

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

AMERICAN BOTTOM CONSERVANCY, )  
)  
Petitioner, )  
) Case No. PCB 2006-171  
) (3rd Party NPDES Permit Appeal)  
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 November 5, 2008, there was filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois a copy of **Petitioner's Brief on Remand.**

Respectfully submitted

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**BRIEF OF PETITIONER AMERICAN BOTTOM CONSERVANCY ON  
REMAND**

**I. INTRODUCTION**

The Illinois Environmental Protection Agency (“IEPA” or the “Agency”) abused its discretion by issuing a renewal NPDES permit to United States Steel (“U.S. Steel”), authorizing the company to discharge up to 25 million gallons per day of industrial waste into a lake in a state park, without holding a public hearing. Whereas the governing regulation directs IEPA to hold a public hearing when it determines there is significant public interest in the permit, 35 Ill. Adm. Code § 309.115(a)(1) (2005), and five organizations representing 27,000 members requested a public hearing and stated various concerns about the impact of U.S. Steel’s water pollution discharge on Horseshoe Lake, IEPA made no evaluation of the public interest in the permit, denied the public hearing request without explanation, and acted as if it had unfettered discretion to deny a public hearing request for any reason or no reason. At the same time, IEPA implicitly conceded that there was public interest in the permit. Moreover, ABC demonstrated, both in its written comments requesting the public hearing and in the evidentiary hearing in this

appeal, that there indeed is significant public interest in the U.S. Steel permit.

Accordingly, IEPA's decision to issue the U.S. Steel NPDES permit without holding a public hearing should be invalidated and remanded to IEPA with instructions to hold a public hearing before re-issuing a permit.

## **II. FACTUAL BACKGROUND**

On December 19, 2004, IEPA published a public notice for a proposed NPDES renewal permit for U.S. Steel's Granite City Works. (AR 518-28).<sup>1</sup> As proposed, and as issued, the permit allows U.S. Steel to discharge up to 25 million gallons of industrial wastewater into Horseshoe Lake, which is the centerpiece of Horseshoe Lake State Park. (AR 524-28, 651-57).<sup>2</sup> The Lake has no outflow during dry periods. (AR 312).

During the public comment period on the draft permit, five organizations representing some 27,000 members asked IEPA to hold a public hearing. These requests were set forth in two comment letters. One letter was jointly submitted by the American Bottom Conservancy ("ABC"), Sierra Club, Webster Groves Nature Study Society, Health & Environmental Justice-St. Louis, and the Neighborhood Law Office (AR 533-36), and the other was submitted by Health & Environmental Justice-St. Louis (AR 532). In support of their hearing request, the organizations cited concerns about "discharges of toxic heavy metals known to accumulate in biological organisms," the fact that Horseshoe Lake was already violating applicable water quality standards for several pollutants discharged by U.S. Steel, that academic studies had shown high levels of metals in the Lake's sediment, and that U.S. Steel-Granite City Works had a history of

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<sup>1</sup> Citations to the IEPA's record are designated "AR \_\_\_"; citations to the transcript of the Board hearing that took place on November 20, 2006 are designated "Tr. \_\_\_"; citations to the Board's administrative record are designated "C \_\_\_."

<sup>2</sup> IEPA made two changes from the draft to the final permit, both in response to comments submitted by U.S. Steel.

non-compliance with environmental requirements. (AR 532-36). The letters also pointed out that Horseshoe Lake is located within a popular state park and 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. *Id.*

More than 14 months passed between the end of the written comment period and IEPA's issuance of the final permit. Despite this lengthy period of time, IEPA neither provided a public hearing, nor performed an evaluation of whether there was public interest in the permit, nor explained its basis for denying the public hearing request.

