BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

AMERICAN BOTTOM CONSERVANCY	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 06-171
	)	(3rd Party NPDES Permit
	)	Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and UNITED STATES STEEL CORPORATION – GRANITE CITY WORKS,	)	
	)	
Respondents.	)	

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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 of the **Agency Response Brief on Remand** of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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Dated: November 26, 2008
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RESPONSE BRIEF
OF THE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
ON REMAND

NOW COMES the Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") by and through its attorney, Jason R. Boltz, Assistant Counsel and Special Assistant Attorney General, pursuant to the Hearing Officer Order dated October 14, 2008, hereby submits this Brief, in Response to American Bottom Conservancy (hereinafter "ABC" or "Petitioner's") Brief on Remand from the Appellate Court of the Fifth District of Illinois ("Appellate Court").

Pursuant to Section 40(e) of the Illinois Environmental Protection Act ("Act"), ABC has the burden of proof. As stated and ruled by the Appellate Court, the Agency's decision to not hold a hearing under 309.115 of the Illinois Pollution Control Board ("Board") regulations was discretionary. As a result, ABC must prove that substantial evidence existed to show that the Agency abused its discretion in its determination that a significant degree of public interest did not exist in the proposed permit based upon the

properly and timely filed requests for hearing. Moreover, ABC must prove that the Agency's decision to not grant a hearing in this case was an abuse of discretion or clearly erroneous. In support thereof, the Agency submits the following:

I. RELEVANT FACTS

On October 17, 2002, the Agency received United States Steel City Works' ("US Steel") request to renew its NPDES permit that was expiring on April 30, 2003. (Agency Record hereinafter "Record" at 135-155.) Subsequent to various Agency actions concerning US Steel's application seeking a permit, the Agency put the draft US Steel NPDES permit on a 30-day public notice beginning on December 19, 2004. The public comment period ended on January 18, 2005. *Record* at 518. At the close of the comment period on January 18, 2005, the Agency received two written comment letters that requested a public hearing be held, dated January 17 and 18, 2005. ("Requests for Hearing") Kathleen Logan-Smith of the Health & Environmental Justice- St. Louis first submitted a Request for Hearing to the Agency, dated January 17, 2005, requesting a public hearing. Various issues were raised in the letter including concerns of the discharge of lead and the impacts on the lake's recreational uses. *Record* at 532.

The second Request for Hearing (and only other Request for Hearing received during the comment period) was dated January 18, 2005 from the ABC and other environmental groups. ABC presented general concerns that Horseshoe Lake is impaired, and thus has a negative impact on the community that utilizes the Lake for recreation and for a food source. Specifically, ABC raised the following issues:

1) Allowing US Steel to put additional lead and ammonia into Horseshoe Lake would be contrary to the federal Clean Water Act and the Illinois Bureau of Water's mission;
2) US Steel should be added to a list of potential contributors to the impairment of Horseshoe Lake;
3) US Steel had violated ammonia and "other" limits in the past;
4) Requested the Agency hold a public hearing; and
5) Asked for a 30-day extension of the public comment period if the Agency denied its request for a public hearing.
Record at 533-539.

On May 20, 2005, Ms. Burkard responded to comments received during the public comment period. (*Record* at 601-605) On February 8, 2006, Mr. Toby Frevert of the Agency submitted to Marcia Wilhite a memorandum outlining his recommendations that no public hearing be granted based upon the Requests for Hearing comment letters. (Board's Administrative Record, hereinafter "C___", at C286) On March 30, 2006, the Agency granted the NPDES permit to U.S. Steel, and amongst other discretionary decisions, decided to not hold a public hearing based upon the Request for Hearing comment letters submitted during the public comment period. (*Record* at 637-643) On April 10, 2006, the Agency, through Mr. Al Keller sent a letter to the Washington University School of Law addressing various concerns and comments presented to the Agency concerning the previously issued NPDES permit.

On May 8, 2006, pursuant to Section 40(e)(1) of the Act, ABC filed its Third-party Petition seeking the Board's review of the Agency's issuance of the US Steel's NPDES permit, and specific to the case at bar, identified the Agency's decision to not hold a public hearing pursuant to their request as objectionable.

On September 21, 2006, the Board directed the hearing officer to proceed to hearing on the issue of a request for a public hearing by ABC. A Board hearing was held on November 20, 2006, at which testimony was heard on the issue of whether the

Agency's decision to hold a public hearing complied with the Board's regulations, 35 Ill. Adm. Code § 309.115(a)(1). On January 26, 2007, the Board issued an Order wherein it concluded that the Agency's decision to not hold a public hearing violated Section 309.115(a) of the Board's regulations, and as a result, the Board invalidated the permit as issued by the Agency.

Pursuant to Section 41 of the Environmental Protection Act and Supreme Court Rule 335, the Agency and U.S. Steel sought direct administrative review of the Board's Order to the Appellate Court. The Appellate Court ruled to vacate and remand the decision of the Board with respect to the Agency's decision to not hold a public hearing. The Appellate Court ruled that the Board must use an abuse-of-discretion standard in evaluating the Agency's decision to not grant a public hearing.

II. STANDARD OF REVIEW

In the Appellate Court's Order of September 5th, 2008, it ruled that the Board must use an *abuse of discretion* standard. United States Steel Corp. v. Illinois Pollution control Board, 384 Ill.App.3d 457, 892 N.E.2d 606 (Ill. App. 2008) (hereinafter "U.S. Steel"). The Appellate Court further ruled that the Board must evaluate the Agency's decision to determine "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." Id. *citing* In re Marriage of Munger, 339 Ill.App. 3d 1104, 1107 (Ill. App. 2003).

Section 3-110 of the Administrative Review Law, 75 ILCS 5/3-110 *et seq.*, sets forth the narrow standard of judicial review of an administrative decision. This section provides in part:

> The hearing and determination shall extend to all questions of law and of facts presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination, or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct.

