ILLINOIS POLLUTION CONTROL BOARD
January 26, 2007

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

MR. EDWARD J. HEISEL AND MS. ELIZABETH A. MUSHILL, OF THE WASHINGTON UNIVERSITY IN ST. LOUIS SCHOOL OF LAW, APPPEARED ON BEHALF OF THE PETITIONER;

MS. CAROLYN S. HESSE AND MR. DAVID T. BALLARD, OF BARNES & THORNBURG, LLP, APPEARED ON BEHALF OF THE RESPONDENT, UNITED STATES STEEL CORPORATION – GRANITE CITY WORKS; and

MR. SANJAY SOFAT APPEARED ON BEHALF OF THE RESPONDENT, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

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

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

On September 21, 2006, the Board issued an order granting, in part, motions to dismiss filed by the respondents and thereby limiting the number of issues before the Board. The sole issue remaining on appeal is American Bottom's assertion that the Agency improperly denied a request for a public hearing prior to issuing the permit.

For the reasons outlined below, the Board finds the Agency improperly denied the request for a public hearing. Before discussing the Board's findings, the Board sets forth the procedural background, factual background, and the parties' arguments.

PROCEDURAL BACKGROUND

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

On September 21, 2006, the Board issued an order that granted, in part, motions to dismiss filed by the respondents. American Bottom v. IEPA and U.S. Steel, PCB 06-171 (Sept. 21, 2006). In that order, the Board directed the hearing officer to proceed to hearing on the sole issue of American Bottom's request for a public hearing. The Board also granted American Bottom's motion for *pro hac vice*, accepted the Agency's amended record, and allowed American Bottom to supplement the record with documents that predate the Agency's decision of March 31, 2006.

Hearing Officer Carol Webb held a hearing on November 20, 2006, at the Madison County Administration Building in Edwardsville, Madison County. Five witnesses testified at the hearing. Hearing Officer Webb deemed the witnesses credible. Two members of the public provided public comment.

American Bottom submitted offers of proof on November 27, 2006. On December 8, 2006, American Bottom filed its post-hearing brief (Pet. Br.). U.S. Steel filed a post-hearing brief (Resp. Br.) on December 18, 2006. Nine public comments were timely filed. On January 17, 2007, the Agency filed its post-hearing brief (Ag. Br.), accompanied by a motion for leave to file *instanter.*

PRELIMINARY MATTERS

In its motion for leave to file *instanter*, the Agency asserts that on December 18, 2006, the Agency filed its brief via electronic mail with the hearing officer, American Bottom, and U.S. Steel, but misunderstood the Board hearing officer's instructions and did not file the Agency's brief with the Board's Clerk's Office. Mot. at 1. The Agency contends that on January 11, 2007, the Agency learned of this mistake and contacted the attorneys for American Bottom and U.S. Steel. Mot. at 2. The Agency represents that American Bottom and U.S. Steel have no objection to the Agency's motion for leave to file its brief *instanter*. *Id*. The Agency argues that no harm will result to the other parties as they have received the Agency's brief, via electronic mail, on December 18, 2006. *Id.* The Agency moves the Board to allow the filing of its post-hearing brief. *Id.*

Section 101.500(c) provides, in part, that the Board will not grant any motion before the expiration of the 14-day response period except in deadline driven proceedings where no waiver has been granted, or unless undue delay or material prejudice would result. 35 Ill. Adm. Code

101.500(c). The decision deadline in the instant case is January 30, 2007. The Board finds that material prejudice would result if it does not grant the motion for leave to file. Accordingly, the Board grants the motion for leave to file, and accepts the Agency's post-hearing brief.