ABC timely filed a Petition for Review, seeking the Board's review of various effluent limits in the permit and of IEPA's denial of a public hearing. By Order dated September 21, 2006, the Board dismissed ABC's claims challenging the effluent limits because the claims were not based on comments submitted during the initial thirty-day public comment period, but rather were based on supplemental comments ABC had submitted during the more than one-year period between the public notice and permit issuance. The Board's Order, however, stated that ABC's petition had "asserted facts that if proven true would show a significant degree of public interest in the proposed permit to warrant the holding of a hearing." The Board held an evidentiary hearing on November 20, 2006, regarding whether IEPA's denial of the public hearing request complied with the Board's public hearing regulation, 35 Ill. Admin. Code § 309.115(a)(1).

On January 26, 2007, the Board issued its Order on the merits and found that "there is a significant degree of public interest in this case." The permit was thus held

invalid, for IEPA had “violate[d] Section 309.115(a) of the Board’s regulations” when it made the “clearly incorrect” decision not to hold a public hearing.

U.S. Steel and IEPA appealed to the Fifth District Appellate Court. The Court vacated the Board’s Order and remanded the case to the Board with limited instructions to review IEPA’s decision based on an abuse of discretion standard of review. *United States Steel Corp. v. Illinois Pollution Control Board*, 384 Ill.App.3d 457, 892 N.E.2d 606, 611-613 (Ill. App. 2008) (“*U.S. Steel*”).

### **III. APPLICABLE REGULATIONS AND STANDARD OF REVIEW**

The Board’s regulations require IEPA to hold a public hearing on an NPDES permit when IEPA determines there is significant public interest in the permit:

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.

35 Ill. Admin. Code § 309.115(a)(1) (2005) (emphasis added) (“§ 309.115”).

While the public hearing regulation grants some discretion to IEPA in determining whether to hold a public hearing, the regulation hems in that discretion in three critical respects. First, the regulation directs IEPA to consider one and only one factor – the public interest in the permit – in deciding whether to hold a public hearing. Second, the regulation directs IEPA to resolve instances of doubt in favor of holding the hearing. Third, the regulation states that IEPA “shall” – not “may” – hold a public hearing when there is significant public interest in the permit.

Even under the federal Clean Water Act, which does not so heavily weight the scales in favor of public hearings as the Illinois regulation, 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)).

IEPA’s decision not to hold a public hearing is reviewed under an abuse of discretion standard. The Board must evaluate “whether the agency made an arbitrary decision, without using conscientious judgment, or if, in view of all the circumstances, the Agency overstepped the bounds of reason, ignored the law, and thereby caused substantial prejudice.” *U.S. Steel*, 892 N.E.2d at 613 (citing *In re Marriage of Munger*, 339 Ill. App. 3d 1104, 1107 (App. 4<sup>th</sup> Dist. 2003)).

This review focuses on IEPA’s record, which “must [i]nclude any information the Agency relied upon in making its final decision.” 35 Ill. Adm. Code § 105.212(b)(5) (2008). The record should contain a rational explanation of how IEPA decided not to hold a public hearing. *See Lewis v. Hayes*, 152 Ill. App. 3d 1020, 1024 (App. 3<sup>rd</sup> Dist. 1987).

#### **IV. ARGUMENT**

IEPA abused its discretion from start to finish in handling the public hearing requests in this case. The Agency never evaluated the degree of public interest – the sole criterion to be considered – and acted as if it had unfettered discretion to deny the requests for no reason or any reason, without regard for the public interest. Moreover, while the Agency implicitly acknowledged the public interest in the permit, it denied the hearing requests anyway.

It is hard to imagine a permit more deserving of a public hearing than the U.S. Steel permit in this case. The permit authorizes a massive industrial discharge into an already-polluted lake that is the centerpiece of a popular state park where people fish and eat their catch. Five organizations representing some 27,000 members requested a public hearing.

