

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

**RECEIVED**  
CLERK'S OFFICE

AMERICAN BOTTOM CONSERVANCY, )  
)  
Petitioner, )  
)  
v. )  
)  
ILLINOIS ENVIRONMENTAL PROTECTION )  
AGENCY, and UNITED STATES STEEL )  
CORPORATION - GRANITE CITY WORKS )  
)  
Respondents. )

MAY 30 2007

STATE OF ILLINOIS  
Pollution Control Board

Case No. PCB 2006-171  
(NPDES Permit Appeal)

NOTICE OF FILING

To: Sanjay K. Sofat  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
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Springfield, IL 62794-9276

Edward J. Heisel  
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Carol Webb, Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
P.O. Box 19274  
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**PLEASE TAKE NOTICE** that on May 30, 2007 there was filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original and executed copies of **United States Steel Corporation's Motion to Stay Orders of January 26, 2007 and May 3, 2007 Pending Appeal along with United States Steel Corporation's Memorandum in Support of Motion to Stay Orders of January 26, 2007 and May 3, 2007 Pending Appeal**, copies of which is herewith served upon you.

Dated: May 30, 2007

Respectfully submitted,

Carolyn S. Hesse  
David T. Ballard  
**Barnes & Thornburg LLP**  
One North Wacker Drive - Suite 4700  
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(312) 357-1313

**United States Steel Corporation - Granite City Works,**  
  
One of Its Attorneys


**CERTIFICATE OF SERVICE**

I, the undersigned, an attorney, certify that I caused to be served the attached, **United States Steel Corporation's Motion to Stay Orders of January 26, 2007 and May 3, 2007 Pending Appeal along with United States Steel Corporation's Memorandum in Support of Motion to Stay Orders of January 26, 2007 and May 3, 2007 Pending Appeal**, by U.S. Mail, postage prepaid, from One North Wacker Drive, Suite 4400, Chicago, Illinois 60606, on this 30<sup>th</sup> Day of May, 2007, upon the following:

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\_\_\_\_\_  
Carolyn S. Hesse

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PCB No. 2006-171  
(NPDES Permit Appeal)

**UNITED STATES STEEL CORPORATION'S MOTION TO STAY ORDERS OF  
JANUARY 26, 2007 AND MAY 3, 2007 PENDING APPEAL**

Respondent, United States Steel Corporation - Granite City Works ("U. S. Steel"), pursuant to Illinois Supreme Court Rule 335(g) and 35 Ill. Adm. Code § 101.906(c), moves the Board to stay its January 26, 2007 and May 3, 2007 Orders pending U. S. Steel's appeal of the same orders. In support of its Motion, U. S. Steel states as follows:

1. The American Bottom Conservancy ("ABC") filed a third-party appeal of IEPA's issuance of the final NPDES permit issued to U. S. Steel's Granite City Works facility ("Granite City Works") on March 8, 2006 (the "Final Permit").

2. ABC alleged, among other things,<sup>1</sup> that IEPA violated its administrative duties by denying ABC's request for a public hearing on the proposed permit.

3. On January 26, 2007, the Board entered an Opinion and Order and found that IEPA violated 35 Ill. Adm. Code 309.115(a)(1) because IEPA should have held a public hearing

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<sup>1</sup> On September 21, 2006, the Board dismissed all substantive issues raised in ABC's petition except the request for a public hearing.

before issuing the Final Permit. Because of IEPA's purported failure to hold a public hearing, the Board invalidated the Final Permit.

4. On March 9, 2007, U. S. Steel moved to reconsider the Board's decision, including the Board's invalidation of the Final Permit.

5. On May 3, 2007, the Board entered an order denying U. S. Steel's Motion to Reconsider.<sup>2</sup>

6. On May 25, 2007, U. S. Steel filed a Petition for Review of the Board Orders to the Appellate Court for the Fifth District. U. S. Steel now moves to stay the Board Orders pending appellate review.

7. The Board should stay the Board's Orders pending appeal because all of the relevant factors for determining whether a stay should be granted are satisfied in this case.