FACTS

On December 19, 2004, the Agency gave notice that it proposed to issue a renewal of the NPDES permit governing the discharge by U.S. Steel at its Granite City Works' facility of certain pollutants into Horseshoe Lake. Pet. at 3-4, Agency Rec. at 518. Specifically, the Agency issued a proposed NPDES permit for the Granite City Works facility that would allow the facility to discharge into Horseshoe Lake in compliance with Illinois water quality standards. Agency Rec. at 518. According to the notice, U.S. Steel's plant is a major point source discharger that discharges 25 million gallons per day of wastewater into Horseshoe Lake. Agency Rec. at 312, 518. This facility has had NPDES permits ever since such permits have been required. Agency Rec. at 554.

The proposed NPDES permit stated that the public notice period started on December 19, 2004 and ended on January 18, 2005. Agency Rec. at 518. The Agency received draft permit comments from U.S. Steel on January 13, 2005. Agency Rec. at 530-531. On January 17, 2005, Kathleen Logan Smith submitted a comment to the Agency on behalf of the Health & Environmental Justice (HEJ). Agency Rec. at 532. That comment asked the Agency to "please hold a public hearing on US Steel's NPDES permit referenced above and to extend the comment period for three weeks on the above-referenced permit. This permit warrants public involvement because it impacts directly a recreational body of water promoted by the Illinois Department of Natural Resources (DNR) for boating, fishing, bird watching, and waterfowl hunting." Agency Rec. at 532.

On January 18, 2005, American Bottom filed a comment (jointly submitted by four other organizations, including the Sierra Club, Webster Groves Nature Study Society, HEJ, and the Neighborhood Law Office) that Horseshoe Lake is impaired and has a negative impact on the community that utilizes the lake for recreation and as a food source. The comment stated that the named organizations request that the Agency hold a public hearing for the above-entitled permit; that the receiving waters for this permit is Horseshoe Lake at Horseshoe Lake State Park in Madison County; and that the lake is used recreationally by outdoor enthusiasts, bird watchers, nature lovers, fishers, hunters and families, as well as low-income and minority folks for subsistence fishing. AR at 537. Finally, the letter asked the Agency to hold a public hearing in order to allow citizens to ask questions and present information and testimony because "we have just recently received the Southern Illinois University – Edwardsville (SIUE) reports and have not had time to review them or to get technical guidance as to their meaning." Agency Rec. at 539.

The comment also raised the following issues: (1) that allowing U.S. Steel to put additional lead and ammonia into the lake would be contrary to the federal Clean Water Act and the Agency's Bureau of Water's mission; (2) that U.S. Steel should be added to a list of potential contributors to the impairment of the lake; (3) that U.S. Steel had violated ammonia and "other" limits in the past; (4) that the Agency should hold a public hearing; and (5) that the public

comment period should be extended 30 days if the Agency denied the request for a public hearing. Agency Rec. at 532-39.

On May 13, 2005, US Steel requested a meeting with Agency staff to provide additional comments regarding the public comment period. On May 20, 2005 Agency engineer Beth Burkard responded to comments received during the public comment period. Agency Rec. at 560-63; 602-05. American Bottom sent supplemental technical comments to the Agency in October 2005, and on December 9, 2005. Agency Rec. at 607-609, 611-623.

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

APPLICABLE LAW

The Act and the Board's rules allow for third-party appeals in an NPDES permit proceeding (415 ILCS 5/40(e)(1); 35 Ill. Adm. Code 105.102). Section 40(e)(1) of the Act (415 ILCS 5/40(e)(1) (2004)) allows certain third parties to appeal Agency determinations to grant NPDES permits. The third party's petition to the Board must contain:

> [A] demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held; and
>
> [A] demonstration that the petitioner is so situated as to be affected by the permitted facility. 415 ILCS 5/40(e)(2) (2004); *see also* 35 Ill. Adm. Code 105.210(d).

American Bottom has demonstrated participation during the public notice period. Therefore, pursuant to the Act and Board procedural rules, American Bottom has standing to appeal the Agency's decision.

Section 309.115(a)(1) of the Board's regulations provide, in part, that:

> 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.
>
> 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 party filing such a request and the reasons why a hearing is warranted. 35 Ill. Adm. Code 309.115(a)(1),(2) (2004).