**A. IEPA Unlawfully Acted as if it had Unfettered Discretion in Rejecting the Public Hearing Request.**

1. IEPA Failed to Evaluate the Degree of Public Interest in the Permit.

Throughout its review of the draft U.S. Steel permit, IEPA acted as though it had unfettered discretion to grant or deny a public hearing request. In its public notice regarding the draft permit, the Agency stated: “If written comments or requests indicate a significant degree of public interest in the draft permit, the permitting authority *may, at its discretion*, hold a public hearing.” (AR 518, 522) (emphasis added). This notice contained two key errors. First, it tellingly omitted the sole criterion by which IEPA is required to assess hearing requests – the public interest in the permit. Second, it substantially overstated the scope of the Agency’s discretion by indicating, without qualification, that the IEPA “may, at its discretion” hold a hearing rather than, as the regulation requires, the IEPA “shall” hold a public hearing if it finds a significant degree of public interest in the permit. *See* 35 Ill. Adm. Code § 309.115(a)(1) (2005). These two errors reflect more than sloppy draftsmanship; they foreshadow the fatal flaws in IEPA’s handling of the public hearing requests – i.e., its failure to evaluate the public interest in the permit, and its rejection of the hearing requests on the assumption that it could do so for any reason or no reason.

IEPA's first action regarding the comment letters requesting a public hearing was to consider U.S. Steel's response to them. On April 25, 2005, IEPA received a letter from U.S. Steel that provided its technical responses to the organizations' concerns and concluded: "USS believes the comments submitted to IEPA are largely irrelevant to the permit, and are adequately addressed in this correspondence. Therefore a public hearing is unjustified and further delay in the reissuance of [the permit] is unwarranted." (AR 553-557). Not that doing so would have relieved the IEPA of its obligation to assess the public hearing request from the perspective of the regulatory agency – not the regulated entity, U.S. Steel provided no analysis of the public interest in the permit. Although U.S. Steel had already informed IEPA that the company did not favor a public hearing, IEPA met with U.S. Steel "to discuss the Public Hearing issue" on May 13, 2005. (AR 601). An internal memo briefly mentions that the Agency's permit writer and Industrial Unit Manager met with three representatives from U.S. Steel for that purpose. *Ibid.* Nothing in the memo mentions the public interest in the permit. *Ibid.*

After that meeting, IEPA appears to have ignored the public hearing requests for the next nine months, until it was almost ready to issue the permit. The next mention of the public hearing requests appears in a February 8, 2006 memorandum from Toby Frevert, the Manager of the Division of Water Pollution Control, to Marcia Willhite, the Chief of the Bureau of Water (the "Frevert memo") (C 286). This one-page memorandum constitutes the Agency's only analysis of the public hearing requests during the 14-month period between its receipt of the comment letters and its issuance of the final permit. Nowhere does the memorandum evaluate the public interest in the permit. Rather, the memorandum opens with the recommendation to issue the permit



“without further delay” and then discusses several reasons why a public hearing would not be of interest to IEPA. Absent from the memorandum is any discussion of the only relevant question – whether a hearing would be of interest to the public.

The Frevert memo supports its recommendation to forego a public hearing with two points. First, it states that the issues raised are “easily answered” and “[t]he comments do not provide any additional information” of benefit to IEPA in issuing the permit. (C 286). In short, IEPA should not hold a public hearing because the hearing would not be of benefit to the Agency in issuing the permit. That analysis entirely misses the point of the governing regulation, which asks whether there is significant public interest – not IEPA interest and not permittee interest – in a public hearing. 35 Ill. Admin. Code § 309.115(a)(1).

In addition to providing information to the Agency, public hearings are also held “to provide opportunity for the public to understand and comment on the permit.” 35 Ill. Admin. Code § 106.111(b) (2005). Although Mr. Frevert acknowledged that the permit conditions were “confusing to citizens and advocacy groups,” he neglected to note the potential value of a public hearing in explaining to the public why the apparent increases in discharge limits for harmful pollutants such as lead and ammonia should not be of concern to them. (C 286). Public hearings provide the public its only opportunity to ask questions of and seek clarification from the IEPA regarding the “confusing” aspects of technically complex permits. In addition, the opportunity for give-and-take at a public hearing creates the possibility that community concerns may prompt the Agency to look more closely at some of the issues raised.

