present in order for it to set aside the EPA's decision under Part 124. *In re: Dominion Energy Brayton Point, L.L.C. (February 1, 2006)* ("The Board's standard of review where we are reviewing the permit under part 124 is whether the permit issuer based the permit on a clearly erroneous finding of fact or conclusion of law."). Similarly, in *In the matter of: Osage (November 24, 1992)*, the EAB applied the same standard of review. ("The Region did not commit error or abuse its discretion by not granting Petitioner's request for an administrative hearing.")

Clearly, the phrase "abuse of discretion" contemplates a reasoning process consisting of considering the facts in record and leading to a conclusion that a reasonable person would reach. The Agency thus asserts that the Board's review is limited determining whether there has been an abuse of discretion. In order for the Board to find that the Agency abused its discretion, there must have been a clearly erroneous

conclusion that is against both logic and facts in the Agency record at the time of the close of the comment period on January 18, 2005. Further, the Board should view the inferences of the facts in the light most favorable to the Agency.

D. A Significant Degree of Public Interest finding Requires More than A Mere Interest In the Permit

A public hearing is required only if the significant degree of interest is present in the proposed permit. *In re City of Los Angeles,* 1997 WL 28253 (E.P.A.) (October 8, 1977), ("In any permit modification proceeding an opportunity for public hearing must be provided, but a hearing must be held only if the Regional Administrator finds that there is a significant degree of public interest in the permit modification").

Recently the United States Environmental Protection Agency ("USEPA" or "EPA") provided a better test to decide when to hold a hearing. In a press release, EPA stated that, "[a] request for a public hearing must be in writing and state the nature of the issues proposed to be raised during the hearing. EPA will hold a public hearing if it decides there is a significant degree of public interest in the draft permit, or if the comment raises an issue that EPA believes is important." *2005 WL 1685556 (E.P.A.) (July 20, 2005).*

In *In the matter of: Avery Lake Property Owners Assc.*, 4 E.A.D. 251 (September 15, 1992), the EAB did not find that a significant degree of public interest existed as the comment letter "did not focus on any specific permit conditions in the draft permit, instead it expressed general concerns over the risks that the type of activity might pose to water resources in the area."

In *In the matter of: Terra Energy LTD.*, 4 E.A.D. 159(August 5, 1992), the request for a hearing only expressed only generalized concerns about the potential input of the well on the environment and property values." Based on these facts, the Region found that there was not a significant degree of public interest. Instead, the Region chose to respond to each comment letter individually. The EAB held that, "the judgment of the Region in this respect has not been shown to be erroneous." *Id.*

In *In the matter of Spokane Regional Waste-to-Energy Project,* 3 E.A.D. 68 (January 2, 1990), the record showed that there was public interest in the permit. Nevertheless, Washington State Department of Ecology ("Ecology") decided not to hold a public hearing because it found that "there was little expression of interest in the specific issue raised by the remand." Instead, Ecology prepared a response to the public comments and issued its revised final permit determination. The EAB held that, "[u]nder the circumstances, no clear error is apparent from Ecology's decision not to hold a public hearing." *Id.*

Similarly, in *In the matter of: Osage,* 4 E.A.D. 395 (November 24, 1992), during the public comment period, comments were provided only by the permittee and petitioner. The petitioner's request for a public hearing was the only request received by the Region. The Region decided to deny a public hearing on the draft permit. Instead a meeting was held with petitioner. The Region addressed the petitioner's comments in the formal response to comments. The EAB noted that petitioner was given ample opportunity for participation in the permit process. Thus, the EAB held that "Petitioner has failed to show that the Region's decision not to hold a public hearing was clearly erroneous or an important exercise of discretion that warrants review." *Id.*

In order for ABC to establish that the Agency record at the time of the close of the comment period showed a significant degree of public interest in the proposed permit, it must show that the comment letters had more than general statements of environmental concerns over the risks the US Steel's NPDES permit pose to Horseshoe Lake, instead ABC and must clearly articulate problems with the specific permit conditions in the draft permit. Further, ABC must show that comments were directly related to the NPDES permit issues, and not Clean Air Act or Resource Conservation and Recovery Act issues.