STANDARD OF REVIEW

Section 39(a) of the Act (415 ILCS 5/39(a) (2004)) 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. Section 39(a) further provides that "[i]n making determinations on permit applications . . . the Agency may consider prior adjudications of noncompliance" with the Act. 415 ILCS 4/39(a) (2004)

The Board's scope of review and standard of review are the same whether a permit applicant or a third party brings a petition for review of an NPDES permit. Prairie Rivers Network v. PCB *et al*., 335 Ill. App. 3d 391, 401; 781 N.E.2d 372, 380 (4th Dist. 2002) and Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E.2d 189 (1st Dist. 1983). The distinction between the two types of NPDES permit appeals is which party bears the burden of proof. Under Section 40(e)(3) of the Act, in a third party NPDES permit appeal, the burden of proof is on the third party. 415 ILCS 5/40(e)(3) (2004); Prairie Rivers, 335 Ill. App. 3d 391, 401; 781 N.E.2d 372, 380. Under Section 40(a)(1) of the Act, if the permit applicant appeals the permit, the burden of proof is on the permit applicant. 415 ILCS 5/40(a)(1) (2004).

The question before the Board in permit appeal proceedings is: (1) whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would have occurred if the requested permit had been issued; or (2) whether the third party proves that the permit as issued will violate the Act or Board regulations. Joliet Sand & Gravel, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958; Prairie Rivers, 335 Ill. App. 3d at 401; 781 N.E.2d at 380. The Agency's denial letter frames the issues on appeal and the burden of proof is on the petitioner. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 676 N.E.2d 299 (3rd Dist. 1997).

The Board's review of permit appeals is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112 (Aug. 9, 2001) *aff'd* at 335 Ill. App. 3d 391, 401; 781 N.E.2d 372, 380 (4th Dist. 2002); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987).

ISSUES

American Bottom raised several issues for Board decision in this proceeding, however as noted above, only one issue remains – whether the Agency's decision not to hold a public hearing at the underlying level invalidates the issued permit.

AMERICAN BOTTOM'S ARGUMENTS

American bottom argues that 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)). Pet. Br. at 4.

American Bottom argues that the decision to issue the permit without a public hearing must be "supportable by substantial evidence." Des Plaines River Watershed Alliance v. IEPA, PCB 04-88, 2005 WL 3270426, at *15 (Nov. 17, 2005) (quoting Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112, 2001 WL 950017, , at 7 (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)). Pet. Br. at 5.

American Bottom asserts that a public hearing was required for the U.S. Steel permit because there was clearly a significant degree of public interest in the permit, and comment letters from organizations representing thousands of members cited heavy public use of Horseshoe Lake and raised serious concerns about the draft permit. Pet. Br. at 5. Thus, argues American Bottom, the Agency'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. Pet. Br. at 5-6.

American Bottom argues that Horseshoe Lake is heavily used by the public and that it is hard to imagine a permit more deserving of a public hearing than this one concerning major industrial discharge into an impaired lake, located within a popular state park, where people fish and eat their catch. Pet. Br. at 6.

American Bottom cites to testimony at hearing wherein witnesses discussed the use of and need for the lake. Pet. Br. at 6-7. American Bottom notes that three members of the public provided comment indicating how they would attend a public hearing on the NPDES permit. Pet. Br. at 7. American Bottom asserts that 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. Pet. Br. at 8. American Bottom contends that a public hearing would have allowed the organizations' members to provide the Agency information about Horseshoe Lake and to ask questions about the terms of the permit. Pet. Br. at 10.

American Bottom argues that the need for a public hearing is demonstrated further by the significant issues raised in the public comment letters, which the Agency almost completely failed to investigate before issuing the permit. Pet. Br. at 10. American Bottom argues that the Agency'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. Pet. Br. at 16.

American Bottom contends that 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. Pet. Br. at 17. Further, American Bottom asserts that it is a well-established principle of administrative law that an agency's decision can only be upheld based on rationales actually offered by the agency at the time of its decision and not on the basis of post-hoc rationales offered by counsel. *Id.* American Bottom stresses that other forums cannot substitute for a public hearing on the permit. Pet. Br. at 18.