Furthermore, public hearings provide an opportunity for some of the people most directly affected by the permit, such as subsistence fishermen, to learn more about the permit and U.S. Steel's industrial discharge into Horseshoe Lake. Subsistence fishermen are not likely to have the time or expertise to work through a "confusing" and technical permit, but they should nonetheless have an opportunity to ask questions of and express concerns to IEPA in the more informal setting of a public hearing. If IEPA had taken the public interest into account, it would likely have considered such factors.

Second, the Frevert memo advises against holding a public hearing regarding the U.S. Steel permit authorizing wastewater discharges into Horseshoe Lake because the commenters have an opportunity for a public hearing regarding Horseshoe Lake in a separate proceeding, under section 303(d) of the Clean Water Act. This essentially acknowledges that there is public interest in U.S. Steel's discharge into Horseshoe Lake worthy of a public hearing, and suggests that the 303(d) hearing substitute for a separate hearing regarding U.S. Steel's NPDES permit. The governing regulation, however, does not provide an exception for NPDES public hearings where other hearings are available regarding the receiving water. Rather, the governing regulation makes clear that when there is significant public interest in a permit, IEPA "shall" hold a public hearing. The only forum where the public can provide oral comment on a proposed permit, ask questions regarding permit limits for a major industrial discharger, and create a record for a possible appeal of the adequacy of such permit limits, is an NPDES permit public hearing. *Wesley Brazas v. IEPA*, PCB 06-131 slip op. at 3-4 (May 4, 2006); 415 ILCS 5/40(e)(2) (2004). No comment provided during a 303(d) hearing can be used as a basis for an NPDES appeal. Denying a public hearing in favor of a 303(d) hearing causes

substantial prejudice to organizations concerned about the adequacy of the terms and conditions in an NPDES permit.

Following the Frevert memo, the only other IEPA document mentioning the comment letters prior to the permit's issuance was a brief February 27, 2006 e-mail from Ms. Willhite to Doug Scott, the IEPA Director ("Willhite e-mail") (C 288). This communication also did not evaluate the public interest. Rather, Ms. Willhite recommended to Mr. Scott that he deny the request on two bases. One was time:

Doug, we received a hearing request on the renewal of this permit last year. Regrettably, due to staff losses, a year has passed since we public noticed the permit. Yet this request is still outstanding. We would like to move forward to issue the permit and recommend that a meeting with the environmental group be held instead of a hearing.

*Ibid.* The other is misconstrued authority. This final communication mentioning the comment letters ends with: "*Since hearings are held at the discretion of the Director, I'm asking if you would be comfortable with us denying the hearing request, but having a meeting and issuing the permit as quickly as possible.*" *Ibid.* (emphasis added). This makes clear that IEPA based its public hearing denial on the erroneous belief that it could do so for any reason or no reason, and without evaluating the public interest in the permit, contrary to the constraints of the governing regulation. *See* 35 Ill. Adm. Code § 309.115.

IEPA then issued the permit to U.S. Steel without responding to the commenting organizations in any fashion. (AR 644). Only after ABC inquired about procedural irregularities did IEPA mail out cursory responses. (AR 645-57). The responses to the two comment letters were identical (AR 646-47, 649-50), although the letters raised different issues (AR 532-36). This too suggests that IEPA paid little attention to the content of the comment letters. As with the internal communications, the responses

contained no mention, let alone evaluation, of the public interest governing public hearings. (AR 646-47, 649-50). Most significantly, the letters neither acknowledged the organizations' requests for a public hearing nor offered any explanation for denying the hearing requests.

The Agency never evaluated the only criterion within its discretion – public interest in the proposed permit – before deciding not to hold a public hearing. This cannot be attributed to a lack of ample time in which to do so: More than fourteen months passed from the time of the public comment period until IEPA issued the permit. (AR 518, 648). Yet *nothing* in the administrative record covering this period documents that IEPA ever considered the comment letters for indications of the public interest in the permit.