8. The Illinois Supreme Court has stated that the purpose of a stay pending review "is preventive or protective and seeks to maintain the status quo." *Stacke v. Bates*, 138 Ill. 2d 295, 309 (1990). In order to determine whether a stay pending appeal is appropriate, "[t]here are numerous different factors which may be relevant when the court makes its determination and, by necessity, these factors will vary depending on the facts of the case." *Stacke*, 138 Ill. 2d at 305. The factors that can be considered are "whether a stay is necessary to secure the fruits of the appeal in the event the movant is successful," "the movant's likelihood of success on the merits," and "the likelihood the movant will suffer hardship. . ." *Id.* at 305-307. Indeed, the Illinois Supreme Court has provided a "balancing process" that is to be conducted in assessing whether to grant a stay pending appeal:

We believe that in all cases, the movant, although not required to show a probability of success on the merits, must, nonetheless,

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<sup>2</sup> Collectively, the Board's January 26, 2007 and May 3, 2007 orders will be referred to as the "Board Orders."

present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay. If the balance of the equitable favors does not strongly favor movant, then there must be a more substantial showing of a likelihood of success on the merits. Thus a strong showing of the likelihood of success on the merits may offset other equitable factors favoring the other party.

*Stacke*, 138 Ill. 2d at 309.<sup>3</sup>

9. Applying the process provided by the Illinois Supreme Court, as stated above, it is clear that the balance of the equitable factors weigh in favor of granting the stay. A stay is necessary to secure the fruits of U. S. Steel's appeal, which would be lost if the Board Orders are immediately imposed; there is a reasonable likelihood of success for U. S. Steel's appeal; and U. S. Steel will suffer substantial and irreparable harm if a stay is not granted. Furthermore, even if the appellate court rules that a public hearing should be held on U. S. Steel's permit, it is likely that the new permit would contain the same conditions as the permit that the Board invalidated.

10. U. S. Steel hereby incorporates its Memorandum in Support of Motion to Stay Orders of January 26, 2007 and May 3, 2007 Pending Appeal filed currently herewith.

WHEREFORE, U. S. Steel requests that the Board enter an Order staying its January 26, 2007 and May 3, 2007 Orders pending U. S. Steel's appeal, and grant all relief it deems fair and just.

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<sup>3</sup> The *Stacke* Court assessed the parameters of Illinois Supreme Court Rules 305(a) and (b), which involve stays pending appeal of a civil judgment, including non-monetary judgments similar to the one entered in the instant case.

Respectfully submitted,

**U. S. Steel Corporation - Granite City Works**

By: Carolyn S Hesse  
One of Its Attorneys

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**UNITED STATES STEEL CORPORATION'S MEMORANDUM IN SUPPORT OF  
MOTION TO STAY ORDERS OF JANUARY 26, 2007 AND  
MAY 3, 2007 PENDING APPEAL**

Respondent, United States Steel Corporation - Granite City Works ("U. S. Steel"), pursuant to Illinois Supreme Court Rule 335(g) and 35 Ill. Adm. Code § 101.906(c), moves the Board to stay its January 26, 2007 and May 3, 2007 Orders pending U. S. Steel's appeal of the same orders. In support of its Motion, U. S. Steel states as follows:

**INTRODUCTION**

The American Bottom Conservancy ("ABC") filed a third-party appeal of IEPA's issuance of the final NPDES permit issued to U. S. Steel's Granite City Works facility ("Granite City Works") on March 8, 2006 (the "Final Permit"). Along with other issues that were dismissed, ABC alleged that IEPA violated its administrative duties by denying ABC's request for a public hearing on the proposed permit. On January 26, 2007, the Board entered an Opinion and Order and found that IEPA violated 35 Ill. Adm. Code 309.115(a)(1) because IEPA should have held a public hearing before issuing the Final Permit. Because of IEPA's purported failure to hold a public hearing, the Board invalidated the Final Permit. On March 9, 2007, U. S. Steel

moved to reconsider the Board's decision, including the Board's invalidation of the Final Permit. On May 3, 2007, the Board entered an order denying U. S. Steel's Motion to Reconsider.<sup>1</sup> On May 25, 2007, U. S. Steel filed a Petition for Review of the Board Orders to the Appellate Court for the Fifth District. U. S. Steel now moves to stay the Board Orders pending appellate review.

The Board should stay the Board's Orders pending appeal because all of the relevant factors for determining whether a stay should be granted are satisfied in this case. Specifically, a stay is necessary to secure the fruits of U. S. Steel's appeal, which would be lost if the Board Orders are immediately imposed; there is a likelihood of success for U. S. Steel's appeal; and U. S. Steel will suffer substantial hardship if a stay is not granted. Furthermore, even if a public hearing is held on U. S. Steel's permit, the new permit would contain the same conditions as the permit that the Board invalidated.