American Bottom concludes that the Agency's decision to forgo a public hearing on the U.S. Steel Permit is not supported by substantial evidence in the record and asserts that the Agency did not provide any rationale for the decision to those requesting the hearing. Pet. Br. at 19. American Bottom asks the Board to remand the U.S. Steel permit to the Agency with instructions to hold a hearing and make changes warranted by the information obtained. *Id*.

U.S. STEEL'S ARGUMENTS

U.S. Steel argues that the sole issue before the Board is whether the Agency abused its discretion by denying American Bottom's request for a public hearing on the proposed permit. Resp. Br. at 1. U.S. Steel asserts that the administrative record and relevant law show that the Agency did not abuse its discretion in denying the request. *Id.*

U.S. Steel asserts that American Bottom raises a litany of issues that were not raised in any comments to the Agency during the public notice comment period for the proposed permit, and that such a strategy ignores the rule that the Board cannot consider any issues that were not raised during the public notice period. Resp. Br. at 1-2. U.S. Steel argues that American Bottom must demonstrate that there was a significant degree of public interest in the proposed permit to warrant a hearing. Resp. Br. at 2.

U.S. Steel asserts that the Agency did provide American Bottom with opportunities to ask questions and obtain more information about the proposed permit, in that the Agency provided the name and telephone number of its permit engineer to contact with questions, and offered to meet with American Bottom. Resp. Br. at 2.

U.S. Steel contends that American Bottom ignores binding and long-established case law holding that the Agency's decision to hold a public hearing is reviewed for an abuse of discretion, with the burden of proof resting on the party challenging the decision. Resp. Br. at 2. U.S. Steel stresses that the decision to hold a public hearing is a discretionary decision to be made by the Agency. Resp. Br. at 7.

U.S. Steel argues that under the abuse of discretion standard, an agency abuses its discretion when it makes a decision "without employing conscientious judgment or when the decision is clearly against logic." Resp. Br. at 7 citing Deen v. Lustig, 337 Ill . App. 3d 294, 302, 785 N.E.2d 521, 529 (4th Dist. 2003). U.S. Steel argues that the cases cited by American Bottom to address standard of review deal with review for an agency's decision to issue a permit, not the decision regarding a public hearing. Resp. Br. at 8.

Further, U.S. Steel contends that the Act provides that only issues raised during the public notice period for a proposed NPDES permit can be the basis for a third party appeal of the Agency's issuance of a NPDES permit and requires a third party petitioner to make a demonstration that the petitioner raised the issues contained within the petition during the public notice period. Resp. Br. at 8-9. U.S. Steel asserts that it timely filed for a NPDES permit and met its burden for the issuance of such a permit. Resp. Br. at 10. Accordingly, posits U.S. Steel, the Agency was required to issue a NPDES permit to U.S. Steel's Granite City Works' facility because the discharges from the facility would not cause a violation of the Act or its regulations. *Id*. U.S. Steel argues that American Bottom has failed to demonstrate that it would present any evidence at a requested public hearing or that it raised any issues in the January 17 or 18, 2005 comments that would affect the issuance of the final permit to U.S. Steel. Resp. Br. at 10.

U.S. Steel contends that American Bottom improperly raises issues for the first time in its post-hearing brief that were not raised in either its comments or in its Petition for Review. Resp. Br. at 12. U.S. Steel asserts that because these issues were not raised during the public notice period, they cannot now be asserted as part of American Bottom's petition. Resp. Br. at 12.