IEPA thus abused its discretion by never evaluating the degree of public interest and by acting as though it had the discretion to deny the public hearing for any reason or no reason at all. IEPA accordingly made its hearing denial decision outside of the bounds of the governing regulation. The decision is an abuse of the limited discretion provided to the Agency under 35 Ill. Adm. Code § 309.115(a)(1). “[T]he use of the word ‘judgment’ is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.” *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 1462 (2007). Here, IEPA never acted within the defined limits of § 309.115 and actually only acted outside of them.

In addition, IEPA abused its discretion by failing to offer a legally sufficient rationale for its decision. “[A]n administrative agency is required to examine relevant facts and articulate a sufficient explanation for its action.... There must be a rational

connection between the facts considered and the decision made.” *Lewis v. Hayes, supra*, 152 Ill. App. 3d at 1024. Here, 35 Ill. Admin. Code § 309.115 defines the scope of the only “sufficient explanation” for a decision not to hold a public hearing – a finding that there is not a significant degree of public interest in the permit. IEPA never considered, let alone based its decision on, the public interest in the U.S. Steel permit.

2. IEPA Implicitly Acknowledged That There Was Significant Public Interest in the Permit.

IEPA also abused its discretion by implicitly acknowledging that there was public interest in the permit yet denying the public hearing. As discussed above, the Frevert memo reflected a belief that a public hearing was unnecessary because 303(d) hearings were available regarding water quality concerns about Horseshoe Lake. However, in doing so, IEPA acknowledged that the public interest was significant enough to require a place for “concerns about Horseshoe Lake” to be discussed and heard in a public forum. Frevert memo (C 286).

The Willhite e-mail also recognizes that there was considerable public interest in the permit, but suggests that a meeting be held “instead of a public hearing” because the Agency wants to “issu[e] the permit as quickly as possible.” (C 288). This essentially conceded that there was sufficient public interest to justify a public hearing, but suggested denying the hearing request in the interest of issuing the permit as soon as possible – notwithstanding the 15-month delay between the receipt of the hearing requests and the issuance of the permit. This acknowledgment of significant public interest in the U.S. Steel permit should also have triggered a decision to hold a public hearing under 35 Ill. Admin. Code § 309.115(a)(1). A private meeting with IEPA is not a public hearing on the NPDES permit that is required by such a finding. A private meeting

is not open to the public – such as subsistence fishermen. Nor does it provide an opportunity for members of the public to learn from one another's questions and comments and from the IEPA's responses. It also effectively disenfranchises those who are not invited or do not know such a meeting is occurring, as well as those who do not have the ability to travel to Springfield during a business day to attend such a meeting – rather than attend a public hearing in the evening at a location near the U.S. Steel discharge. Just as the regulation provides no exception for an NPDES public hearing when public hearings are available in other for a, neither does it provide an exception when public meetings are offered in lieu of public hearings.

IEPA thus abused its discretion by acknowledging that public interest was significant enough to warrant a public forum, but refusing to grant the proper forum under § 309.115. Again, the Agency ignored the regulatory standard and acted outside of its scope of discretion under 35 Ill. Admin. Code § 309.115(a)(1).

**B. The Comment Letters Demonstrated Significant Public Interest in the Permit.**

Five organizations, representing some 27,000 members, requested a public hearing in comment letters that noted heavy public use of Horseshoe Lake and raised concerns about a permit allowing 25 million gallons of industrial discharge into it per day. (AR 532-36). The letters stated that the permit allowed U.S. Steel to discharge additional bioaccumulative toxins for which the Lake was already listed as impaired. This was a particular concern, the letters went on, because some subsistence fishermen eat their catch from the Lake and an IDNR fish biologist had already confirmed the existence of fish with melanoma there. *Id.* It is clear that there exists significant public interest in the permit, and IEPA abused its discretion by not holding a public hearing.