735 ILCS 5/3-110 (West 2000). *See also*, East Saint Louis School District v. Hayes, 237 Ill. App. 3d 638, 646 (Ill. App. 1992).

Illinois courts have repeatedly defined the review standard as one where courts should not interfere with the discretionary authority of an administrative agency unless the agency has exercised its power in an arbitrary or capricious manner or the agency's action is contrary to the manifest weight of the evidence. Hanrahan v. Williams, et al., 174 Ill.2d 268, 271 (1996). Illinois appellate courts, like the Fifth District Appellate Court, have stated that in order for a reviewing tribunal to find an administrative decision to be against the manifest weight of the evidence, the reviewing tribunal must determine, after reviewing the evidence in the light most favorable to the agency, that no rational trier of fact could have agreed with the administrative agency's decision. Agans v. Edgar, 142 Ill. App. 3d 1087, 1094 (Ill. App. 1986). Furthermore, "if there is any evidence in the record that supports administrative agency's decision, that decision is not contrary to the manifest weight of the evidence and must be sustained in judicial review." Leong v. Village of Schaumburg, 194 Ill. App. 3d 60 (Ill. App. 1990). If the Agency's decision is not against the manifest weight of the evidence, it can only be reversed if it is arbitrary or unreasonable. Kappel v. Police Bd. of City of Chicago, 220 Ill. App. 3d 580 (1991).

The criteria for holding a public hearing 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). Now, two Illinois courts, including the Appellate Court in U.S. Steel, and several Environmental Appeals Board ("EAB") cases have repeatedly concluded that the Agency's decision to hold a public hearing is a discretionary one.

"The unambiguous and plain language of section 309.115(a) vests discretion in the Agency to hold a public hearing *whenever it determines* that there exists a significant degree of public interest in the proposed permit." (emphasis added by Appellate Court) U.S. Steel, 384 Ill.App.3d 457, at 463 (Ill. App. 2008). The decision to hold a public hearing lies within the discretion of the Agency. Borg-Warner Corp v. Mauzy, 100 Ill. App. 862, 867, 427 N.E. 2d 415, 419 (3rd Dist. 1981). (The decision to hold a public hearing "is a discretionary decision to be made by the Agency").

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 pubic hearing is a largely discretionary one." See, e.g., In re City of Forth 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). Also, in In Re: Weber # 4-8, Underground Injection Control, 2003 WL 23177505 (December 11, 2003), the EAB held that, "we do not reach that issue, notwithstanding the broad discretion afforded to the "shall hold a public hearing whenever [it] finds, on the basis of requests, a significant degree of public interest in a draft permit(s)."); In re City of Fort Worth, 6 E.A.D. 392, 407 (EAB 1996); In re Avery Lake Prop. Assoc., 4 E.A.D. 251, 252 & n.2 (EAB 1992)." Further, in In the matter of: Osage, 4 E.A.D. 395 (EAB

1992), the EAB held that, "[i]n this type of permit proceeding, the Region's decision to hold a public hearing is largely discretionary."

Consequently, the Agency's decision to grant or not grant a request for a public hearing under Section 309.115(a) of the Board regulations is clearly a discretionary decision. As stated by the Appellate Court, the discretion whether to hold a public hearing is left for the Agency, "***whenever it determines*** that exists a significant degree of public interest in the proposed permit." (emphasis added by Appellate Court) U.S. Steel, at 463.

III. STATUTORY & REGULATORY AUTHORITY

The Petitioner's sole statutory authority for purposes of this action, and specifically referenced in their Petition for Review filed on May 8, 2008, is provided under Section 40(e)(1) of the Act which provides the following:

> If the Agency *grants or denies a permit* under subsection (b) of Section 39 of this Act, a third party, other than the permit applicant or Agency, may petitioner the Board within 35 days from the date of issuance of the Agency's decision, for a hearing to contest the decision of the Agency. (*Emphasis added*) 415 ILCS 5/40(e)(1) (2004)

Section 39(a) of the Act provides that the Agency has a duty to issue a permit upon proof that the facility will not cause a violation of the Act or Board regulations. *See* 415 ILCS 5/39(a) (2004).

> (a) When the Board has by regulation required a permit ... 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 the Act or of regulations hereunder... (*Emphasis added*) 415 ILCS 5/39(a) (2004)

As only *part* of the Agency's final decision to issue the NPDES permit, includes the Agency's discretionary duty to evaluate *whether a significant degree of public interest existed for purposes of deciding whether to hold a public informational hearing.* The Board's regulations at 35 Ill. Adm. Code 309.115 set forth the standard governing the Agency's determination on whether to hold a public hearing on an NPDES permit. Section 309.115(a) provides:

> The Agency shall hold a public hearing on the issuance of 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. (*emphasis added*) 35 Ill. Adm. Code 309.115(a)(1) (2005)

The Code of Federal Regulations provides relevant guidance regarding the meaning and intent concerning "a significant degree of public interest." As such, the following is also cited:

40 C.F.R. § 124.12(a) Public hearings.

> (1)"The Director *shall* hold a public hearing whenever he or she finds, on the basis of requests, *a significant degree of public interest* in a draft permit(s)." (emphasis added)

IV. ARGUMENT

A. The Agency Utilized Its Discretion In Determining That the Requests for Hearing Filed With the Agency During the Comment Period Did Not Indicate That a Significant Degree of Public Interest Existed In the Draft Permit

The Appellate Court in U.S. Steel ruled that only Requests for Hearing filed within the public comment period would provide the Agency a basis to make a discretional determination as to whether a significant degree of public interest in a proposed permit is present. U.S. Steel, 384 Ill.App.3d 457, at 463 (Ill. App. 2008)The Appellate Court stated this rule clearly and unambiguously in the following manner:

