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MAR 12 2007

STATE OF ILLINOIS
Pollution Control Board

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)

NOTICE OF FILING

Dorothy Gunn, Clerk
Illinois Pollution Control Board
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Chicago, IL 60601

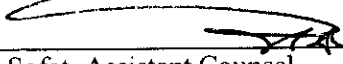
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board an original and four (4) copies of the **MOTION FOR AND MEMORANDUM OF LAW IN SUPPORT OF RECONSIDERATION** of the Illinois Environmental Protection 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: March 8, 2007
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62794-9276
(217) 782-5544

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AGENCY'S MOTION FOR RECONSIDERATION

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 35 Ill. Adm. Code 101.520, hereby submits this Agency's Motion for Reconsideration to the Illinois Pollution Control Board ("Illinois PCB" or "Board"). The Agency is requesting the Board to RECONSIDER its decision as it erred in applying "existing law." See *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156, slip op. at 2 (March 11, 1993), citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill.App.3d 622, 627, 575 N.E.2d 1154, 1158 (1st Dist. 1991). The Agency respectfully requests the Board to apply an abuse of discretion standard to determine whether the Agency's decision to not hold a public hearing was "clearly erroneous" and not just a "poor" decision. In support of its Motion, the Agency states as follows:

1. On May 8, 2006 American Bottom Conservancy (“ABC”) filed its Petition seeking the Board’s review of the Agency’s issuance of United States Steel’s (“US Steel”) National Pollutant Discharge Elimination System (“NPDES”) permit.
2. On September 21, 2006, the Board dismissed ABC’s petition on all the issues, except “the issue of a request for a public hearing.” PCB 06-171, January 26, 2007 *at 8*. (Hereinafter “Board Order.”)
3. A Board hearing was held on November 20, 2006.
4. On February 2, 2007, the Agency received the Board’s order dated January 26, 2007. The Board phrased the issue as “whether the Agency’s decision to not hold a public hearing at the underlying level invalidates the permit.” *Board Order at 5*.
5. In that order, the Board states: “the issue of whether the Agency abused its discretion in deciding not to hold a hearing is squarely before the Board.” (*emphasis added*) *Board Order at 13*.
6. Yet, the Board applied the standard under which the Agency’s final permit decision is reviewed. Specifically, the Board states that, “[I]n 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.” (*emphasis added*) *Board Order at 13*.
7. The Board’s reasoning assumes that since the applicable regulation is a Board regulation, the proper standard of review is the same as that which is applied to

- review the Agency's final permit decision. The Board thus reads Section 309.115(a) as a non-discretionary regulation.
8. By applying the standard that whether the issuance of the permit violates the Act or Board regulations, the Board ignores the Agency's discretion written into Section 309.115(a). Consequently, the Board rejected the abuse of discretion standard, in favor of determining whether the Agency erred in the context of the Board regulation. *Board Order at 13.*
 9. The state courts have long held that the Agency's decision under Section 309.115(a)¹ is discretionary in nature. The Environmental Appeals Board ("EAB") has also read a similar regulation at 40 C.F.R. § 124.12 as discretionary, granting the Agency discretion on whether to hold a public hearing.
 10. The *Borg-Warner* court agreed that the Agency's decision of whether to hold a public hearing is discretionary. *Borg-Warner Corp. v. Mauzy*, 100 Ill.App.3d 862, 427 N.E.2d 415 (3rd Dist. 1981). Regarding the reviewability of Agency action, the court states that, "agency action is reviewable, subject to an abuse of discretion standard, but the availability of review over the determination does not alter the essentially discretionary nature of the determination." *Id.*, at 867 (*emphasis added*).
 11. The 5th District Court provides further insight into the nature of the Agency's decision under Section 309.115(a). The court also finds the federal regulation at 40 C.F.R. § 124.12(a), from which Section 309.115(a) is modeled, to be discretionary. In *Village of Sauget*, the court recognized that "a hearing pursuant

¹ The criterion for holding a public hearing is 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).

to these regulations [35 Ill. Adm. Code 309.115(a); 40 C.F.R. § 124.11] is discretionary with the IEPA....” *Village of Sauget v. PCB*, 207 Ill.App.3d 974, 981, 566 N.E.2d 724 (5th Dist. 1991).