1. Horseshoe Lake is Located Within a Popular State Park and is Used Heavily by the Public.

It is hard to imagine a permit more deserving of a public hearing than one for a major industrial discharge into an impaired lake, located within a popular state park, where people fish and eat their catch. (AR 532-33). Yet that is the exact situation here, as the comment letters point out. *Ibid.* Horseshoe Lake is located within a state park that is used heavily for bird watching, fishing, hunting, and other forms of outdoor recreation. (AR 532-35). The Illinois Department of Natural Resources' website touts the fishing opportunities at Horseshoe Lake for species such as "channel catfish, bass, crappie, bluegill, carp, and buffalo." (AR 532).

At the hearing on this appeal, representatives of organizations that submitted comment letters offered testimony that elaborated upon the issues raised in the letters.

Kathy Andria is President of ABC and primary author of the organizations' joint comment letter. (Tr. 25:1-3; 29:10-13). Ms. Andria stated that she uses the Lake about once per week for bird watching and other outdoor recreation. (Tr. 25:11-24). She testified that Horseshoe Lake is a "spectacular place" to birdwatch and that some birds found at the Lake are considered endangered. (Tr. 25:11-24). Ms. Andria also stated that she has observed large numbers of people at the Lake engaged in fishing, picnicking, running, and biking. (Tr. 26:18-24). On some days there may be 1,000 or more people at the Lake and total attendance at the state park in 2005 was 358,000. (Tr. 49:20-50:5). She also explained the basis of her written comments about consumption of fish from the Lake, saying that she sees people with fish on stringers or in coolers (Tr. 50.6-51:15) and has seen people eat fish from the Lake. (Tr. 65:21-24). In light of all this public use, Ms. Andria testified that she believes members of the public, including ABC's constituency,

are concerned about Horseshoe Lake and would have attended a public hearing on the U.S. Steel permit (Tr. 57:16-20; 58:9-18; 61:10-17).

Yvonne Homeyer was President and Conservation Chair of the Webster Groves Nature Study Society (WGNSS) at the time the joint comment letter was submitted. (Tr. 109:15-18; 110:12-20). She testified about her use of the Lake (Tr. 112:21-113:5), as well as its use by other WGNSS members. She testified that WGNSS members visit the Lake “almost daily” because it is considered “one of the most outstanding areas in the St. Louis area for birds.” (Tr. 111:14-22). *See also* Tr. 115:9-16. More bird species have been seen at Horseshoe Lake than at any other place in the St. Louis region, 308 species in total. (Tr. 112:6-20). Two members of WGNSS maintain an official list of “All the bird species that have been seen at the Lake.” (Tr. 113:8-11). In addition to bird watching, WGNSS members use the Lake and surrounding state park to observe butterflies. (Tr. 111:23-112:5; 114:19-115:8).

Representatives of both the Sierra Club and Health & Environmental Justice-St. Louis also testified at the hearing. Christine Favilla is on staff with the Illinois Chapter of the Sierra Club. (Tr. 130:14-15). In this capacity, she has organized cleanups at Horseshoe Lake to remove debris that washes in from surrounding areas. The cleanups are held on an annual or semi-annual basis and attract approximately thirty participants. (Tr. 125:16-126:23). Kathleen Logan Smith also offered brief testimony about Health & Environmental Justice’s comment on the Permit. (Tr. 114:5-24).

In addition, three members of the public provided oral comments at the hearing. Robert Johnson is an environmental consultant from Collinsville who has worked for a duck club that owns Canteen Lake, which adjoins Horseshoe Lake. He indicated that



members of the duck club would be interested in participating in a public hearing on the U.S. Steel permit. Mr. Johnson also testified that he regularly uses Horseshoe Lake and would be interested in such a public hearing himself. (Tr. 101:17-107:9). Cathy Copley is a resident of Madison County who uses Horseshoe Lake. She testified that she supports holding a public hearing now that she knows the Lake is used as a discharge point for U.S. Steel's waste. (Tr. 107:17-108:12). Finally, Jason Warner, a Sierra Club volunteer and a user of the trails around Horseshoe Lake, offered comments on behalf of the Sierra Club about the importance of public participation in the permitting process. (Tr. 140:21-143:12).