IV. ARGUMENTS

Section 402 (b)(3) of the Clean Water Act provides only that the public "receive notice of each application for a permit and ... an opportunity for a public hearing before a ruling on each application ..." 33 U.S.C. §1342 (emphasis added).

Both the federal and Board regulations provide a process to ensure that this intent of the Clean Water Act is fully met. "we conclude that the regulations the EPA has promulgated to implement this congressional policy are fully consistent with the legislative purpose, and are valid." *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 100 S.Ct. 1095 (1980). Fundamentally, the process of determining terms and conditions for NPDES permits is an information-gathering and fact-finding process. *See 35 Ill. Adm. Code Part 309 and Part 166.* The process begins with the submission of information and data by the applicant. Thereafter, the applicant and the public are provided several opportunities to participate in the administrative process and thereby protect their interests. The Board regulations require that public notice be given of the

proposed issuance of each permit, setting forth Agency's tentative determinations. See 35 Ill. Adm. Code 309.107-309.119.

Interested persons may submit written comments concerning the Agency's tentative determinations and may request a public hearing. The written comments must be considered by the Agency in making its final determinations. If it is determined that a significant degree of public interest regarding a proposed permit exists or that a public hearing would provide useful information, the Agency may hold a public hearing after due notice. At the hearing, any person may submit oral or written statements and the information provided must be considered by the Agency in making its final determinations. If the applicant or a third-party is still dissatisfied with the terms and conditions of the final permit, he or she may request a review by the Board. *Also see, In the Matter of Marathon Oil Company, Union Oil Company, Atlantic Richfield Company, and Mobil Oil Corporation*, 1 E.A.D. 83 (September 25, 1975).

In this case, though a public hearing[2] was not granted, but by responding to the comment letters received at the close of the comment period, the Agency met the public participation requirements of the Clean Water Act.

A. ABC Has the Burden of Proof Under Section 40(e) Of the Act, And The Act Does Not Allow ABC To Shift That Burden

[2] The *Record* clearly shows that Kenneth Page, Illinois EPA, Office of Compliance Assistance and Environmental Justice, correspondence with Kathy Andria of ABC offered a chance to discuss issues related to the topics of subsistence fishing, PCBs, Horseshoe Lake quality, and environmental justice. See Record at 630-31, 633-34. The Agency never asserted that the Environmental Justice meeting with the Agency was in lieu of or was a substitute for a public hearing on the US Steel NPDES draft permit. This meeting was simply scheduled to address the ABC's non-NPDES permit related issues.

ABC brought this third party NPDES permit appeal under Section 40(e) of the Act. 415 ILCS 5/40(e)(1) (2006). Section 40(e)(3) of the Act specifically states that the burden of proof shall be on the petitioner. *See* 415 ILCS 5/40(e)(3) (*emphasis added*).

In *Village of Lake Barrington et al., v. Illinois EPA and Village of Wauconda*, PCB 05-55 (April 21, 2005), the Board addressed the burden of proof issue in a third-party NPDES permit appeal. The Board noted that, "[t]he distinction between the two types of NPDES permit appeals is which party bears the burden of proof." *Id.* at 5. Under Section 40(a)(1) of the Act, if the permittee appeals the permit, the burden of proof is on the permit applicant. *Id.* The Board, consistent with the holding of the court in *Prairie Rivers*, held that, "[u]nder Section 40(e)(3) of the Act, in a third party NPDES permit appeal, the burden of proof is on the third party." *Id.* at 5; *Prairie Rivers*, 781 N.E. 2d 372, 380 (*emphasis added*).

On the burden of proof issue, the Board in *Des Plaines River Watershed Alliance v. Illinois EPA*, PCB 04-88 (2005), held that, "IEPA's decision to issue the permit in this instance must be supported by substantial evidence. This does not, however, shift the burden away from the petitioner, who alone bears the burden of proof in this matter." *Des Plaines River Watershed Alliance* at 7 (*emphasis added*).