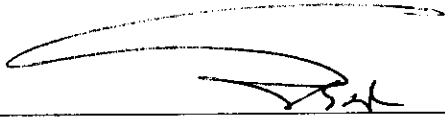
12. The EAB has also read similar regulation at 40 C.F.R. § 124.12 as warranting discretion to Environmental Protection Agency (“EPA”). In *In re: Sunoco Partners Marketing & Terminals, LP* 2006 WL 1806987 (June 2, 2006), the EAB held that, “[a]s we have expressed on many occasions, the Region’s decision to hold a public hearing is a largely discretionary one.” See, e.g., *In re City of Fort 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).
13. Even the Board in *Marathon Oil* acknowledged that the Agency’s decision to grant a hearing is discretionary. Specifically, the Board noted that: “[w]hether an Agency hearing is to be held in an NPDES permit review is discretionary with the Agency....” *Marathon Oil*, PCB 92-166, slip op. at 10 (*emphasis added*).
14. As the EAB and the courts in *Borg-Warner* and *Sauget* have repeatedly concluded, the proper standard of review here is abuse of discretion, as the Agency’s decision under Section 309.115(a) is discretionary in nature. The Agency’s decision of whether to hold a public hearing is separate and independent from the final permit decision. By applying the improper standard, the Board is bypassing the Agency’s discretion that is written into Section 309.115(a).
15. The Agency thus urges the Board to apply the proper standard of review, abuse of discretion.

WHEREFORE, the Agency respectfully requests that the Board RECONSIDER its decision regarding the proper standard to review Agency's discretionary decision under Section 309.115(a). The Agency further requests the Board to apply an abuse of discretion standard.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: _____


Sanjay K. Sofat
Assistant Counsel
Special Assistant Attorney General

DATED: March 8, 2007
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AGENCY’S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION

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 35 Ill. Adm. Code 101.520, hereby submits this Agency’s Memorandum of Law in Support of Motion for Reconsideration to the Illinois Pollution Control Board (“Illinois PCB” or “Board”). The Agency respectfully requests the Board to RECONSIDER its decision regarding the proper standard to review Agency’s discretionary decision under Section 309.115(a). In support, the Agency states as follows:

ARGUMENTS

A party can file a motion to reconsider “to bring to the [Board’s] attention ... changes in law or errors in the [Board’s] previous application of existing law.” (*emphasis*

added) See *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156, slip op. at 2 (March 11, 1993), citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill.App.3d 622, 627, 575 N.E.2d 1154, 1158 (1st Dist. 1991). By applying the standard that is only applicable to Agency's permit decision, the Board has erred in applying the existing law.

I. Applicable Statutory and Regulatory Provisions

The Clean Water Act ("CWA") requires the Agency to allow the public an "opportunity to comment." 33 U.S.C. § 1342. This opportunity to comment mandate does not require that a public hearing be held every time a request is made. This requirement is satisfied as long as the public "receives notice of each application for a permit and ... an opportunity for a public hearing...." 33 U.S.C. §1342.

The Environmental Protection Agency (EPA) adopted 40 C.F.R. § 124.12 to comply with the opportunity to comment requirement of the CWA. Under Section 124.12, EPA is required to "... hold a public hearing whenever ... [the Director finds] a significant degree of public interest in a draft permit(s)." (*emphasis added*) 40 C.F.R. § 124.12(a). Similarly, to ensure that the State of Illinois' NPDES program is consistent with the CWA requirements, Illinois adopted 35 Ill. Adm. Code 309.115(a). The criterion for holding a public hearing set forth in Section 309.115(a) is identical to the criterion stated in the federal regulations at 40 C.F.R. §124.12(a). Section 309.115(a) of the Board regulations requires:

The Agency shall hold a public hearing on the issuance or denial of an NPDES Permit... whenever the Agency determines that there exists a significant degree of public interest in the proposed permit... to warrant the holding of such a hearing. 35 Ill. Adm. Code 309.115(a)(1) (2005) (*emphasis added*).