### **BACKGROUND FACTS**

#### **I. U. S. Steel's application for a renewed NPDES permit, public comment, and issuance of Final Permit.**

1. On October 14, 2002, U. S. Steel submitted an application to renew its NPDES permit to IEPA for its Granite City Works facility located in Granite City, Illinois. R. 135.<sup>2</sup> This facility has had NPDES permits ever since such permits have been required. R. 554. After conducting a thorough analysis of the facility and its discharges into Horseshoe Lake, on December 19, 2004, IEPA issued a proposed NPDES permit for the Granite City facility (the "Proposed Permit"), which would allow the facility to continue to discharge into Horseshoe Lake

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<sup>1</sup> Collectively, the Board's January 26, 2007 and May 3, 2007 orders will be referred to as the "Board Orders."

<sup>2</sup> Citations of "R. \_\_\_," will be to the Administrative Record, "SR. \_\_\_," will be to ABC's Second Supplement to the Administrative Record, and "Trans. \_\_\_," will be to the Transcript from the November 20, 2006 hearing before the Chief Administrative Officer.



in compliance with Illinois water quality standards. R. 518. This proposed permit was noticed for public comment. The public comment period expired on January 18, 2005.

2. On January 17, 2005, Kathleen Logan Smith submitted a comment to IEPA regarding the Proposed Permit on behalf of the Health & Environmental Justice - St. Louis ("HEJ"). R. 532. The letter raised a question about the permit allowing lead to be discharged into Horseshoe Lake (R. 532). U. S. Steel does not use lead in its processes. R. 601.<sup>3</sup> The letter did not identify any regulations or sections of the Act that would be violated by the Proposed Permit if it were issued. R. 532.

3. On January 18, 2005, Katherine Andria and four other individuals submitted comments related to the Proposed Permit on behalf of ABC, HEJ, Neighborhood Law Office (East St. Louis), Sierra Club, and Webster Groves Nature Study Society. R. 537-539. The January 18, 2006 letter provided numerous comments on issues that were unrelated to U. S. Steel's effluent and whether the Proposed Permit, if issued, would violate the Act or water regulations. IEPA determined that ABC's letter did not identify any provisions of the Act or regulatory standards for the protection of water quality that would be violated if the Proposed Permit were issued as drafted. R. 537-539.

4. On March 8, 2006, IEPA issued the Final Permit for U. S. Steel's Granite City Works facility. R. 637. On March 31, 2006, IEPA reissued the Final Permit to coincide with its issuance of the responses to the comments it received. R. 645, 648, 651-657. The effective date of the Final Permit was April 1, 2006.

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<sup>3</sup> The increased limits that appear on paper are due to production changes and are consistent with calculations of allowable discharges under the effluent limitation guidelines and federal rules at 40 C.F.R. 420. R. 601.

## II. U. S. Steel's operations under the Final Permit.

1. On April 1, 2006, Granite City Works began operating its facility according to the parameters of the Final Permit. There were some differences between the Final Permit and the NPDES permit under which Granite City Works previously operated, which will be discussed in more detail below. One of the most significant changes is that the Final Permit was written to reflect new, more stringent water quality standards that apply to Horseshoe Lake. These new water quality standards were promulgated before the Final Permit was issued and after the previous permit was issued. A summary of some of the differences between the two permits follows:

a. The concentration-based limits were set to meet the water quality standards for Horseshoe Lake. *See* Correspondence from Alan Keller at IEPA, dated April 10, 2006 (as attached to ABC's First Motion to Supplement the Record), p. 3 ("the Agency has concluded that the NPDES permit issued March 31, 2006 is protective of water quality . . ."); *see also, id.*, pp. 2-5.

b. The Final Permit included a new internal outfall for landfill leachate that would allow landfill leachate from the National Steel Corporation's landfills to flow through an underground pipe to U. S. Steel's wastewater treatment plant instead of being transported above ground with vehicles to the wastewater treatment plant. R. 478, 601.<sup>4</sup> This permit condition has no affect on the quality of the treated effluent. In other words, the change in how the leachate arrives at the treatment plant does not affect the quality of U. S. Steel's discharges to Horseshoe Lake. The leachate from the "landfills has been conveyed to the wastewater treatment plant