2. The Commenters Represent Thousands of Members Interested in Horseshoe Lake.

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. (AR 537-39).

ABC is an organization that works to protect the natural and cultural resources of the American Bottom, which is that part of the Mississippi River floodplain that extends south from just below Alton, Illinois to the Kaskaskia River. (Tr. 23: 17-24:1; 24:13-18). ABC monitors and participates in government decisions that might affect the American Bottom, including decisions of IEPA, IDNR, and local entities. (Tr. 24:2-12). It also works with neighborhood organizations to address local issues. (Tr. 24:8-9). ABC has approximately 100 members. (TR. 24:22-24).

WGNSS has over 400 members and has been in existence since 1920. (Tr. 110:3-11). It is primarily an organization dedicated to nature study, but also gets involved in permitting actions that impact wildlife habitat. (Tr. 110:24-111:4). Its members

regularly use the Lake and surrounding state park as described above. Its Conservation Chair, Yvonne Homeyer, testified that WGNSS members would have attended a public hearing on the U.S. Steel permit had there been one. (Tr. 116:18-21).

The Sierra Club, which has 26,000 members in Illinois and 650 members in the area around Horseshoe Lake, was also a signatory to the joint comment letter. (AR 536; Tr. 126:24-127:3). The Sierra Club engages in cleanups at Horseshoe Lake and has an interest in its overall health. Health & Environmental Justice, an organization that has approximately 500 members and works on environmental justice issues in the St. Louis metropolitan region, also signed on to the joint comment letter and submitted a comment letter of its own (AR 532; Tr. 144:9-24)

3. The Comment Letters Raised Significant Concerns about U.S. Steel's Discharge of Pollution into the Lake.

The joint comment letter raised at least two issues that could have affected the terms of the permit. First, the letter pointed out that a Southern Illinois University at Edwardsville ("SIUE") professor had conducted studies of bottom sediment in Horseshoe Lake and had found high levels of heavy metals, including zinc and lead. IEPA's permit writer noted in her records that obtaining a copy of these studies would be "beneficial," yet the Agency neglected to do so. Second, the letter brought to IEPA's attention reports of fish being caught from Horseshoe Lake with melanoma. Again, the Agency noted that "[m]ore information is needed," but it never took any action to determine whether pollution might be causing diseased fish in the Lake.

- a. IEPA failed to address concerns raised in the comment letters about heavy metal contamination of Horseshoe Lake sediments.

The January 18, 2005 joint comment letter pointed out to IEPA that Professor Richard Brugam at SIUE had studied the bottom sediments at Horseshoe Lake. (AR 537). The letter indicated that studies had been obtained only recently and had not been reviewed thoroughly by commentators. (AR 533, 535). Copies of the study were not submitted, but the letter suggested that IEPA hold a public hearing to address the issue. *Id.* The comment letters also raised a concern about heavy metals in the U.S. Steel discharge (AR 532-33) and mentioned that Horseshoe Lake was already impaired for a number of pollutants. (AR 537). For example, zinc was identified on both the 2004 and 2006 “impaired waters” list developed by IEPA, and the 2006 list identifies an “industrial point source discharge” as a cause of the “contaminated sediments.” *See* <http://www.epa.state.il.us/water/tmdl/303-appendix/appendix-a.pdf>. IEPA’s public notice for the U.S. Steel permit erroneously omitted zinc from the list of pollutants it identified as causing impairment. (AR 519).

Despite the fact that the joint comment letter raised this concern, IEPA took virtually no action to investigate whether U.S. Steel’s discharge was contributing to the contamination of bottom sediments. The IEPA permit writer’s notes state: “A copy of the SIU-E study would be beneficial to determine its relevance in this matter.” (AR 603).

Although IEPA did not seek or obtain a copy of the study, it downloaded an abstract of the study from the Internet. (AR 604). That abstract only served to highlight the relevance of the issue and should have spurred further inquiry by IEPA. The abstract, which is in the record, states:

"A record of metal contamination exists in the sediment of Horseshoe Lake.... Lead, cadmium and zinc concentrations increased in the sediment after the 1940's. This increase in heavy metals is probably related either to increased input to the lake from local industrial activities or the use of lead shot by local waterfowl

hunters."