In addition, U.S. Steel asserts that American Bottom did not demonstrate that the public interest is not generally in Horseshoe Lake or some other aspect pertaining to the regulation of discharges to Horseshoe Lake, and that the interest must be specific to the NPDES permit proposed by the Agency to be issued to U.S. Steel's Granite City Works. Resp. Br. at 15. U.S. Steel argues that the statutory language should be given its plain and ordinary meaning, and that the plain meaning of the word "public" is "of, relating to, or affecting all the people or the whole area of a nation or state." Resp. Br. at 21 citing Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/public. U.S. Steel asserts that American Bottom has not made the required showing that there was a significant interest from all the people that use Horseshoe Lake, such that the Agency abused its discretion in denying the request for a public hearing. *Id*.

U.S. Steel asserts that only two requests for a public hearing were made. Resp. Br. at 21. According to U.S. Steel, the first request was in HEJ's January 17, 2005 comment, and although it submitted a public hearing request in that comment, HEJ did not deem its interest sufficiently significant to file a petition for review of the Agency's denial of HEJ's public hearing request. *Id*. U.S. Steel argues that the other public hearing request of January 18, 2005, was purportedly submitted on behalf of multiple organizations, but that the January 18, 2005 letter appears to have been written by Kathy Andria, with representatives of other organizations only commenting on Ms. Andria's letter and allowing their names to be added to the signature block. Resp. Br. at 22.

In the case at bar, argues U.S. Steel, there were not numerous requests for a public hearing, only two requests making it well within the Agency's discretion to find that there was not a significant degree of public interest. Resp. Br. at 23. U.S. Steel asserts that American Bottom ignores the fact that only five individual representatives were listed on the January 18, 2005 letter, and that no other individual members of the organizations were identified or submitted separate public hearing requests. *Id.* U.S. Steel contends that American Bottom did not present any evidence that it asked its membership whether members were interested in a public hearing. Resp. Br. at 24.

More tellingly, suggests U.S. Steel, not one member of the public, independent of any private organization, submitted a comment, or was identified in the organizations' comments as wanting to attend a potential public hearing. Resp. Br. at 24. U.S. Steel asserts that even if the Board accepts American Bottom's analysis that all of the members of the organizations can be counted as making a request for a public hearing (*i.e.*, approximately 27,000 members requested a public hearing), then it follows that only approximately 100 of those American Bottom Members deemed the denial of the public hearing request sufficiently important to appeal to the Board. *Id.* U.S. Steel calculates that less than one percent (0 .4%) of the members whose public hearing requests were denied actually deemed the denial sufficiently important to file an appeal of the Agency's decision. *Id.*

U.S. Steel asserts that at the November 20, 2006 Board hearing, multiple witnesses admitted that the January 17, 2005 and January 18, 2005 comments did not identify any individual of the public who would be adversely affected by U.S. Steel's permit. Resp. Br. at 24, citing Tr. at 135, 146. U.S. Steel argues that neither of the comments identifies any individual of the public that would have an interest in attending a public hearing. Resp. Br. at 24.

U.S. Steel contends that the Agency did not commit any procedural error and did not abuse its discretion in denying American Bottom's public hearing request. Resp. Br. at 25.

Further, U.S. Steel argues that American Bottom was not denied a forum for resolving its concerns with Horseshoe Lake in that although the Agency denied the request for a public hearing American Bottom had numerous opportunities to raise the issues that were stated in its January 18, 2005 letter to the Agency. Resp. Br. at 26.

Moreover, U.S. Steel argues, the Agency considered American Bottom's comments where it requested a public hearing or, in the alternative, a meeting with the Agency, and decided to schedule a meeting with American Bottom to address its January 18, 2005 comments. Resp. Br. at 26. U.S. Steel contends that this decision was entirely consistent with American Bottom's request, which stated, "[If] the Agency denies this request for a hearing, we ask for a meeting with you and your staff." Resp. Br. at 26.

U.S. Steel asserts that since American Bottom's letter of January 18, 2006, asked for a meeting if a hearing was not held, American Bottom waived its right to either a hearing or a meeting when its representatives failed to follow through with any meeting with the Agency. Resp. Br. at 27.