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<sup>4</sup> In 2003, U. S. Steel acquired the Granite City Works facility from National Steel Corporation but did not acquire sections III and IV of the landfill or other lands. Under the purchase agreement, U. S. Steel agreed to continue treating the landfill leachate. National Steel Corporation had previously treated this landfill leachate in the wastewater treatment system which is now owned by U.S. Steel. R. 260, 441, 601.

since the landfills were created in the early 1980s. . . . The leachate wastestreams have been a part of the final effluent of the facility and all effluent data evaluated over the years include this source.” R. 340. (See also R. 302). “[T]reatment will remain the same.” *Id.* The Final Permit only changes the allowable method for transporting leachate. See Affidavit of Carl Cannon, attached as Exhibit A.

c. The Final Permit concentration limits for ammonia are based on the general use water quality standards, which apply to Horseshoe Lake. R. 314, 509. The concentration based limits in the Final Permit were set so that the ammonia water quality standards would be met in Horseshoe Lake. R. 314, 509. The Board revised the ammonia general use water quality standards before the Final Permit was issued and after the previous permit was issued. Those revisions are reflected in the Final Permit. “With regard to ammonia, the difference in the limits in the draft permit and the current permit reflect a revision in the water quality criteria used to develop standards.” SR. X. There is also a new weekly average concentration based limit for ammonia that was not in the previous permit. Ex. A.

d. Lead load limit levels in the permit increased because they are production-based and production increased at the facility, even though U. S. Steel does not use lead in its production processes. SR. 601, X. “A lead limit appears in the NPDES permit solely due to Federal Categorical regulatory requirements that would apply to any steel mill in that category. The permit limits for categorical steel mills are production based.” SR. X. The effluent limitation guidelines established at 40 CFR 420 determine the calculated allowable daily and monthly loading limit for lead for the iron and steel manufacturing point source category. The concentration based limit for lead changed because of changes in the water quality standard.

There is a new 30-day average concentration limit for lead set at 0.09 mg/L. Previously, there was no 30-day average concentration based limit for lead. Ex. A.

e. The limits are more stringent in the Final Permit for oil and grease, naphthalene and total and available cyanide. For example, the daily load limit for available cyanide decreased from 4.2 lb./day to 1.1 lb./day. In addition, a different, more accurate test method is required to test cyanide under the Final Permit. Ex. A.

f. The concentration based limit for zinc was set to “assure that the dissolved zinc water quality standard is met in Horseshoe Lake.” R. 314, 343. Because the Board changed the applicable zinc water quality standard between the time when the old permit was issued and when the Final Permit was issued, some of the zinc concentration based limits went up, and others went down. The Final Permit contains a new 30-day average zinc concentration limit of 0.17 mg/L that was not in the previous permit. Ex. A.

g. The Final Permit also requires more frequent monitoring at outfall A01 Coke By-products Wastewater. Under the previous permit, U. S. Steel was required to monitor naphthalene and benzo(a)pyrene twice a month; the new permit requires monitoring two times per week for naphthalene and benzo(a)pyrene. Ex. A.

2. Once the Final Permit was issued, U. S. Steel modified piping and an internal outfall to transport landfill leachate to its treatment system at a cost of approximately \$48,000.00. Ex. A. These costs included upgrading the sumps to the current configuration, rebuilding pumps and installing guide rails in addition to the costs for the piping and monitoring equipment. Ex. A. If U. S. Steel is forced to comply with the prior permit because the Board Order invalidating the Final Permit is not stayed, U. S. Steel will deconstruct the piping, and transport the leachate with vehicles to the wastewater treatment system, as occurred under the

prior permit. SR. I and II; R. 302. In addition to the costs of \$36,000 to deconstruct the piping modifications, the operating costs to store leachate in tanks at each sump and then transport it to the wastewater treatment plant are expected to be approximately \$128,000 per year. Ex. A. When IEPA then issues a new permit that includes the internal outfall, U. S. Steel will have to re-construct the piping modifications at a cost roughly equal to \$7,500 and at a risk to the workers who would have to do the work in a confined space. Ex. A. These hazards arise because a worker must be lowered into the leachate sumps to change the hard piping inside each leachate sump. The significant safety hazards associated with this work include confined space entry, lockout/tagout requirements, hazardous atmosphere risk, and fall protection. Ex. A.

### **III. Administrative review of the Final Permit.**

1. On May 4, 2006, ABC filed its Petition for Review alleging among other things that IEPA improperly denied ABC's request for a public hearing. Petition for Review, ¶¶ 27-29.