> "If the Agency determines, **in its discretion,** that there is a significant degree of public interest in a proposed permit, **based on requests for a public hearing that are filed within the public comment period and that indicate the party's interest and why a hearing is warranted**, then a public hearing must be held." (emphasis added) U.S. Steel at....(U.S. Steel at 463)

The Appellate Court's order clearly placed the emphasis not on another court's or tribunal's determination of this interest, but solely on the Agency's discretion and determination of this issue. Furthermore, the Appellate Court determined that only the Requests for Hearing that (1) are filed ***within*** the public comment period that indicate a party's interest, and (2) express ***why*** a hearing is warranted, should properly be considered by the Agency. Moreover, the Appellate Court made clear that that the Agency need not evaluate whether a significant degree of public interest is otherwise identifiable or provable *outside the written contents* of properly and timely filed requests for hearing. The Appellate Court in U.S. Steel articulated this important explanation by stating that, "the regulation does not state that the Agency must hold a hearing *whenever there is a significant degree of public interest.*" (Emphasis added by Appellate Court) Id. The Appellate further noted the clarity on this issue by ruling that the determination of

the Agency of the public interest evaluation is *based* on the timely filed requests for hearings. Id.

The Appellate Court, as well as Section 309.115(a)(2) of the Board regulations, places the burden on the party requesting a public hearing to show through their filed requests for hearing why a hearing is warranted. Id.; 35 Ill. Adm. Code 309.115(a)(2) (2006). The Board regulation specifically requires that the request for a hearing shall be filed within the 30-day comment period and shall indicate the interest of the party, and the reasons why a hearing is warranted. 35 Ill. Adm. Code 309.115(a)(2) (2006).

In this case, at the close of the comment period on January 18, 2005, the Agency received only two written comment letters that requested hearings, dated January 17 and 18, 2005. ("Requests for Hearing"). The Record reflects through various memoranda and correspondence that the Agency reviewed the Requests for Hearing to determine whether a significant degree of public interest existed in this proposed permit. The Agency found that the nature and extent of comments received during the comment period were general in nature and failed to establish a significant degree of public interest. Specific Agency documents within the Record, specifically a memorandum dated February 8, 2006 from Toby Frevert to Marcia Willhite ("Frevert Memo") as well as a May 20, 2005 memoranda by Beth Burkard from the Agency ("Burkard Memos"), and the Agency's summary Response to Comments letter, dated April 10, 2006 ("Keller Letter"), all indicate and show considerable thought, consideration, and reasonable evaluation took place *specific* to the facts presented to the Agency in the Requests for Hearing.

The Requests for Hearing were non-significant in that they did not provide any specific or additional information that the Agency could have used in drafting the permit.

And furthermore, the Requests for Hearing's general concerns and discussion regarding general recreational issues presented in each letter all were previously and appropriately acknowledged and addressed. The Frevert Memo, Burkard Memos, and the Keller Letter presented much of the Agency's clear rationale concerning the public uses of Horseshoe Lake. For example, the Frevert Memo referenced the contents within the 303(d) report for purposes of the Agency's understanding and evaluation of Horseshoe Lake for purposes of the NPDES permit review. (C286) Furthermore, the Keller Letter stated in a response to an inquiry regarding recreational concerns on page five (5) that, "Horseshoe Lake is regulated as a General use water, and as such, the water quality criteria used to derive permit limits are deemed protective." And finally, the Burkard memos reasoned that since the 303(d) report did not reference Industrial Point Sources as a source of impairment, the concern relative to the recreational uses was not significant for purposes of the NPDES permit. *(Record* at 601-603) Clearly, the Agency provided sufficient rationale and justification for purposes of addressing the general concerns raised in the Requests for Hearing with respect to the recreational and public uses of Horseshoe Lake as they relate to the NPDES permit review process.

The comments in the Requests for Hearing also failed to meet the requirements of Section 309.115(a). Moreover, the comments did not present any beneficial or unknown information to the Agency that would demonstrate a significant degree of public interest in a public hearing. To illustrate, the January 17th Request for Hearing stated that the US Steel's permit "impacts directly a recreational body of water;" "would allow additional discharges of toxic heavy metals;" or/and "would add several other toxin to their body burden."(*Record* at 532) The January 18th Request for Hearing stated that, the permit

"would allow additional lead" and "would allow additional ammonia."(*Record* at 537-539) These are simple statements of fact of which the Agency was already aware, and again, fully considered as demonstrated through the Frevert Memo, the Burkard Memos, the Keller Letter, and other documents in the Record. As stated in the Frevert Memo, "the comments do not provide any additional information..." (C286) As stated in the Burkard Memos, "Horseshoe Lake is not impaired for Lead or heavy metals; Industrial Point Sources is *not* a source of impairment." (*Record* at 601) As a result, not only did those statements fail to present any information relevant to the Agency concerning the degree of public interest, the information posed in the Requests for Hearing further failed to provide the Agency a showing that a significant degree of public interest in the proposed permit.

The Agency also found various other comments in the Requests for Hearing not relevant to activities authorized or within the jurisdiction of the proposed NPDES permit. As a result, certain comments within the Requests for Hearing that were not germane and applicable to issues that could be addressed in a NPDES public hearing, and as such, were not considered. To illustrate, the January 17th Request for Hearing referred to "excessive levels of PCBs from fish consumption." In addition, the January 18th Request for Hearing stated that, "Horseshoe Lake is impaired;" "we believe that industrial effluent from Granite City Steel should be added to the list;" "Granite City is also in significant non-compliance with Clean Air Act and RCRA." (*Record* at 532) These aforementioned issues raised in these comments in the Requests for Hearing are outside the scope of an NPDES permit public hearing. For example, the Agency does not consider addition or deletion of sources or causes of impairment of a water body such as Horseshoe Lake at an

NPDES permit public hearing. Consideration of impairments in bodies of water by the Agency is instead governed by Sections 305(b) and 303(d) of the Clean Water Act("CAA"), and a separate process is prescribed by these sections to address the listing of impairments to bodies of water within the State of Illinois. Nor does the Agency consider a discharger's noncompliance with CAA or RCRA issues at an NPDES permit public hearing.