The Board's opinion rephrases the issue as, "[w]hether the Agency's decision not to hold a public hearing at the underlying level invalidates the issued permit." *See Board opinion at 5*. By rephrasing the issue, the Board has changed the paramount inquiry. The Board's stated issue only considers the *impact* of not holding a hearing on an issued permit, but the real inquiry before the Board is whether the Agency abused its discretion by not holding a public hearing.

Also, the Board's opinion rephrases the burden of proof as "American Bottom must establish that the permit issued to US Steel will violate the Act or Board regulations." *See Board opinion at 12*. By rephrasing the burden of proof, the Board has changed the true burden of proof² that American Bottom must establish to secure a favorable outcome in this case. ABC cannot 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." To prove the Agency abused its discretion, ABC must show that the Agency's decision is clearly erroneous³ or arbitrary and unreasonable given the facts of the case.

In its opinion, the Board does not address the sole issue before it-- whether the Agency's decision under Section 309.115(a) is discretionary. To apply the proper standard of review, the Board first must ascertain whether Section 309.115(a) vests discretion in the Agency to decide whether to hold a hearing. As discussed below, the proper standard of review of the Agency's discretionary decision under Section 309.115(a) is an abuse of discretion.

² For a detailed discussion of applicable burden of proof, please refer to the Agency's brief, pgs. 16-17.

³ For a detailed discussion of abuse of discretion, please refer to the Agency's post-hearing brief, pgs. 20-21.

II. Section 309.115(a) is discretionary

The Agency's decision under Section 309.115(a) is discretionary and several Illinois courts have recognized this discretion. The 3rd District court in *Borg-Warner*, referring to Water Rule 909(a) (now Section 309.115(a)), notes that a public hearing is "a discretionary decision to be made by the Agency." *Borg-Warner Corp. v. Mauzy*, 100 Ill.App.3d 862, 867, 427 N.E.2d 415 (3rd Dist. 1981) (*emphasis added*). Also, the 5th District in *Village of Sauget* reads Section 309.115(a) to give the Agency discretion in making the decision of whether to hold a public hearing. The court specifically states that, "[w]e recognize that a hearing pursuant to these regulations [35 Ill. Adm. Code § 309.115(a); 40 C.F.R. § 124.11] is discretionary with the IEPA...." *Village of Sauget v. IPCB*, 207 Ill.App.3d 974,981, 566 N.E.2d 724 (5th Dist. 1990) (*emphasis added*).

The Agency did not cite *Marathon* in its post-hearing brief to contend that the issue regarding the Agency's decision to not hold a hearing was before the Board. Rather the Agency cited *Marathon Oil* to show that even the Board acknowledged that the Agency's decision under Section 309.115(a) is discretionary in nature. Specifically, the Board states that, "[w]hether an Agency hearing is to be held in an NPDES permit review is discretionary with the Agency...." *Marathon Oil Co. v. IEPA*, PCB 92-166, slip op. at 10 (March 31, 1994) (*emphasis added*).

The Environmental Appeals Board ("EAB") reviews EPA's decisions to hold or not hold a public hearing, has expressed on many occasions⁴ that, "the Region's decision to hold a public hearing is a largely discretionary one." *In re: Sunoco Partners Marketing & Terminals, LP* (June 2, 2006) (*emphasis added*) quoting *See, e.g., In re City of Fort Worth*, 6 E.A.D. 392, 407 (EAB 1996).