2. U. S. Steel and IEPA filed motions to dismiss, and on September 21, 2006 the Board dismissed all issues except whether IEPA should have held a public hearing.

3. On November 20, 2006, a hearing was held before the Board Hearing Officer on whether IEPA improperly denied ABC's request for a public hearing.

4. On January 26, 2007, the Board issued an Order finding that IEPA's decision not to hold a public hearing prior to the issuance of the Final Permit violated section 309.115(a) of the Board's regulations. *See* Jan. 26, 2007 Order, p. 14. Specifically, the Board found "that the two public comments filed in this case evidence a significant degree of public interest in the proposed permit." *Id.* Based on its ruling that IEPA improperly failed to hold a public hearing, the Board found that "the permit issued by the Agency on March 31, 2006, to U. S. Steel for its steelmaking facility at 20<sup>th</sup> and State Streets, in Granite City, Madison County is invalid." *Id.*

5. On March 9, 2007, U. S. Steel filed an Amended Motion to Reconsider that requested that the Board reconsider all legal aspects of its January 26, 2007 Order.

6. On May 3, 2007, the Board denied the Motion to Reconsider.

7. On May 25, 2007, U. S. Steel filed a Petition for Review of the Board Orders to the Appellate Court of Illinois for the Fifth District.

## ARGUMENT

### **I. Standard of review for motion to stay pending appeal.**

The Illinois Supreme Court has stated that the purpose of a stay pending review “is preventive or protective and seeks to maintain the status quo.” *Stacke v. Bates*, 138 Ill. 2d 295, 309 (1990). In order to determine whether a stay pending appeal is appropriate, “[t]here are numerous different factors which may be relevant when the court makes its determination and, by necessity, these factors will vary depending on the facts of the case.” *Stacke*, 138 Ill. 2d at 305. The factors that can be considered are “whether a stay is necessary to secure the fruits of the appeal in the event the movant is successful,” “the movant’s likelihood of success on the merits,” and “the likelihood the movant will suffer hardship. . .” *Id.* at 305-307. In ruling on motions for stays, “[t]he Board has held that it is not required to specifically address each of these factors in making a stay determination.” *North Shore Sanitary Dist. v. IEPA*, PCB No. 03-146, 2006 Ill. Env. LEXIS 156, \*7 (March 20, 2003). Indeed, the Illinois Supreme Court has provided a “balancing process” that is to be conducted in assessing whether to grant a stay pending appeal:

We believe that in all cases, the movant, although not required to show a probability of success on the merits, must, nonetheless, present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay. If the balance of the equitable favors does not strongly favor movant, then there must be a more substantial showing of a likelihood of

success on the merits. Thus a strong showing of the likelihood of success on the merits may offset other equitable factors favoring the other party.

*Stacke*, 138 Ill. 2d at 309.<sup>5</sup> Applying the above balancing approach set forth by the Supreme Court, the Board should stay its invalidation of the Final Permit as provided in the Board Orders pending U. S. Steel's appeal, because all of the above factors weigh in U. S. Steel's favor.

**II. The Board should stay its invalidation of the Final Permit pending appeal to protect U. S. Steel's right to secure the fruits of a successful appeal.**

A stay is necessary pending appeal to protect U. S. Steel's rights and the benefits derived from its rights. As an initial matter, a stay is proper pending appeal because U. S. Steel is entitled to protect its right to secure the benefits of the Final Permit under the Illinois Environmental Protection Act (the "Act"), regardless of the Board's ruling that IEPA should have held a public hearing. Under section 39(a) of the Act, "[w]hen the Board has by regulation required a permit for the construction, installation, or operation of any type of facility . . . , the applicant shall apply to the Agency for such permit and it **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 this Act or of regulations hereunder." 415 ILCS 5/39(a) (emphasis added). Under this section, U. S. Steel timely filed an application with IEPA for an NPDES permit and met its burden of proving that the permitted discharges would not cause a violation of the Act or regulations. Accordingly, IEPA was required to issue an NPDES permit to Granite City Works because the discharges from the facility will not cause a violation of the Act or its regulations. Nowhere in the timely filed comments does ABC provide evidence that issuance of the permit would cause a violation of the Act or regulations. Thus, U. S. Steel has a clear right to have an NPDES permit

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<sup>5</sup> The *Stacke* Court assessed the parameters of Illinois Supreme Court Rules 305(a) and (b), which involve stays pending appeal of a civil judgment, including non-monetary judgments similar to the one entered in the instant case.

issued to it under the Act, and a stay is necessary to protect the benefits that derive from that right during the pending appeal.