The Petitioner, however, continues to ignore the Appellate Court's ruling in U.S. Steel and ignore the law that has been unequivocally clarified and stated. On page 9 of the Petitioner's Brief, the Petitioner stated that, "the governing regulation makes clear that when there is a significant public interest in a permit, IEPA 'shall' hold a public hearing." (Petitioner's Brief, P. 9) This blanket conditional statement ignores the Appellate Court's ruling in U.S. Steel. The statement by itself, that if "there is a significant public interest, the IEPA 'shall' hold a public hearing" without properly referencing the necessary conditions in U.S. Steel that (1) require properly and timely filed requests for hearing, (2) for the requests for hearing to indicate a party's interest, and (3) for the requests for hearing to indicate why a hearing is warranted, shows the Petitioner's disregard for the Appellate Court's ruling and the governing regulations.

Section 40(e)(2)(a) of the Act, states that the 3rd party Petitioner shall demonstrate that it raised the issues within the petitioner during the public notice period or during the public hearing. Section 40(e)(3)(ii) states that the Board shall decide exclusively based on the Record before the Agency. To the extent that the petitioner raises and argues information outside of the Record and its timely comments, it is irrelevant to the Agency's decision, including the denial of the public hearing and the decision now before

the Board. The Agency would not have been privy to evidence which includes testimony in the November 20, 2006 Board hearing at the time it made its decision to not hold a public hearing, and furthermore, any consideration of that evidence would be contrary to the applicable law as well as the Order in U.S. Steel.

As stated by the Appellate Court and Section 309.115(a) of the Board's regulations, the Agency's determination with respect to evaluating whether a significant degree of public interest existed in a public hearing is *based solely* upon the Requests for Hearing filed within the comment period. As a result, the Agency did not consider information that was not provided within the Requests for Hearing, did not consider testimony in the Board Hearing on November 20, 2006, and did not consider facts and comments presented outside of the comment period, all evidence that the Petitioner argues should be considered for purposes of evaluating the degree of public interest within its Brief. The Record contains various memorandums and correspondence of the Agency that clearly and unequivocally show that the Agency did, however, properly consider all of the facts and comments submitted within the Requests for Hearing in making its discretionary determination not to hold a public hearing based upon its finding that a significant degree of public interest did not exist in the proposed hearing.

B. ABC Has Failed to Meet its Burden to Prove that the Agency Abused Its Discretion in Not Granting a Public Hearing

Since the Agency's decision under Section 309.115(a) to grant or not grant a request for a public hearing is a discretionary one, ABC must show that the Agency's determination of not finding a significant degree of public interest in this case was clearly erroneous or that the Agency's decision was arbitrary and unreasonable given the facts of the case. And as the Appellate Court has also stated, "the party requesting the hearing has the burden of showing why it is warranted." U.S. Steel *citing* Borg-Warner Corp. v. Mauzy, 100 Ill.App.3d 862, 867 (1981). Moreover, under Section 40(e) of the Act, Petitioner has the burden to prove that the Agency Record at the time of the close of the public comment period contained substantial evidence to show that a significant degree of public interest in the proposed permit existed, and that the Agency's decision to not hold the hearing amounted to an abuse of discretion. To satisfy this burden, Petitioner must demonstrate that the Agency abused its discretion in determining that the Requests for Hearing failed to provide a basis that a significant degree of public interest existed in the proposed permit, and thus the Agency's decision was clearly erroneous, and not a "poor decision."

The Petitioner can not 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." In support of its case, ABC provides the following arguments: (1) ABC believes that a significant degree of public interest existed because Horseshoe Lake is used by the public, and (2) that various organizations of sizeable membership asked the Agency to hold a public hearing in this case. The Agency believes that the use of Horseshoe Lake by the public and requests for a hearing from the interested groups are relevant factors in determining

whether a significant degree of public interest exist in this case; however, these two factors alone are not sufficient to satisfy the criteria described in Section 309.115(a) of the Board regulations.

The Petitioner has argued in its Brief that based upon the number of members within each group that the public interest component is satisfied. This argument is misplaced and inadequate. While the Petitioner and other various groups who requested a hearing, such as the Sierra Club which has allegedly 26,000 members, may have a large number of members within its organization, that rationale by itself does not satisfy a significant degree of public interest in a public hearing. Analogously to City of Fort Worth, the EAB ruled that petitioner, City of Arlington, was not entitled to a public hearing based solely on the "eighty thousand citizens of Arlington" that are within the City of Arlington and are part of that "organization." In Re: City of Fort Worth, 6 E.A.D 392 (April 5, 1996) While the petitioner, City of Arlington, further argued similarly to the Petitioner ABC that thousands of people of the City depend upon and publicly use the water at subject in the contested permit action, the EAB ruled that the City of Arlington must meet its burden of showing a clear error and abuse of discretion "on the basis of the requests" that are filed. Id.

If the Agency is required to hold a public hearing purely based on circumstantial facts regarding the public use of a water body and a request from a group with a large number of members, it may have to hold approximately 300 NPDES permit public hearings each year, each of which would add approximately six (6) to nine (9) months of time to the permitting process. This result is neither intended by the Clean Water Act nor by the federal or Board regulations. Moreover, the membership size of an entity does

not by itself establish a significant degree of public interest. Obviously in such a scenario, it would be impossible for the Agency to issue more than a couple of NPDES permit in a year and deem the applicable regulations of 309.115(a) as well as the Agency's discretionary role in determining the significance of public interest as meaningless. The Petitioner thusly has failed to demonstrate any clear error or abuse of discretion in the Agency's decision not to hold a public hearing in this case. Consequently, the Petitioner has failed to meet its burden of proof under Section 40(e) of the Act.