THE AGENCY'S ARGUMENTS

The Agency asserts that an administrative agency's findings and conclusions on questions of fact are deemed to be prima facie true and correct. Ag. Br. at 8, citing City of Belvidere v. Illinois State Labor Relations Board, 18 Ill. 2d 191, 2004, 229 Ill. Dec. 522, 692 N.E.2d 295, 302 (1998). The Agency contends that 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, and that 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. Ag. Br. at 8.

The Agency argues that Section 309.115(a) of the Board regulations directs the Agency to hold a public hearing only when it finds that there is a "significant degree of public interest in a draft permit." Ag. Br. at 8. The Agency views this as a two step process: the first step requiring the Agency to review and evaluate the facts presented by the interest groups during the comment period, and the second step requiring the Agency to apply the significant degree of public interest standard to the facts to determine if the standard is satisfied. Ag. Br. at 8-9.

Under Section 309.115(a), asserts the Agency, 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. Ag. Br. at 9. The Agency argues that 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. *Id.*

The Agency contends that the decision to hold a public hearing lies within the discretion of the Agency. Ag. Br. at 9. Further, argues the Agency, the courts have long held that it is only the alleged abuse of discretion, not discretion itself that is reviewable on appeal. Ag. Br. at 11, citing McFarlan v. Fowler Bank City Trust Co., 214 Ind. 10, 14, 12 N.E.2d 752 (Ind. 1938). The Agency asserts that 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, and that further, the appropriate test for abuse of discretion is whether the Agency exceeded the bounds of reason. Ag. Br. at 11, citing Nestle v. City of Santa Monica, 6 Cal.3d 920, 101 Cal.Rptr. 568, 496 P.2d 480 (Cal. 1972).

An abuse of discretion, argues the Agency, is not shown by the mere fact that one or more of the judges of a court would have exercised the discretion differently if sitting as a trial court. Ag. Br. at 12, citing Halliday v. Diehm, 11 Ohio App. 398 (1919). The Agency notes that the Environmental Appeals Board (EAB) has also required that an abuse of discretion must be present in order for it to set aside an EPA decision under Part 124. Ag. Br. at 12, citing Dominion Energy Brayton Point, L.L.C. (Feb. 1, 2006).

Thus, the Agency argues, 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, and the Board should view the inferences of the facts in the light most favorable to the Agency. Ag. Br. at 12-13.

The Agency argues that a public hearing is required only if the significant degree of interest is present in the proposed permit, and that the USEPA recently provided a better test to decide when to hold a hearing. Ag. Br. at 13. The Agency states that in a press release the USEPA provided 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. [USEPA] 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 the USEPA believes is important." Ag. Br. at 13, citing 2005 WL 1685556 (E.P.A.) (July 20, 2005).

In order for American Bottom 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, the Agency believes, it must show that the comment letters had more than general statements of environmental concerns over the risks that U.S. Steel's NPDES permit poses to Horseshoe Lake. Ag. Br. at 15. Instead, the Agency continues, American Bottom must clearly articulate problems with the specific permit conditions in the draft permit, and must further show that comments were directly related to the NPDES permit issues, and not the Clean Air Act or Resource Conservation and Recovery Act issues. *Id.*

The Agency asserts that interested persons may submit written comments concerning the Agency's tentative determinations and may request a public hearing, and that the written comments must be considered by the Agency in making its final determinations. Ag. Br. at 16. If, the Agency contends, 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. *Id.*

In this case, the Agency argues, though a public hearing was not granted 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. Ag. Br. at 16.

The Agency asserts that the Board, consistent with the holding of the court in Prairie Rivers, has held that under Section 40(e)(3) of the Act, in a third party NPDES permit appeal, the burden of proof is on the third party. Ag. Br. at 16, citing Prairie Rivers, 781 N.E.2d 372, 380. The Agency emphasizes that American Bottom must prove that the Agency's record at the close of the comment period 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 request to hold a hearing on the basis of the information before it at the close of the comment period. Ag. Br. at 17-18.