If the Board does not stay the permit invalidation, the status quo will be altered on appeal, and Granite City Works will be forced to spend money to disconnect and modify piping that U. S. Steel modified to comply with the Final Permit in order to return to operating conditions regulated under the old permit. When the issues related to its NPDES permit are finally resolved, U. S. Steel will be required to modify the piping again. As evidenced by the affidavit of Carl Cannon, making the change is not a simple matter of turning a faucet off and on again. *See* Ex. A. If U. S. Steel is forced to switch from operating under the Final Permit, in its previous permit (while prosecuting its appeal), and then back to the conditions in the Final Permit (should it prevail on its appeal or a new permit be issued with this condition if it does not prevail) U. S. Steel will be deprived of the benefit of pursuing an appeal. Ex. A. The purpose of a stay is to maintain the status quo (*Stacke*, 138 Ill. 2d at 309). Accordingly, the Board Orders invalidating the Final Permit should be stayed pending U. S. Steel's appeal to protect U. S. Steel's right to its NPDES permit.

There was no evidence presented by ABC that the Granite City facility's operation under the Final Permit would cause a violation of the Act or its regulations. Rather the Board found that IEPA violated 35 Ill. Adm. Code 309.115(a)(1) because IEPA did not hold a public hearing on the proposed permit. This finding does not equate to a finding that the permitted discharges would violate the Act or applicable regulations. Because the facility's operations under the conditions of the Final Permit would not violate the Act or regulations, IEPA had a duty under section 39(a) of the Act to issue the Final Permit and the Final Permit was properly issued. Further, regardless of the outcome of the appeal, U. S. Steel will ultimately have a permit that



includes the piping and the internal outfall to transport the leachate to its wastewater treatment plant. If U. S. Steel prevails on appeal, the Final Permit will be valid; if it loses the appeal, a public hearing will be held and the permit that will be issued will include the piping and internal outfall. The effluent limit and quality of the effluent are not affected by the means of getting the effluent to the wastewater treatment plant. Consequently, there is no harm to the environment if the status quo is preserved by a stay. Thus, the Board should stay its decision to invalidate the permit.

**III. U. S. Steel will suffer a substantial hardship if the invalidation of the Final Permit is not stayed pending appeal.**

As discussed above, Granite City Works has been operating under the Final Permit for approximately a year, and has made modifications to its facility and operations in reliance on the requirements contained in the Final Permit. If invalidation of the Final Permit is not stayed and U. S. Steel is forced to comply with the prior permit until a new one is issued, U. S. Steel will have to deconstruct the modifications that were made to comply with its previous NPDES permit and then reconstruct the modifications after either U. S. Steel prevails on appeal or IEPA issues a new permit, after a public hearing, with the same provisions as the Final Permit. A stay is necessary to avoid this nonsensical situation.

Under Illinois rules, there is no mechanism to protect against such a result pending appeal other than a stay of Board Orders. For instance, because U. S. Steel is the appealing party and neither ABC nor IEPA can be required to post a *supersedeas* bond to protect against such construction costs if the Appellate Court reverses, the costs will simply be imposed on U. S. Steel, even though U. S. Steel did nothing wrong and a reversal would mean that it was the prevailing party. In addition to unnecessary costs, the work will require pipe-fitters to conduct

potentially unnecessary work that raises safety concerns because they will need to enter confined spaces. All of these consequences will be avoided by granting a stay.

**IV. Probability of success on the merits of U. S. Steel's appeal.**

While the *Stacke* Court held that a movant is not required to show a probability of success on the merits where the equitable factors weigh in favor of granting a stay (*Stacke*, 138 Ill. 2d at 309), and U. S. Steel has shown above that the equitable factors weigh in favor of granting a stay, there is a probability of success on the merits of U. S. Steel's appeal.

**A. The Board Order applied the wrong standard of review for determining whether IEPA should have held a public hearing.**

In its Order, the Board correctly stated the standard of review for issuance of a permit was 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." Jan. 26, 2007 Order, p. 13. However, the Board improperly applied that standard when it determined that U. S. Steel's permit was invalid because IEPA violated 35 Ill. Adm. Code 309.115(a)(1) when IEPA determined that a public hearing on the proposed permit was not warranted. Further, the Board applied the wrong standard of review to 35 Ill. Adm. Code 309.115(a)(1) when the Board held that "the Board does not apply an 'abuse of discretion' standard as advocated by U. S. Steel." *Id.* Both of these holdings were improper and will likely be reversed on appeal.