(R.604).

IEPA's failure to investigate the contamination of Horseshoe Lake sediment is troubling because U.S. Steel discharges significant quantities of two of the pollutants – zinc and lead – identified in the abstract of the SIUE study. The load limits in the permit allow U.S. Steel to discharge up to 4,380 pounds of zinc and 2,044 pounds of lead into the Lake each year. (AR 652).<sup>3</sup>

The unanswered questions relating to contaminated sediments show that substantial issues were raised in the joint comment letter that should have been investigated by IEPA through a public hearing. IEPA has a legal duty to ensure that NPDES permits comply with both numeric and narrative water quality standards. 35 Ill. Admin. Code § 309.143(a) (2005). Although Illinois has no numeric criteria for heavy metals in sediment, the narrative criteria prohibit "bottom deposits" that are of "other than natural origin." 35 Ill. Admin. Code § 302.203 (2005); *See also Des Plaines River Watershed Alliance v. IEPA*, 2007 WL 1266926, at \*44 (Ill. Poll. Control Bd., April 19, 2007) (remanding permit to IEPA for evaluation of whether discharge would violate narrative water quality standards). This clearly was a concern relating to the *permit* and not a general grievance to be addressed in other forums. Moreover it was a concern about which IEPA could have gathered more information if it had held a public hearing.

- b. IEPA failed to address questions raised in the joint comment letter about diseased fish being caught in Horseshoe Lake.

The joint comment letter also raised a concern about fish with melanoma, or

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<sup>3</sup> These figures are calculated using the permit's 30-day average for the daily load limit. (AR 652). For zinc, 12 pounds per day X 365 days = 4,380 pounds per year. For lead, 5.6 pounds per day X 365 days = 2,044 pounds per year.

unusual skin pigment, being caught in Horseshoe Lake. (AR 537). Again, the IEPA permit writer suggests that the agency should investigate this issue, stating: "More information is needed on the fish with melanoma issue-was this reported as part of an IDNR study, or did one fish appear with melanoma, and was confirmed by an IDNR fish biologist?" (AR 603). IEPA did not follow up on this question.

The health of resident fish populations is of heightened importance due to the fact that many people consume fish from Horseshoe Lake, some for subsistence purposes, and that the Lake is already impaired by numerous pollutants. (AR 532, 537; Tr. 50:8 -51:20). If IEPA had doubts about whether people eat fish from Horseshoe Lake (AR 561), despite the fact that its sister agency IDNR publicizes fishing opportunities on its website, (AR 532). IEPA could have found out more about public uses of the Lake through a public hearing on the permit.

Moreover, the record shows that U.S. Steel's effluent has failed chronic toxicity tests in the past. (AR 158, 168). Early drafts of the U.S. Steel permit contained chronic toxicity testing requirements (AR 396), perhaps in light of the earlier indications of a problem, but the final permit eliminated this requirement. (AR 651-57). The permit writer noted that this removal of human health and chronic toxicity requirements from the final permit "significantly reduces the burden of toxicity testing". (AR 478-79). The removal of this testing requirement also runs counter to concerns raised in the comment letters about the U.S. Steel facility's history of non-compliance with its permit. (AR 537-39).

## **V. CONCLUSION**

As the Board appropriately found, in its Opinion and Order of January 26, 2007 in this case, "the two public comments filed in this case evidence a significant degree of

public interest in the proposed permit.” Opinion and Order at 14. IEPA abused its discretion by failing to consider the public interest in the permit, and by denying the hearing requests in the face of apparent public interest in the permit.

For the foregoing reasons, ABC respectfully requests that the Board vacate the U.S. Steel permit as issued and direct IEPA not to re-issue the permit without first holding a public hearing thereon.

Respectfully submitted,

/s/

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**CERTIFICATE OF SERVICE**

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