BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING

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PLEASE TAKE NOTICE that on March 8, 2007, there was filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of American Bottom Conservancy's Response to United States Steel Corporation's Motion to Reconsider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 8 day of March 2007, one copy of the foregoing was sent via electronic communication to the following:

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AMERICAN BOTTOM CONSERVANCY'S RESPONSE TO UNITED STATES STEEL CORPORATION'S MOTION TO RECONSIDER

Petitioner, American Bottom Conservancy ("ABC"), respectfully asks the Illinois Pollution Control Board ("Board") to deny United States Steel Corporation's ("U.S. Steel") Motion to Reconsider. In support of its Response, ABC states as follows:

I. INTRODUCTION

On January 26, 2007, the Board entered an Opinion and Order ("Board Order") holding that the Illinois Environmental Protection Agency's ("IEPA") failure to hold a public hearing prior to issuing a NPDES permit for U.S. Steel's Granite City Works violated the Board's regulations. The Board concluded that the record demonstrated significant public interest in the subject permit and that its regulations required that a public hearing be held in such instances. Therefore, the Board invalidated the permit pending a public hearing.

The Board did not misapply the law in issuing its Order as U.S. Steel argues in its Motion to Reconsider. The Board has authority pursuant to the Illinois Environmental

Protection Act (the "Act") to hear permit appeals and to grant appropriate remedies. To suggest, as U.S. Steel does, that the Board does not have the power to invalidate permits after finding a violation of applicable regulations is to render meaningless the Board's quasi-judicial functions. U.S. Steel's motion should therefore be denied.

II. FACTUAL BACKGROUND

On December 19, 2004, IEPA put on public notice a proposed NPDES permit for U.S. Steel's Granite City Works. (AR 518-28).[1] The proposed permit attached to the public notice (AR 524-28) and the final permit that was issued some fourteen months later (AR 651-57) both allowed for hundreds of tons of pollutants to be discharged into Horseshoe Lake each year.[2]

During the thirty-day comment period that ran from December 19, 2004, through January 18, 2005, five organizations submitted written comments. One of the letters was submitted by the organization Health & Environmental Justice-St. Louis (AR 532) and the other was jointly submitted by five organizations, including ABC, the Sierra Club, Webster Groves Nature Study Society, Health & Environmental Justice-St. Louis, and the Neighborhood Law Office. (AR 537-39). The comment letters requested a public hearing, asked for an extension of the comment period, and raised numerous concerns about the proposed permit. Specifically, the letters cited "discharges of toxic heavy metals known to accumulate in biological organisms," the fact that the Lake is already considered "impaired" by several pollutants, that academic studies had shown high levels of metals in the Lake's sediment, and that U.S. Steel has a history of non-compliance.

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[1] The designation "AR" refers to the administrative record for this appeal.

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

The letters also pointed out that the Lake is used heavily for recreation, including for bird watching, hunting, and fishing and that many people consume fish from the Lake, some for subsistence purposes.

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

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

On May 8, 2006, ABC filed its Petition for Review, which sought the Board's review of various effluent limits in the permit and of IEPA's decision to forego a public

hearing. By Order dated September 21, 2006, the Board dismissed ABC's claims challenging the effluent limits in the permit because the claims were not based on comments submitted during the initial thirty-day comment period. A Board hearing was held on November 20, 2006, at which testimony was heard on the remaining issue of whether IEPA's decision not to hold a public hearing complied with the Board's regulations.

On January 26, 2007, the Board entered its Order holding that the decision of the IEPA not to hold a public hearing prior to issuing the permit to U.S. Steel was error. Board Order at 14. The Board invalidated the permit and ordered a public hearing. *Id.* On February 22, 2007, U.S. Steel filed its Motion to Reconsider.

III. ARGUMENT

A. Standard of review

For U.S. Steel to prevail on its motion to reconsider, it must "bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." *People v. Community Landfill Co., Inc.*, PCB No. 03-191, 2006 Ill. Env. LEXIS 323, 2-3 (June 1, 2006) (citations omitted). *See also* 35 Ill. Adm. Code § 101.902 ("In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error."). Further, "[r]econsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character so as to make it probably [sic] that a different judgment would be reached." *Community Landfill* at 3 (citation omitted).

U.S. Steel has come forward with no newly discovered evidence or changes in the law. Therefore, the only issue before the Board is whether it misapplied the law. U.S. Steel has not met its burden of showing that the Board misapplied any laws. Therefore the Board should deny U.S. Steel's motion.

B. The Board Did Not Misapply the Law When it Invalidated the Permit.

The Act gives the Board the power to hear third-party appeals of NPDES permits, 415 ILCS § 5/40(e)(1), and to "enter such final order, or make such final determination, as it shall deem appropriate under the circumstances." 415 ILCS § 5/33(a).[3] The Board therefore has the authority to invalidate permits that have been issued in violation of the Act. U.S. Steel's suggestion that the Board does not have this power threatens to render meaningless the Board's quasi-judicial functions. The power to hear appeals is only significant if there is a concomitant power to remedy violations proven in the course of such appeals.

Well-established principles of administrative law support the Board's authority to grant meaningful remedies in permit appeal proceedings. Administrative agencies such as the Board have those powers expressly delegated by statute as well as those "found, by fair implication and intendment, to be incident-to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the objectives for which the agency was created." *Illinois Dep't of Public Aid v. Brazziel*, 377 N.E.2d 1119, 1121-22 (Ill. App. Ct. 1978) (citation omitted).

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[3] The statutory authority of the Board to grant "appropriate" remedies, while located in the enforcement title of the Act, is incorporated by reference into the Act's permit appeal provisions. *See* 415 ILCS §§ 5/40(e)(3)(i) and 5/40(a)(1).