Thus, in a third party permit appeal, the burden never shifts away from Petitioners. Here, ABC challenged the Agency's decision to not grant a request for a public hearing on the draft NPDES permit. Pursuant to Section 40(e)(3) of the Act and the Board's ruling in *Village of Lake Barrington* and *Des Plaines River Watershed Alliance*, ABC must prove that the Agency's record at the close of the comment period[3]

[3] 309.115(a)(2) specifically requires that the ABC has the burden to show that a hearing should be granted. This section requires that this request must be filed within the comment period. Therefore, this section

contained substantial evidence to show that a "significant degree of public interest existed in the proposed permit," and that the Agency clearly erred or abused its discretion in not granting the ABC's request to hold a hearing on the basis of the information before it at the close of the comment period.

B. ABC Has Failed To Establish That A Significant Degree of Public Interest Existed In The Draft Permit

Section 309.115(a)(2) of the Board regulations places the burden on the party requesting a public hearing why a hearing is warranted. *See* 35 Ill. Adm. Code 309.115(a)(2). The Board regulation specifically requires that the request for a hearing shall be filed with the 30-day comment period and shall indicated the interest of the party, and the reasons why a hearing is warranted. *Id.*

Neither the Clean Water Act nor the Board regulations require that the Agency must hold a public hearing every time a request is made to the Agency. The Agency is required to grant a request for public hearing only when a significant degree of public interest is present in the proposed permit. Further, neither the Act nor the Board regulations define what constitutes a significant degree of public interest. The Agency is left with the task to determine whether the facts present in a given case satisfy the significant degree of public interest standard. In evaluating the degree of public interest in an NPDES permit, the Agency considers the following prior to responding to a request

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prohibits ABC from introducing new evidence in the form of documents or the testimony of its witnesses at the Board hearing. At the hearing, the Agency made several objections to ensure that the record reflects the Agency's general position on this issue. In this case, the Agency's decision to not grant a public hearing was entirely based on the two comment letters received prior to the close of the comment period. Therefore, to meet the burden under Section 40(e) of the Act, ABC must prove that the Agency's decision to not grant a hearing in this case was either clearly erroneous or was arbitrary and unreasonable.

for a public hearing: 1) whether a high degree of public interest exists, whether it be in the form of letters from individuals or letters from groups of interested citizens; 2) the nature and extent of comments received during the public comment period; and 3) the relevance of comments to activities authorized under the proposed permit. The Agency has found these factors to provide a perfect balance between ensuring genuine public participation in an NPDES draft permit and ensuring that enough resources are available to undertake requests for a public hearing.

In this case, at the close of the comment period on January 18, 2005, the Agency received two comment letters dated January 17 and 18, 2005 requesting that a public hearing be held. The Agency reviewed the comments based on the factors outlined above to determine if a significant degree of public interest exists in this case. The Agency found that the nature and extent of comments received during the comment period were general in nature. The comments were non-significant in that they did not provide any specific or additional information that the Agency could have used in drafting the permit. To illustrate, the January 17th comment letter states that, the US Steel's permit "impacts directly a recreational body of water;" " would allow additional discharges of toxic heavy metals;" or/and "would add several other toxin to their body burden." To further illustrate, the January 18th comment letter states that, the permit "would allow additional lead;" "would allow additional ammonia." These are simple statements of facts of which the Agency is already aware. Thus, these comments alone do not satisfy the significant degree of public interest in the draft permit standard.

The Agency further found that there were comments in these two letters that were not relevant to activities authorized under the US Steel's proposed permit. The

comments were related to issues that could have not been addressed in an NPDES public hearing. To illustrate, the January 17 comment letter states that, "excessive levels of PCBs from fish consumption." To further illustrate, the January 18th comment letters states that, "Horseshoe Lake is impaired;" "we believe that industrial effluent from Granite City Steel should be added to the list;" "Granite City is also in significant non-compliance with Clean Air Act and RCRA." The issues raised in these comments are outside the scope of an NPDES permit public hearing. For example, the Agency does not consider addition or deletion of sources or causes of impairment at an NPDES permit public hearing. That action of the Agency is governed by Sections 305(b) and 303(d) of the Clean Water Act, and a separate process is prescribed by these sections to address the listing of impaired waters. Nor does the Agency consider a discharger's noncompliance with CAA or RCRA issues at an NPDES permit hearing.

Contrary to ABC's assertion, the Agency's decision to not grant the ABC's request for a public hearing is detailed in the February 8, 2006 memorandum[4] from Toby Frevert to Marcia Willhite. This memorandum describes in detail the Agency's findings of the facts in this case.