C. An Abuse of Discretion Must Amount to the Agency Overstepping the Bounds of Reason

For the Agency to have abused its discretion in its review of the Requests for Hearing for purposes of examining the degree of public interest in the proposed permit, it must have abused its clear grant of discretion. The Appellate Court in U.S. Steel articulated the meaning of the abuse of discretion in the following manner:

> "A tribunal abuses its discretion when it makes **an arbitrary decision, without using conscientious judgment, or when, in view of all the circumstances, the lower tribunal oversteps the bounds of reason, ignores the law, and thereby causes substantial prejudice**." (emphasis added) U.S. Steel citing In Re Marriage of Munger, 339 Ill. App. 3d 1104, 1107 (2003).

The Appellate Court further stated that, "The question is not whether the reviewing court would have made the same decision if it were the lower tribunal." Id. As such, the analysis for the case at bar is not whether the Board, another court, or another tribunal may have decided things differently, after being provided the same Requests for Hearings that the Agency possessed on January 18, 2005, but whether the Agency utilized conscientious judgment, or when, in light of all of the circumstances and facts available, the Agency overstepped the bounds of reason, ignored the law, and caused substantial prejudice.

The courts have required the moving party to show that the lower court made more than a "poor decision." First Nat. Bank of Crosby v. Bjorgen, 398 N.W.2d 789 (N.D. 1986) (the moving party must also show more than that the lower court made a "poor" decision, but that it positively abused the discretion it has in administering the rule.) (quoting Bender v. Liebelt, 303 N.W.2d 316, 318 (N.D. 1981). In determining the abuse of discretion standard, the courts have viewed the evidence in the "light most favorable to the action of the court below." Parks v. U.S. Home Corp., 652 S.W.2d 479, 485(Tex.App.-Houston[1st Dist.] 1983, writ dism'd).

The EAB has also required that an abuse of discretion must be present in order for it to set aside the EPA's decision under 30 C.F.R. Part 124. In re: Dominion Energy Brayton Point, L.L.C., (February 1, 2006) ("The Board's standard of review where we are reviewing the permit under part 124 is whether the permit issuer based the permit on a clearly erroneous finding of fact or conclusion of law."). Similarly, 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.")

In order for the Board to find that the Agency abused its discretion, the Petitioner must show that the Agency's decision was clearly erroneous and against both logic and facts, that overstepped the bounds of reason. Further, the Board should view the inferences of the facts in the light most favorable to the Agency.

1. **The Agency Did Not Overstep the Bounds of Reason by Evaluating Whether a Significant Degree of Public Interest Existed in the Proposed Permit Through Reviewing the Properly Filed Requests for Hearing**

The Frevert Memo clearly reveals that the Agency utilized proper rationale in reviewing the Requests for Hearing for purposes of determining whether a significant degree of public interest existed. The Agency was limited to the content of the two Requests for Hearing in deciding whether a significant degree of public interest existed. The Frevert Memo incorporated that issue succinctly, appropriately, and consistent with the law when it stated that "only comments received prior to the close of Public Notice can be considered in determining the merits for granting a Public Hearing..."(C286) And, consistent with the ruling in U.S. Steel, the Agency must determine in its discretion whether a significant degree of public interest was present, "...based on requests for a public hearing that are filed within the public comment period..." U.S. Steel, at 643.

While the Petitioner seeks to diminish the thought and analysis in the Frevert Memo through their argument that it did not include (1) a speculative discussion of "public interest" for facts not provided in the Requests for Hearing and (2) an evaluation

of issues not presented within the Request for Hearing, the Petitioner at the same time, shows its failure to accurately characterize the applicable law and the ruling in U.S. Steel. Id. As a result, the Petitioner argues that since it failed to present to the Agency facts and concerns that demonstrated a significant degree of public interest in the proposed permit, the Petitioner would otherwise require and argue that the Agency should have assumed and considered outside sources, documentation, and testimony not otherwise *properly and timely filed* in the Requests for Hearing.

The Petitioner first evidences this misunderstanding of the law through its argument that the Frevert Memo fails to "ask whether there is a significant public interest." (Petitioner's Brief, P. 8) The Petitioner exemplifies this argument by quoting Frevert Memo excerpts, "the issues raised are 'easily answered' and '[t]he comments do not provide additional information' of benefit to IEPA in issuing the permit." (Petitioner's Brief, P. 8 citing C 286) The Petitioner's criticisms of these appropriate references show that the Petitioner again misapprehends the necessary focus of the 309.115(a) analysis.

As a result of that rationale, the Petitioner amplifies its failure in recognizing and acknowledging that the Frevert Memo, in fact, correctly addressed only what it should have evaluated in accordance with the law: the Requests for Hearing's indication of interest and explanation of why a hearing is warranted. For the Agency to consider facts outside the content of the Requests for Hearing, or to assume facts not before it for purposes of determining whether a significant degree of public interest was present for purposes of a public hearing, would be contrary to Appellate Court's Order in U.S. Steel,

the plain language of law and the governing regulations the Agency is mandated to uphold.

The Petitioner also wrongly reasons its justification for granting a public hearing through its misapplication of the regulations concerning the *purpose* of the public hearing for the purposes of holding a public hearing. While the Agency agrees with the Petitioner that the purpose for the public hearings "provide opportunity for the public to understand and comment on proposed actions of the Illinois Environmental Protection Agency (Agency)," the law *first* requires and conditions that a showing be made to the Agency by the public to demonstrate their interest in the permit and why a public hearing is warranted. 35 Ill. Adm. Code 164.101 (a). As such, the Appellate Court and governing regulations have set forth that unless the Agency *first* determines that a significant public interest exists, a public hearing need not occur that would otherwise require the Agency and the interested public to meet the above stated purpose. Moreover, the Agency properly only considered the level of significance of public interest through the submission of properly and timely filed Requests for Hearing.