The Agency argues that American Bottom has failed to establish that a significant degree of public interest existed in the draft permit. Ag. Br. at 18. The Agency contends that in order to see if a public hearing should be held it considers: (1) whether a high degree of public interest exists, either 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. Ag. Br. at 19. 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. *Id.*

The Agency declares that in reviewing the comments in this case, the Agency found that the nature and extent of comments received during the comment period were general in nature, and were non-significant in that they did not provide any specific or additional information that

the Agency could have used in drafting the permit. Ag. Br. at 19. Further, the Agency claims that the comments contained facts the Agency already knew, or issues not pertaining to the permit. Ag. Br. at 19-20.

The Agency argues that in order to satisfy its burden in this case American Bottom 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 that the Agency's decision was clearly erroneous, and not a "poor" decision. Ag. Br. at 21.

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, but that these two factors alone are not sufficient to satisfy the criteria described in Section 309.115(a) of the Board regulations. Ag. Br. at 21. The Agency stresses that if it were required to hold a public hearing purely based on the public use of a waterbody and a request from a group, it would have to hold approximately 300 NPDES permit public hearings each year; a result not intended by the Clean Water Act. *Id.*

The Agency argues that American Bottom 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. Ag. Br. at 22. Such comments, contends the Agency, would be of significant relevance were the Agency conducting a total maximum daily load (TMDL) on Horseshoe Lake, and 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, and would, in fact, conduct a public hearing and several public meetings before a final TMDL would be established for Horseshoe Lake. Ag. Br. at 22-23.

The Agency argues that American Bottom has failed to show that its comments regarding diseased fish caught in Horseshoe Lake sediments amounted to a significant degree of public interest. Ag. Br. at 26. Further, the Agency stress that the Board has already dismissed American Bottom's arguments concerning the adequacy of the permit limits, and that 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, that the Agency abused its discretion by not granting the hearing in this case. Ag. Br. at 27-28.

DISCUSSION

The Board has consistently held that to have standing in an NPDES permit appeal as a third-party petitioner under Section 40(e)(2) of the Act, a petitioner must show that he raised the issues contained in the petition during the public comment period. Wesley Brazas v. IEPA, PCB 06-131 slip op at 3-4 (May 4, 2006),. 415 ILCS 5/40(e)(2) (2004). The record shows that American Bottom did submit a timely public comment raising the request for a public hearing. Agency Rec. at 518.

A petitioner in a third party NPDES permit appeal bears the burden of establishing that the permit as issued would violate the Act or Board regulations. In this case, the Board finds that

American Bottom must establish that the permit issued to U.S. Steel will violate the Act or Board regulations in order for the Board to find for American Bottom in this matter.

Section 309.115 of the Board's regulations provides that the Agency shall hold a public hearing on the issuance of a NPDES permit whenever the Agency determines that there exists a significant degree of public interest in the proposed permit or group of permits. 35 Ill. Adm. Code 309.115(a). The section further provides that instances of doubt shall be resolved in favor of holding the hearing. *Id.* As both the Agency and U.S. Steel have argued, the Agency has discretion in determining whether or not to hold a public hearing prior to the issuance of an NPDES permit. Marathon Oil Co. v. IEPA, PCB No. 92-166 (Mar. 31, 1994), citing Borg-Warner Corp v. Mauzy, 100 Ill. App. 862, 867, 427 N.E.2d 415, 419 (3rd Dist. 1981).

In Marathon Oil, the issue regarding the Agency's failure to hold a hearing was not properly before the Board. However, the Board stated that "[a]ssuming arguendo that the matter of the hearing was properly before the Board in this permit appeal, the Board could not find favor with Marathon's request for the Agency to now be ordered to hold a hearing." Marathon Oil, PCB 92-166, slip op. at 10. The Board continued that Marathon had failed to present any argument that would allow the Board to conclude that the Agency abused its discretion or otherwise failed to comport with the requirements pertaining to NPDES hearings was presented. Marathon Oil, PCB 92-166, slip op. at 10.