Under 35 Ill. Adm. Code 309.115(a)(1), **IEPA** determines whether a party has demonstrated a significant degree of public interest sufficient to warrant the holding of a public hearing. IEPA's decision to hold 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, 419 (3d

Dist. 1981). The *Borg-Warner* Court further explained the standard for demonstrating that IEPA should allow a public hearing, stating that 35 Ill. Adm. Code 309.115:

establishes that the party requesting a public hearing has the burden of showing why it is warranted. Certainly, 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.

*Id.*; *Marathon Oil Co. v. IEPA*, PCB No. 92-166, 1994 Ill. ENV. LEXIS 488, \*18-19 (IPCB, March 31, 1994) (“Whether an Agency hearing is to be held in an NPDES permit review is discretionary with the Agency, as has been declared by the [*Borg-Warner*] court.”)<sup>6</sup> Accordingly, IEPA’s decision to not grant ABC’s request for a public hearing was within IEPA’s discretion and should have been reviewed by the Board for an abuse of discretion.

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.” *Deen v. Lustig*, 337 Ill. App. 3d 294, 302, 785 N.E.2d 521, 529 (4th Dist. 2003) (citing *Bodine Electric of Champaign v. City of Champaign*, 305 Ill App. 3d 431, 435, 711 N.E.2d 471, 474 (4th Dist. 1999) (“the question is whether . . . the court exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted.”)); *see also Whirlpool Corp. v. Certain Underwriters at Lloyd’s London*, 295 Ill. App. 3d 828, 839, 692 N.E.2d 1229, 1237 (1st Dist. 1998); *Modine Manufacturing Co. v. PCB*, 192 Ill. App. 3d 511, 519, 548 N.E.2d 1145, 1150 (2d Dist. 1989) (no abuse of discretion unless the agency acted “unreasonably or arbitrarily.”)

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<sup>6</sup> The *Borg-Warner* Court interpreted former Water Rule 909(a), the language of which was identical to 35 Ill. Adm. Code 309.115(a). Accordingly, the Court was aware of the word “shall” in the regulation. Despite the “shall” in the regulation, the Court still ruled that IEPA’s decision to hold a public hearing is reviewed for an abuse of discretion. *Borg-Warner*, 100 Ill. App. 3d at 867, 427 N.E.2d at 419.

Applying the proper abuse of discretion standard as set forth by the Appellate Courts, there is a likelihood that the Court on appeal will find that IEPA did not abuse its discretion in finding that a public hearing on the Proposed Permit was not warranted. Thus, IEPA properly decided not to hold a public hearing on the Proposed Permit. The language in section 309.115(a)(1) that states “instances of doubt shall be resolved in favor of holding the hearing,” does not undermine such conclusion. Specifically, there is no information in the record that indicates any doubt on the Agency’s part that a hearing was not warranted. The record supports the fact that the Agency considered ABC’s timely filed comments and concluded that, a hearing was not warranted because those comments did not raise issues that would lead to changes in the permit. SR. X. Accordingly, the Agency correctly determined that a hearing on the Proposed Permit was not necessary because no information would be gained that would result in a change in the permit. *Id.* (“The comments do not provide any additional information the Agency would use for inclusion in the reissued permit.”) IEPA also determined that “the issues raised by the environmental groups regarding permit limits and past violations are easily answered, and the overall concerns for Horseshoe Lake have been and continue to be addressed in 303(d) discussions and hearings that have opportunity for public participation.” *Id.* Thus, the Final Permit was properly issued without holding a public hearing. *Id.* U. S. Steel will likely succeed in its appeal.

In the end, ABC did not present sufficient evidence to demonstrate that IEPA abused its discretion or violated the Act or its regulations in denying ABC’s public hearing request, and, thus, U. S. Steel will likely succeed on appeal of the Board Orders.<sup>7</sup>

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<sup>7</sup> Moreover, if the public hearing is ordered, there is a likelihood that the Final Permit will not be invalidated because U. S. Steel complied with section 39(a) of the Act. *See part II supra.* If the Final Permit is not invalidated, but a public hearing is ordered, the proper remedy is for IEPA to hold a public hearing, and then modify the Final Permit, if needed, after the hearing.