C. ABC Has Failed to Prove that the Agency Abused Its Discretion in Not Granting A Public Hearing

As the Agency's decision under Section 309.115(a) to grant or not grant a request for a public hearing is a discretionary one, ABC must show that the Agency's determination of not finding a significant degree of public interest in this case was clearly

[4] This document is part of the record. It was introduced by ABC in its motion to the Board, and the Hearing Officer granted that motion as there was no objection from Respondents.

erroneous or that the Agency's decision was arbitrary and unreasonable given the facts of the case. ABC can not meet the burden of proof outlined in Section 40(e) of the Act by simply arguing that two or more inferences are possible from the facts. Nor can ABC meet this burden by showing that the Agency made a "poor decision."

In support of its case, ABC provides the following arguments. ABC believes that a significant degree of public interest existed because Horseshoe Lake is used by the public, and that various organizations asked the Agency to hold a public hearing in this case.

Under Section 40(e) of the Act, ABC has the burden to prove that the Agency record at the time of the close of the public comment period contained substantial evidence to show that a significant degree of public interest in the proposed permit existed, and that the Agency's decision to not hold the hearing amounted to an abuse of discretion. To satisfy this burden, ABC must show that facts contained in the comment letters alone were sufficient to establish a significant degree of public interest in this case, and thus the Agency's decision was clearly erroneous, and not a "poor decision." The Agency believes that the use of Horseshoe Lake by the public and requests for a hearing from the interested groups are relevant factors in determining whether a significant degree of public interest exist in this case; however, these two factors alone are not sufficient to satisfy the criteria described in Section 309.115(a) of the Board regulations. If the Agency is required to hold a public hearing purely based on the public use of a waterbody and a request from a group, it may have to hold approximately 300[5] NPDES permit public hearings each year. This result is neither intended by the Clean Water Act

[5] Based on the Agency's estimates that it issued approximately 300 NPDES permits in 2005.

nor by the federal or Board regulations. Obviously, it would be impossible for the Agency to issue more than a couple of NPDES permit in a year. ABC thus has failed to demonstrate any clear error or abuse of discretion in the Agency's decision not to hold a public hearing in this case. Consequently, ABC has failed to meet its burden of proof under Section 40(e) of the Act.

1. ABC Has Failed to Show That Its Comments Regarding Heavy Metals in Horseshoe Lake Sediments Amounted to A Significant Degree of Public Interest in the Proposed permit

ABC next argues that the comment letters filed during the close of the comment period raised two significant issues as at least one of the issues should have affected the terms of the US Steel's NPDES permit.

ABC argues that the Agency erred by not seeking additional information on studies conducted by Professor Brugam of the Southern Illinois University at Edwardsville. In support of this argument, ABC cites to the engineer's notes indicating that obtaining a copy of these studies would be "beneficial." ABC believes that these studies were relevant information for the Agency to consider establishing the proper limits for zinc and leading in the US Steel's NPDES permit.

The Agency asserts that ABC's argument is flawed in many ways. First, the Agency did download an abstract of the study to determine its relevance to the US Steel's NPDES permit. Upon review of the abstract, the Agency determined that the scope of the studies was on contamination of sediments in Horseshoe Lake from heavy metals. As the permit limits for heavy metals in this case were either at or below the Board's water

quality standards, the findings of these studies were not relevant for an NPDES permit proceeding.

However, the same studies would be of significant relevance when the Agency conducts a total maximum daily load ("TMDL") on Horseshoe Lake. During the development of TMDL for Horseshoe Lake, the Agency would determine sources and causes of impairment of Horseshoe Lake and would assign load allocations to various point as well as non point sources. Before a final TMDL is established for Horseshoe Lake, the Agency would conduct a public hearing and several public meetings to apprise the public regarding its findings. At the public meetings and hearing, the Agency would request the public to submit any site-specific information that the Agency has not considered in developing this TMDL. The Agency would then consider incorporating appropriate source reduction practices including such measures as sediment remediation and possible load allocations into individual NPDES permit. However, an NPDES permit public hearing is not the proper forum to discuss the impaired water related issues.