The Agency's decision to not grant a public hearing under Section 309.115(a) is a separate and independent decision from the Agency's decision to issue or deny an NPDES permit. The Illinois courts have read Section 309.115(a) to give the Agency discretion in deciding whether to hold a hearing in a given case. However, to review the Agency's discretionary decision, the Board applies the standard of whether the issuance of the permit violates the Act or Board regulations. The Board can apply this standard only if it determines that the Agency's decision under Section 309.115(a) is non-discretionary. Without making that determination, the Board applied an improper standard to review the Agency's decision that is discretionary in nature.

III. If the regulation is discretionary, the only applicable standard of review is abuse of discretion.

It is a long held principle that it is only the alleged abuse of discretion, not discretion itself that is reviewable on appeal. *See McFarlan V. Fowler Bank City Trust Co.*, 214 Ind. 10, 14, 12 N.E.2d 752 (Ind. 1938). When a regulation is discretionary in nature, the reviewing court must apply the abuse of discretion standard. The court in *Borg-Warner* applied a similar principle and held that, "Agency action on a decision is reviewable, subject to an abuse of discretion standard, but the availability of review over the determination does not alter the essentially discretionary nature of the determination." *Borg-Warner Corp. v. Mauzy*, 100 Ill.App.3d 862, 867, 427 N.E.2d 415 (3rd Dist. 1981).

The EAB has also applied the abuse of discretion standard to review EPA's decision whether to hold a hearing under Section 124.12 of the federal regulations.

⁴ For a detailed discussion of EAB cases, please refer to the Agency post-hearing brief, pgs. 9-10.

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 public hearing is a largely discretionary one.” See, e.g., *In re City of Fort 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). 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.”)

IV. Board applied an improper standard of review

To review the issue of whether the Agency abused its discretion in deciding not to hold a hearing, the Board did not apply the abuse of discretion. Instead, the Board applied a standard that is applied to review the Agency’s permit decision. The Board, however, provides no logic or rationale for its departure from the commonly applied standard of review. Even though the Board mentions that the issue of whether the Agency abused its discretion is squarely before the Board, the Board did not review the Agency’s decision as if it were discretionary. Rather, the Board treated Section 309.115(a) as a non-discretionary regulation and applied a standard that is used to review the Agency’s non-discretionary decision. The Board’s reasoning makes no distinction between a discretionary and a non-discretionary decision. The net effect of this reasoning is that the Board reviewed a discretionary decision by a standard that is applicable only to non-discretionary decisions.

By applying the standard of review as whether the issuance of the permit violated the Act or Board regulations, the Board has effectively removed the Agency's discretion written into the Section 309.115(a) language. By reading Section 309.115(a) as non-discretionary, the Board is also requiring the Agency to grant public hearing whenever one is requested by the public. 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 a public hearing only when it determines a significant degree of public interest is present in the proposed permit. The Agency's decision under Section 309.115(a) has been read to be a discretionary one. Unless the Board determines that the Agency's decision under Section 309.115(a) is not discretionary, the proper standard of review is abuse of discretion.

In sum, the Agency contends that the Board must apply a proper standard to review the Agency's discretionary decision. The proper standard of review for a discretionary decision is abuse of discretion.

CONCLUSION

For the reasons and arguments provided herein, the Agency respectfully requests the Board to RECONSIDER its decision to apply a non-discretionary standard of review to an Agency's discretionary decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 

Sanjay K. Sofat
Special Assistant Attorney General
Division of Legal Counsel

Dated: March 8, 2007
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STATE OF ILLINOIS)
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COUNTY OF SANGAMON)

SS

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached the **MOTION FOR AND MEMORANDUM OF LAW IN SUPPORT OF RECONSIDERATION** upon the persons to whom it is directed, by placing a copy in an envelope addressed to:

Dorothy Gunn, Clerk
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and mailing it from Springfield, Illinois on March 8, 2007, by U.S. Mail with sufficient postage affixed.



SUBSCRIBED AND SWORN BEFORE ME
THIS 8th DAY OF MARCH, 2007.



THIS FILING PRINTED ON RECYCLED PAPER