**CONCLUSION**

For the foregoing reasons, U. S. Steel requests that the Board stay its January 26, 2007 and May 3, 2007 Orders pending U. S. Steel's appeal, and grant all relief it deems fair and just.

Respectfully submitted,

**U. S. Steel Corporation - Granite City Works**

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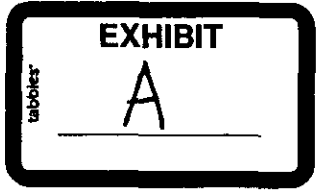
**BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS**

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

**AFFIDAVIT OF CARL CANNON**

I, Carl Cannon, the undersigned, being first sworn on oath, states as follows:

1. My name is Carl Cannon, I am over the age of 21 years and competent to testify in court if called to do so. I have personal knowledge of the facts set forth in this affidavit.
  
2. I am currently employed by U. S. Steel in its Granite City Works facility at 1951 State Street, Granite City, Illinois 62040. I am employed as an environmental manager for the facility, in the Environmental Department, which administers the environmental compliance programs and practices at Granite City Works.
  
3. In reliance upon the NPDES permit issued by the Illinois Environmental Protection Agency ("IEPA") on March 31, 2006, the Granite City Works modified piping at its facility to facilitate the transport of National Steel Corporation sections III and IV landfill leachate to Granite City Works wastewater treatment system. The March 31, 2006 permit allowed for an additional internal outfall for the leachate that did not exist in Granite City Works' previous NPDES permit.



4. Because the previous permit did not have the internal outfall, U. S. Steel transported the landfill leachate by vehicles to the wastewater treatment system prior to the issuance of the March 31, 2006 permit.

5. The modification of the piping and installation of monitoring equipment for the outfall in 2006 cost U. S. Steel approximately \$48,000. These costs included upgrading the sumps to the current configuration, rebuilding pumps and installing guide rails in addition to the costs for the piping and monitoring equipment.

6. To deconstruct the piping modifications would cost U. S. Steel approximately \$36,000.

7. To store and truck the National Steel Corporation landfill leachate to the U. S. Steel wastewater treatment system would cost U. S. Steel approximately \$128,000 per year.

8. To reconstruct similar piping modifications would cost approximately \$7,500.

9. The piping is in a confined space, which raises safety concerns for construction workers operating in that space. Such work raises work hazards because a worker must be lowered into the leachate sumps to change the hard piping inside each leachate sump. Significant safety hazards associated with this work include confined space entry, lockout/tagout requirements, hazardous atmosphere risk, and fall protection.

10. There were differences between the NPDES permit for Granite City Works issued by IEPA on March 31, 2006 and the NPDES permit under which Granite City Works previously operated, some of the differences are stated below:

- a. The March 31, 2006 Permit included a new internal outfall for landfill leachate that would allow landfill leachate from the National Steel Corporation's landfills to flow through an underground pipe to


- U. S. Steel's wastewater treatment plant instead of being transported above ground with vehicles to the wastewater treatment plant. This new condition only changes the allowable method for transporting leachate, and has no affect on the quality of the treated effluent;
- b. There is a weekly average concentration based limit for ammonia in the March 31, 2006 Permit that was not in the previous permit for Granite City Works;
  - c. There is a new 30-day average concentration limit for lead set at 0.09 mg/L, whereas the previous permit did not have a 30-day average concentration based limit for lead;
  - d. The limits are more stringent in the March 31, 2006 Permit for oil and grease, naphthalene and total and available cyanide than in the previous permit;
  - e. A different, more accurate test method to test cyanide is used in the March 31, 2006 Permit than the previous permit and the allowable daily load limit for available cyanide decreased from 4.2 lb./day to 1.1 lb./day;
  - f. The March 31, 2006 Permit contains a new 30-day average concentration limit of 0.17 mg/L for zinc; whereas the prior permit did not contain a 30-day average limit for zinc;
  - g. The March 31, 2006 Permit requires more frequent monitoring at outfall A01, Coke By-Products Wastewater. Under the previous permit, U. S. Steel was required to monitor naphthalene and benzo(a)pyrene twice



a month; the March 31, 2006 Permit requires monitoring for naphthalene and benzo(a)pyrene twice per week.

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Executed on this 30 day of May 2007.

  
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Carl Cannon