Second, as the lead and zinc limits in the US Steel's NPDES permit are well below the acute or chronic water quality standards, the Agency has applied the most stringent permit limit. The US Steel permit allows discharge of lead because lead is a parameter that must be regulated under the federal categorical regulations irrespective of whether a facility actually has lead in its manufacturing process. Thus, ABC's assertion that the permit allows 2,044 pounds of lead into the Lake each year is misleading. Lead has often not been detected in the Agency or facility generated effluent results. The source water for the US Steel process comes from the Mississippi River. The Agency's sample results between March 2000 and December 2003 show that total lead was not

detected in all samples except one. This one sample had a lead concentration of 0.0096 mg/L. This source water data corresponds to the effluent data, which also usually shows no detectable amount of lead. The data showed average lead concentration of 0.0059 mg/L, whereas, the most stringent applicable water quality standard is 0.88 mg/L. Thus, contrary to ABC's belief, the concentrations of lead are well below the acute or chronic water quality standards. Additionally, the loading of lead in pounds per year based on this average is 308.8 pounds per year, not 2,044 pounds.

Similarly, the 30-day average zinc load limit in the US Steel's permit is based on the 30 day average concentration limit for zinc[6]. This permit limit is based on the chronic water quality standard for dissolved zinc. The 30 day average load limit for zinc of 12 pounds per day is calculated from the 0.17 mg/L concentration limit, which is equivalent to 0.0586 mg/L of dissolved zinc, the chronic water quality standard. The load limit for zinc is lower than the 15.05 pounds per day limit in the previous permit. On average, the loading of zinc in Horseshoe Lake will be reduced under this permit. The daily maximum amount of zinc is based on the Federal categorical limits because it was determined that no reasonable potential to exceed the acute water quality standard exists. The Agency, thus, concluded that the zinc limits in the US Steel's permit do not allow an increase in loading of zinc in Horseshoe Lake.

ABC also argues that the Agency erred in granting the US Steel an exemption from Central Treatment. In the October 17, 2002 Federal Register (volume 67, No. 201), the USEPA granted the Central Treatment Exemption upon the determination that US

[6] Contrary to ABC's belief, the Agency did not erroneously emit zinc from the list of pollutants causing impairment. At the time of public notice, zinc was not listed in the 303(d) impaired water list as a cause of impairment in Horseshoe Lake sediments. However, the Agency record shows that the Agency did consider this fact prior to the issuance of the final permit.

Steel with an exemption for zinc would still meet the cost model criteria to come into compliance with 40 CFR 420 standards. Prior to the granting of this exemption, however, the USEPA public noticed its decision and no comments were received in support of removing the exemption.

Even though ABC accepts/agrees that the Board regulations do not have numeric criteria for heavy metals in sediments, it still asserts that the Agency failed to ensure that the US Steel's discharge is not causing or contributing to high levels of heavy metals in the bottom of Horseshoe Lake. ABC's assertion is without any merits. The permit limits for heavy metals in the US Steel's NPDES permit are based on either the federal categorical standards or Board's water quality standards. The ABC's assertion that these duly adopted standards are causing bottom deposit is totally absurd. The fact that the sediments in Horseshoe Lake have high concentrations of heavy metals alone does not establish that the US Steel's discharge is causing these bottom deposits. These deposits of heavy metals in Horseshoe Lake sediments could be from sources that operator prior to the adoption of the Clean Water Act. Further, if the TMDL for Horseshoe Lake indicated that existing sources are contributing to the impairment of Horseshoe Lake, the Agency, at that time, may consider incorporating more stringent limits in these permits.

Under Section 40(e) of the Act, ABC has the burden to prove that the Agency record at the time of the close of the public comment period contained substantial evidence to show that a significant degree of public interest in the proposed permit existed, and that the Agency's decision to not hold the hearing amounted to an abuse of discretion. To satisfy this burden, ABC must show that facts contained in the comment letters alone were sufficient to establish a significant degree of public interest in this case,

and that the Agency's decision was thus clearly erroneous, and not simply a "poor decision." The Agency did consider the relevance of studies performed by Professor Burgam, but found that these studies are more relevant for assessing and listing waterbodies under Sections 305(b) and 303(d) process, rather than an NPDES permit proceeding. At the public hearing, the best answer the Agency could have given is that "please provide your comments and concerns to the Watershed Unit of the Agency so that the relevant information from these studies can be used in assessing and listing as well as developing the TMDL for Horseshoe Lake." ABC, thus, has failed to demonstrate any clear error or abuse of discretion in the Agency's decision not to hold a public hearing in this case. Consequently, ABC has failed to meet its burden of proof under Section 40(e) of the Act.