In *Brazziel*, the First District Appellate Court upheld the validity of a section of the Rules of the Civil Service Commission relating to state employees against an argument that such rules were not expressly authorized by statute. *Id.* at 1120. The Court held that the section was valid because "on its face [it] aids the Commission in accomplishing the objectives for which it was created, which is the protection of the public and in carrying out that purpose the protection of civil service employees." *Id.* at 1122 (citation omitted).

Here, the Board has statutory authority to hear permit appeals and to grant "appropriate" remedies. The power to invalidate unlawfully issued permits is necessary for it to carry out its purpose of ensuring that NPDES permits comply with the Act. Allowing the permit to stand while IEPA holds a public hearing, as suggested by U.S. Steel, would not provide an adequate remedy for the agency's unlawful failure to hold a public hearing in the first instance. Not only would the unlawful permit stay in existence for some undetermined length of time while pollutants continued to impact Horseshoe Lake, but the IEPA's decision whether to issue the permit could well be prejudiced by the fact that it remains in effect at the same time that public testimony is being accepted. That is, it is easier to prevent a faulty permit from being issued than it is to have the bureaucratic machinery re-open and modify an existing permit.

The Illinois Supreme Court has held that when a public hearing is required the public hearing must occur *before* a permit is issued and the IEPA must consider the evidence presented at the public hearing before issuing the permit. *Pioneer Processing, Inc. v. EPA*, 464 N.E.2d 238 (Ill. 1984). In *Pioneer*, the IEPA considered evidence submitted by Pioneer before and after the public hearing – thus the parties challenging the

permit had no opportunity to examine this evidence. The IEPA argued that this was of no consequence because its "decision to grant or deny a permit precedes the public hearing." *Id.* at 248. The Illinois Supreme Court held that this was improper:

> We believe that if the Agency were to make its decision regarding the issuance of a permit prior to conducting the public hearing, *then the public hearing would serve no purpose*. Certainly, the legislature did not intend to require a public hearing simply to create the illusion that the Agency was considering the evidence admitted during that hearing in making its decision.

Id. (emphasis added).

Pioneer dealt with a different statute in that it involved a permit for hazardous waste, which required a public hearing in all circumstances without a showing of a significant degree of public interest.[4] Nevertheless, the reasoning of the Supreme Court applies equally to the present case where a public hearing was required due to a finding of significant public interest. The statutory requirement for a public hearing would be neutered were the permit to stand. To give the public hearing requirement meaning, the hearing must logically come before the permit is issued such that evidence submitted at the hearing can inform the IEPA's decision. Otherwise, the public hearing is no more than a charade to create the "illusion that the Agency was considering the evidence admitted during that hearing in making its decision." *Pioneer,* 464 N.E.2d at 248. The Board therefore acted appropriately, and within its statutory authority, when it invalidated the illegally issued permit.[5]

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[4] When *Pioneer* was decided, the applicable statute was § 39(c) of the Environmental Protection Act. That section has been amended, and 415 ILCS § 5/39.3(c)(i) now provides that the IEPA must hold a public hearing after issuing a preliminary decision on whether to issue or deny a hazardous waste permit. Its final decision still must reflect the evidence presented at the public hearing.

[5] U.S. Steel spends considerable time arguing that ABC failed to prove that the permit would result in a violation of water quality standards or effluent limitations. This argument misses the mark. The very purpose of the public hearing is to solicit evidence on this issue and ABC will show during the public

B. U.S. Steel's Equitable Arguments Do Not Warrant Reconsideration of the Board's Order

"A motion to reconsider may be brought to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." *Community Landfill*, 2006 Ill. Env. LEXIS 323 at 2-3. *See also* 35 Ill. Adm. Code § 101.902 ("In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error").

U.S. Steel alleges in its Motion to Reconsider that it has "made modifications to its facility and operations as a result of the requirements contained in the Final Permit." U.S. Steel Memo in Support at 8. It also alleges that unless the Board reconsiders its Order it "will now have to undo such modifications to comply with its previous NPDES permit until IEPA issues a new permit after the public hearing." *Id.* U.S. Steel references only one modification it allegedly made in reliance on the permit – piping that was constructed to treat landfill leachate. *Id.* at 9, footnote 10.

This argument is irrelevant as equitable arguments are not a valid basis on which to urge the Board to reconsider its Order. The fact that U.S. Steel relied on an unlawful permit is not newly discovered evidence, a change in the law, or a misapplication of existing law, and is therefore not a basis for reconsideration.

Moreover, the hardship this imposes on U.S. Steel is far from clear. U.S. Steel has not identified the costs involved with the alleged modification, nor has it stated why it

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hearing why the permit should not have been issued in the manner it was. Moreover, ABC has already submitted to IEPA information showing that many of the permit's limits were incorrect. (AR 611-23). This evidence was excluded from consideration by IEPA because it was submitted after the initial 30 day public comment period.

would have to deconstruct the pipes installed to handle the leachate. Prior to issuance of the permit, U.S. Steel apparently trucked this potentially hazardous waste to off-site disposal locations. (AR 292). There is no indication why this practice could not be employed again until this and other issues can be fully considered through a public hearing.

IV. Conclusion

The Board was correct to invalidate the permit as a remedy for IEPA's unlawful failure to hold a public hearing. In order to prevail on its Motion to Reconsider, U.S. Steel has to identify newly discovered evidence or changes in the law, or show that the Board misapplied the law. U.S. Steel has come forward with no new evidence or changes in the law, and has not met its burden of proving that the Board misapplied the law.

For the foregoing reasons, ABC requests that the Board deny U.S. Steel's Motion to Reconsider.

Respectfully submitted,

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