In the instant case, American Bottom has presented such an argument, and the issue of whether or not the Agency abused its discretion in deciding not to hold a hearing is squarely before the Board. In reviewing the Agency's decision not to hold a public hearing, the Board applies the standard applicable to all reviews of an Agency's permit decision - whether or not the issuance of the permit violates the Act or Board regulations. Thus, the Board does not apply an "abuse of discretion" standard as advocated by U.S. Steel. The regulation at issue is Section 309.115(a), which requires the Agency to hold a public hearing if the Agency determines that there is significant public interest.

As stated earlier, the Board's review of permit appeals is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112 (Aug. 9, 2001) *aff'd* at 335 Ill. App. 3d 391, 401; 781 N.E.2d 372, 380 (4th Dist. 2002).

The record shows that two public comments requesting a hearing were before the Agency prior to the close of the underlying public comment period. The first comment was filed by HEJ and asked the Agency to hold a public hearing on the U.S. Steel NPDES permit, noting that the permit warrants public involvement because it impacts directly a recreational body of water promoted by the DNR for boating, fishing, bird watching, and waterfowl hunting. AR at 532. The second comment was filed by American Bottom along with the Sierra Club, Webster Groves Nature Study Society, HEJ, and the Neighborhood Law Office. That stated that the named organizations request that the Agency hold a public hearing for the U.S. Steel NPDES in order to allow citizens to ask questions and present information and testimony, noting that the

organizations had recently received certain reports and had not had time to review them or to get technical guidance as to their meaning. Agency Rec. at 539.

The Board finds that the two public comments filed in this case evidence a significant degree of public interest in the proposed permit. Each comment expressly asks for a public hearing citing the wide use of the lake as well as concerns with the permit itself. American Bottom has a membership of approximately 100 people. Tr. at 24. The Sierra Club, has approximately 26,000 members in Illinois and 650 members in the area around Horseshoe Lake. Tr. at 126. Webster Groves Nature Study Society has over 400 members, and HEJ has approximately 500 members. Tr. 100, 144.

The Board is not convinced by U.S. Steel's argument that no individual members of the public, independent of any private organization, submitted a comment is somehow indicative of a general lack of interest in the permit. Citizens become members of environmental (and other) organizations of like-minded people in no small part because the collective voice is louder than that of the individual. To penalize such individuals for relying on the organization to make comments on their behalf seems counter-intuitive. In addition, the fact that, as asserted by U.S. Steel, multiple witnesses admitted that the January 17 and 18, 2005 comments did not identify any individual of the public who would be adversely affected by U.S. Steel's permit, is not persuasive. The standard for deciding whether or not to hold a public hearing, simply does not require one to be adversely affected.

Further, even the standard the Agency asserts has recently been developed by the USEPA mandates a hearing in this case. In the standard, the USEPA 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 the USEPA believes is important. As the Board has found that there is a significant degree of public interest in this case, the USEPA standard supports the need for a hearing. Again, based on the Agency's record at the close of the comment period, the decision that there was not a significant degree of public interest was clearly incorrect.

Finally, the Board notes that the regulation itself expressly provides that instances of doubt shall be resolved in favor of holding the hearing. *See* 35 Ill. Adm. Code 309.115(a). This caveat coupled with the strong showing of public interest in the draft permit, renders the Agency's decision in violation of Section 309.115(a). Thus, the permit as issued violates Section 309.115(a) of the Board's regulations.

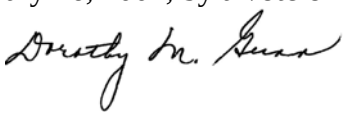
CONCLUSION

The Board finds that the Agency's decision not to hold a public hearing prior to the issuance of the U.S. Steel permit violates Section 309.115(a) of the Board's regulations.. Accordingly, American Bottom has established that the permit as issued would violate the Act and Board regulations, and the Board finds the permit issued by the Agency on March 31, 2006, to U.S. Steel for its steelmaking facility at 20th and State Streets, in Granite City, Madison County is invalid.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2004); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 26, 2007, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board