2. The Agency Did Not Overstep the Bounds of Reason by Referencing Available Section "303(d) Discussions and Hearings" Proceedings in its Rationale

The Petitioner misapplied language in the Frevert Memo in an attempt to argue that since separate 303(d) hearing opportunities were available to the public, the Agency somehow rationalized that no such hearing under Section 309.115(a) would be necessary

or required. And as a result of that misinterpretation, the Petitioner then formulates another irrational deduction through its argument that since the Agency's referenced such 303(d) discussions and hearings, the Agency somehow acknowledged that a significant degree of public interest existed in the proposed permit. Those conclusions are assumedly reached through the Frevert Memo's following statement: "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." (C286) It is obvious from this statement that the Frevert Memo was addressing statements in the Requests for Hearing concerning *water quality concerns* for Horseshoe Lake, and nowhere within the Frevert Memo is any remark that suggests the 303(d) proceeding is a substitute opportunity for a public hearing.

The differences in an NPDES permit review process from Section 303(d) proceedings of the Clean Water Act are as clear as the Petitioner's misapplication of the reference to Section 303(d) proceedings in the context of their argument. While an NPDES permit addresses the *allowable limits for discharges of a facility* into Horseshoe Lake and a NPDES permitting process may properly consider and evaluate information that could be available through the Section 303 proceedings, a 303(d) regulatory process independently and specifically addresses *water quality standards* and implementation plans of Horseshoe Lake. Section 303 of the Clean Water Act is titled "Water Quality Standards and Implementation Plans." Within Section 303's necessary implementation of water quality standards also includes Section 303(c)(1) which *requires* the Agency to hold "public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." *Clean Water Act*, Section

303(c)(1). In addition, for purposes of holding a Section 303(c)(1) public hearing, no initial requirement or showing relative to any degree of public interest is necessary nor is any filing of any requests for hearing required. Such Section 303(c)(1) hearings occur regardless of any public interest showing or public participation. And as stated by the Frevert Memo, a Section 303 public hearing would provide an opportunity for members of the public to discuss and raise concerns regarding *water quality standards* specific to Horseshoe Lake and any other water bodies within the State of Illinois. (C286)

Most of the comments contained within the Requests for Hearing were statements that focused on the *water quality* and the *impairments* of Horseshoe Lake and the affects on individuals who utilize the lake, instead of the actual discharge limits of U.S. Steel's proposed facility as more specifically addressed through the NPDES permit. As such, some of the concerns that only related specifically to impairments and water quality without any discharge-related discussion may more rationally be addressed through the Section 303(d) process. For instance, ABC's Request for Hearing, dated January 18, 2005, repeatedly refers to Horseshoe Lake as "impaired" and then provides significant discussion regarding the various pollutants within Horseshoe Lake. (*Record at 537*) However, the impairments, by themselves, specifically of Horseshoe Lake are not necessarily relevant or properly addressed through an NPDES public hearing or its accompanying permit. As a result, a focused discussion of the identified impairments as raised in the Requests for Hearing as well as relative water quality standards of Horseshoe Lake could appropriately be addressed and discussed through a Section 303 CWA public hearing.

Therefore, the Frevert Memo's reference to Section 303(d) discussions and hearings were completely appropriate and applicable, and certainly not an acknowledgment of any degree of public interest in the NPDES permit, nor was the reference any sort of attempt to substitute the Section 303 public hearing opportunity for a discretionary evaluation concerning the degree of public interest in a NPDES public hearing. Additionally, the comments regarding the general impairments and water quality concerns Horseshoe Lake (without any relationship to the permit-specific discharges) in the Requests for Hearing failed to relate to the proposed NPDES draft permit. Finally, the Agency did not overstep the bounds of reason nor abused its discretion in its evaluation of public hearing interest through referencing the opportunity to discuss the Request for Hearing's references to "impairments" and water quality standards in a Section 303 public hearing.

3. Members of the Public May Address Their Issues and Concerns Through Properly Filed Written Comments Instead of Orally Commenting Through a Public Hearing

The Petitioner argues for the justification of a Section 309.115(a) public hearing within its Brief that, "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 hearings." (Petitioner's Brief, P. 9) The Petitioner's argument is flawed. While the public may only provide oral comments in such a public hearing, the

remainder of this statement is simply not true. The public can provide comments, ask questions, and create a record for a possible appeal through written comments. 35 Ill Adm. Code 309.109(b) provides that any interested persons may submit "written comments" and letters to the Agency and Applicant and such comments "shall be retained by the Agency and considered in the formulation of its final determinations with respect to the NPDES application." The Act also states that creating a record for a possible appeal may be made through "a demonstration that the petitioner raised the issues contained within the petition during the public notice period *or* during public hearing..."(emphasis added) 5 ILCS 40(e)(2)(A) (2006). As such, the plain language of the Act and applicable regulations clearly allows for the opportunity of the public to be involved for purposes of raising issues, comments, concerns, questions, and preserving its opportunity for appeal through written comment letters. Additionally, this argument raised by the Petitioner fails to relate to the proposed NPDES draft permit. And finally, while the reference to the applicable law that includes the opportunities and purposes for public participation, the applicable law also still requires an initial showing of public interest through properly and timely filed requests for hearing for proper Agency evaluation.