2. ABC Has Failed to Show That Its Comments Regarding Diseased Fish Caught in Horseshoe Lake Sediments Amounted to A Significant Degree of Public Interest in the Proposed permit

ABC next argues that the Agency also erred by not addressing questions raised in the comment letters about diseased fish being caught in Horseshoe Lake.

ABC's argument misunderstands the role of water quality standards in protecting designated uses of a waterbody. The State and federal water quality standards for metals are based solely on aquatic life toxicity rather than human health concerns. The absence of human health standards for heavy metals signifies their low risk to human health. The basic premise behind the development of the State and federal water quality standards for heavy metals is that if concentrations of these substances do not exceed aquatic life standards, then these concentrations will not harm other designated uses of the

waterbody. Essentially, the aquatic life standards for heavy metals also serve to protect other uses such as fish consumption.

Further, the kind of information necessary to address the issue raised by ABC is obtained from the Illinois Department of Natural Resources ("IDNR"), not from the public. IDNR, given that many of its employees are professional fisheries biologist, would make the first evaluation of the problem. The Agency has a long standing working agreement with IDNR to jointly investigate fish kills. Thus, an incident of fish disease would be handled similarly. The public usually would make IDNR aware of the problem of fish disease. The IDNR personnel would investigate the problem. In case a water quality problem is suspected, the personnel would get in touch with the local IEPA regional office, and would share the report with the Agency's field inspector. The Agency would then investigate the problem by visiting the site, taking water samples, investigating point source discharge activity, etc. Then each agency would file a report after sharing data. A link between the fish disease or abnormality outbreak and an NPDES or other discharge would be pursued by the Agency just as the source of a fish kill would be pursued.

Also, in its brief, ABC makes several statements regarding the inadequacy of permit limits or statements alleging that the Agency has failed to show that the permit meets the applicable provisions of the Act or Board regulations. The Agency objects to the ABC's assertions in this brief, as these specific issues are not before the Board for review. The Board has already dismissed the ABC's arguments concerning the adequacy of these permit limits. The sole issue before the Board is whether the Agency's record

contained substantial evidence at the time of the close of the comment period and whether the Agency abused its discretion by not granting the hearing in this case.

Under Section 40(e) of the Act, ABC has the burden to prove that the Agency record at the time of the close of the public comment period contained substantial evidence to show that a significant degree of public interest in the proposed permit existed, and that the Agency's decision to not hold the hearing in this case amounted to an abuse of discretion. To satisfy this burden, ABC must show that the facts contained in the comment letters alone were sufficient to establish a significant degree of public interest in this case, and that the Agency's decision was thus clearly erroneous, and was not simply a "poor decision." The Agency did consider the information related to diseased fish, however, there was no incident cited or recorded by either IDNR or the Agency. ABC thus has failed to demonstrate any clear error or abuse of discretion in the Agency's decision not to hold a public hearing in this case. Consequently, ABC has failed to meet its burden of proof under Section 40(e) of the Act.

V. CONCLUSION

ABC has failed to demonstrate any clear error or abuse of discretion in the Agency's decision not to hold a public hearing in this matter. ABC has thus failed to meet the requisite burden under Section 40(e) of the Act. The Agency respectfully requests that the Board **DENY** the ABC's request for relief in this case.

ORIGINAL

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 18th day of December 2006, one copy of the foregoing was sent via electronic communication to the following:

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I, the undersigned, on oath state that I have served the attached **Motion For Leave To File Post-Hearing Brief Instanter** and **Post-Hearing Brief** upon the person to whom it is directed:

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and mailing it from Springfield, Illinois on January 12, 2007, with sufficient postage affixed as indicated above.

Meredith Kelly

SUBSCRIBED AND SWORN TO BEFORE ME
this day of January 12, 2007.

OFFICIAL SEAL
BRENDA BOEHNER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-3-2009

Brenda Boehner
Notary Public