Therefore, the Agency correctly and appropriately followed the governing regulation of 309.115(a) and the Appellate Court's Order in U.S. Steel. Since the Agency reviewed all of the comments and issued raised in the Requests for Hearing and utilized its discretion in examining the Requests for Hearing to determine whether or not a significant degree of public interest was presented for purposes of holding a public

hearing, the Agency did not abuse its discretion, did properly utilize conscientious judgment, and, in light of all of the circumstances and facts available, the Agency stayed within the bounds of reason, adhered with the law, and did not cause substantial prejudice.

D. A Significant Degree of Public Interest Finding Requires More Than a Mere Interest in the Permit

A public hearing is required only if a significant degree of interest is present in the proposed permit. In Re: City of Los Angeles, 1997 WL 28253 (E.P.A.) (October 8, 1977), ("In any permit modification proceeding, an opportunity for public hearing must be provided, but a hearing must be held only if the Regional Administrator finds that there is a significant degree of public interest in the permit modification").

Recently the United States Environmental Protection Agency ("USEPA" or "EPA") provided a better test to decide when to hold a hearing. In a press release, EPA stated that, "[a] request for a public hearing must be in writing and state the nature of the issues proposed to be raised during the hearing. EPA will hold a public hearing if it decides there is a significant degree of public interest in the draft permit, or if the comment raises an issue that EPA believes is important." *2005 WL 1685556 (E.P.A.) (July 20, 2005).*

In In the matter of: Avery Lake Property Owners Assc., 4 E.A.D. 251 (September 15, 1992), the EAB did not find that a significant degree of public interest existed as the comment letter "did not focus on any specific permit conditions in the draft permit,

instead it expressed general concerns over the risks that the type of activity might pose to water resources in the area."

In In the matter of: Terra Energy LTD., 4 E.A.D. 159(August 5, 1992), the request for a hearing only expressed generalized concerns about the potential input of the well on the "environment and property values." Based on these facts, the Region found that there was not a significant degree of public interest. Instead, the Region chose to respond to each comment letter individually. The EAB held that, "the judgment of the Region in this respect has not been shown to be erroneous." Id.

In In the matter of Spokane Regional Waste-to-Energy Project, 3 E.A.D. 68 (January 2, 1990), the Record showed that there was public interest in the permit. Nevertheless, Washington State Department of Ecology ("Ecology") decided not to hold a public hearing because it found that "there was little expression of interest in the specific issue raised by the remand." Instead, Ecology prepared a response to the public comments and issued its revised final permit determination. The EAB held that, "[u]nder the circumstances, no clear error is apparent from Ecology's decision not to hold a public hearing." Id.

Similarly, in In the matter of: Osage, 4 E.A.D. 395 (November 24, 1992), during the public comment period, comments were provided only by the permittee and petitioner. The petitioner's request for a public hearing was the only request received by the Region. The Region decided to deny a public hearing on the draft permit. Instead a meeting was held with petitioner. The Region addressed the petitioner's comments in the formal response to comments. The EAB noted that petitioner was given ample opportunity for participation in the permit process. Thus, the EAB held that "Petitioner

has failed to show that the Region's decision not to hold a public hearing was clearly erroneous or an important exercise of discretion that warrants review." Id.

In order for ABC to establish that the Agency Record at the time of the close of the comment period showed a significant degree of public interest in the proposed permit, it must show that the comment letters had more than general statements of environmental concerns over the risks the US Steel's NPDES permit pose to Horseshoe Lake, instead ABC and must clearly articulate problems with the specific permit conditions in the draft permit. Further, ABC must show that comments were directly related to the NPDES permit issues, and not the Clean Air Act, the Resource Conservation and Recovery Act issues, nor impairment discussions more applicably addressed in Section 303 proceedings.

E. A Section 309.115(a) Public Hearing is Not a Dispositional Matter and the Decision To Not Hold A Public Hearing at the Request of a Third Party Did Not Require an Articulated Decision Specific Only to the Request for Hearing

The Petitioner has argued that the Agency's decision to not hold a public hearing required an articulated decision. However, the Petitioner fails to understand that the Agency's responsibility pertaining to the decision whether to hold a public hearing was one responsibility amongst many for purposes of the NPDES permit review process. Amongst the many regulatory requirements of the Agency regarding the NPDES permit

review process within Title 35, Chapter I, Subpart A, Part 309, includes reviewing the written application, providing necessary public notice, preparing a fact sheet, providing notice to other governmental agencies, receiving and reviewing written comments, evaluating and issuing various terms and conditions within the permit, establishing schedules of compliance, and finally, the decision to hold a public hearing pursuant to Section 309.115(a). All of the above-stated are part of the Agency's NPDES permit review responsibilities. The Section 309 public hearing process is described in Sections 309.115 through 309.119. Section 309.117 describes the substance and nature of the Agency hearing in the following:

> **Section 309.117 Agency Hearing**
>
> The applicant or any person shall be permitted to *submit oral or written statements and data concerning the proposed permit or group of permits*. The Chairman shall have authority to fix reasonable limits upon the time allowed for oral statements, and may require statements in writing. (emphasis added)

Additional procedures for such public hearings are set forth within 35 Ill. Adm. Code 164 et seq. Moreover, Section 164.101 describes the purpose of such hearings in the following:

> **Section 164.101 Purpose**
>
> These procedures are intended:
>
> a) To provide opportunity for the public to understand and comment on proposed actions of the Illinois Environmental Protection Agency (Agency);
>
> b) To establish procedures by which the Agency consults interested or affected members of the public;
>
> c) To enable the Agency to fully consider and respond to public concerns;

d) To encourage cooperation between the Agency and other governmental bodies charged with protecting the environment; and

e) To foster openness among the Agency, other governmental bodies, and the public.

As indicated from the above-stated regulations, the hearing at issue is an opportunity and conduit for the public to provide information to the Agency through dialogue through comments and questions concerning the Agency's decision to issue an NPDES permit. The same opportunity to provide information and comments to the Agency is also made available through Section 309.109 wherein all members of the public can submit questions and comments in a written form. Moreover, a public hearing is not an adversarial proceeding, nor is it a contested hearing where an identifiable property right is at stake. At the conclusion of a public hearing, no decision is rendered, no findings of fact are issued, and no conclusions of law are reached. No dispositional right or penalty is decided, denied, conferred, or rewarded. The only outcome would include the Agency creating a summary of the questions, comments, and statements that were provided by the public and consideration of that information for purposes of its eventual decision regarding the issuance of a permit. 35 Ill. Adm. Code 309.118 (2006) But for purposes relating to the dispositional outcome of the NPDES permit, the public hearing, by itself, merely provides the Agency with a conduit to receive additional information for its consideration.

Clearly, the Petitioner misunderstands the concept of a public hearing through their argument that an articulated decision and a rational explanation should have been provided relative to the Agency's decision not to hold a public hearing similar to an administrative adversarial hearing wherein a final decision is rendered. (See Petitioner's

Brief, pages 5, 12) The Petitioner cites Lewis v. Hayes for purposes of this argument. Lewis v. Hayes, 152 Ill.App. 3d 1020, at 1024 (App. 3rd Dist. 1987).

In Lewis, the plaintiff set forth a civil rights action against a defendant municipality concerning his application for a police officer position. The plaintiff alleged various improprieties against the defendant in failing to adhere to their internal hiring procedures. The hiring procedures in Lewis were governed by the Board of Police and Fire Commissioners. The Third District Appellate Court in Lewis ruled that the plaintiff had a protectable property interest in the police officer position he had applied for, and as such, should have been afforded due process protections through a hearing. Id. at 1024. The court further ruled that the Board was required to examine facts and articulate a sufficient explanation for its action and decision. Id.

The case in Lewis and the case at bar are clearly distinguishable. First and foremost, the decision by the board in Lewis that vested standing in the plaintiff affected an identifiable property right to be awarded or denied through an "articulated decision" in an administrative hearing. The Petitioner ABC had no property right to be awarded or denied in any proposed outcome in the requested public hearing. In fact, no entity, including U.S. Steel, fellow Respondent and the applicant for the NPDES permit, would have any property right or dispositional right directly affected in the requested Section 309.115(a) public hearing. Furthermore, pursuant to Section 40(e) of the Act (as referenced for purpose of standing in the Petitioner's opening statement within their May 8, 2006, Petition for Review), the Petitioner's appeal right to proceed in this matter is solely vested in the Agency's final decision regarding the issuance the permit, not with respect to the decision to not hold a public hearing.

The cases are further distinguishable. In Lewis, through the hearing process, the Board would have adjudicated a final decision concerning that plaintiff's property right in the police officer position contrary to this matter wherein the Agency held no authority to adjudicate any decision in the Section 309.115(a) public hearing. In Lewis, two different sides would have presented adversarial arguments to the relevant and appropriate board through a hearing. In the requested public hearing pursuant to Section 309.115(a), no such adversarial proceeding would occur. And finally, and most importantly, the purpose of the mandatory hearing in Lewis as opposed to the purpose of the discretionary hearing in this matter is significantly distinct. In Lewis, the required hearing would *determine* the outcome of the plaintiff's property right in the police officer position. In the case at bar, the requested hearing's purpose would provide no final decision or determination of any party. The requested hearing would generally provide the public an opportunity and a conduit to present information and commentary to the Agency to assist in the decision to grant or deny a permit. As a result, the Agency's discretionary decision, by itself, to not hold a public hearing, nor the conceptual "outcome" or conclusion of such a public hearing held pursuant to Section 309.115(a), would not otherwise require, in any circumstance, that an articulated decision be issued to anyone. Furthermore, *nowhere* within the Act, nor the regulations, is a requirement for an articulated decision set forth regarding the decision to not hold, or alternatively, hold a public hearing pursuant to Section 309.115(a).

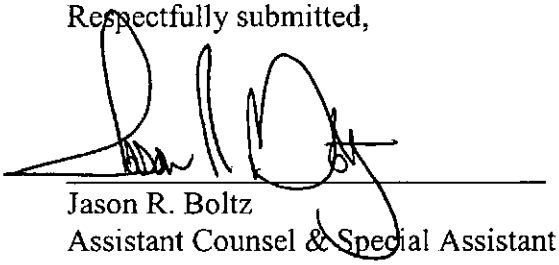
In addition, neither the Administrative Review Law, nor the Act, provides any standing to any direct party or third party regarding the independent decision to not hold a public hearing. The final decision that provides standing to a third party is derived

from the decision to grant or deny an NPDES permit under Section 40(e) of the Act and the Administrative Review Law. Therefore, the Agency's decision not to hold a public hearing, and its rationale, must be read together circumstantially with all documents in the Record.

IV. CONCLUSION

The Petitioner ABC has failed to demonstrate an abuse of discretion or any clear error in the Agency's decision not to hold a public hearing in this matter, based upon the Requests for Hearing filed within the commend period. ABC has thus failed to meet the requisite burden under Section 40(e) of the Act. The Agency respectfully requests that the Board **DENY** the ABC's request for relief in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 26th day of November 2008, one copy of the foregoing was sent via electronic communication to the following:

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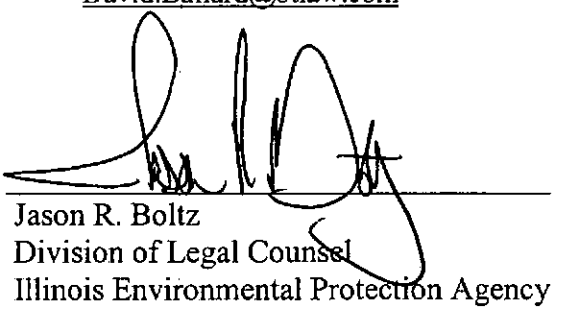

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