

ILLINOIS POLLUTION CONTROL BOARD  
May 6, 2010

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

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

This matter is again before the Board, on remand from the Fifth District Appellate Court following the court's review of an earlier Board decision. By way of background, the Illinois Environmental Protection Agency (Agency) issued a National Pollutant Discharge Elimination System (NPDES) renewal permit to United States Steel Corporation (U.S. Steel) for the Granite City Works (GCW), a steelmaking facility located at 20th and State Streets in Granite City, Madison County. Before issuing the permit, the Agency received two timely requests from several organizations to hold a public hearing on the draft permit. The Agency declined to hold a public hearing.

Under Section 40(e)(1) of the Environmental Protection Act (Act) (415 ILCS 5/40(e)(1) (2008)), American Bottom Conservancy (ABC), one of the organizations that asked the Agency to hold a hearing, timely filed a third-party petition with the Board for review of the Agency's permit determination. ABC raised numerous grounds for appeal, only one of which survived separate motions to dismiss filed by U.S. Steel and the Agency. That ground was the Agency's failure to hold a public hearing on the draft NPDES permit. In its decision, the Board found the permit invalid because the Agency's issuance of the permit, without the requested hearing having been held, violated Section 309.115(a) of the Board's NPDES permit regulations (35 Ill. Adm. Code 309.115(a)). The Fifth District Appellate Court vacated the Board's decision because the Board did not apply an "abuse of discretion" standard in reviewing the Agency's determination not to hold a public hearing. On remand, the Board is instructed to apply that standard of review, which the Board does today.

For the reasons set forth below, the Board finds that the Agency did not abuse its discretion in declining the two requests to hold a public hearing on the proposed NPDES permit. Accordingly, because issuance of the permit without a public hearing did not violate Section 309.115(a), the Board affirms the Agency's issuance of the permit to U.S. Steel.

In this opinion, the Board first provides the procedural history of this proceeding. The Board then sets forth the legal framework for today's decision, followed by the factual background of the case. Next, the Board summarizes the parties' arguments, after which the Board renders its ruling on remand.

### **PROCEDURAL HISTORY**

On May 8, 2006, ABC filed a third-party petition for Board review of the Agency's March 31, 2006 NPDES permit issuance to U.S. Steel. C1-31. On May 18, 2006, the Board accepted ABC's petition for hearing. C32-34. On June 5, 2006, the Agency filed the administrative record of its permit determination (AR1-643).

On September 21, 2006, the Board issued an order ruling on separate motions to dismiss filed by U.S. Steel and the Agency and separate motions to supplement the record filed by the Agency and ABC. In that order, the Board granted the motions to dismiss in part and denied them in part, and directed the hearing officer to proceed to hearing on the issue of the Agency's denial of the public hearing requests, which was the only appeal ground not dismissed. The Board also granted the Agency's motion to supplement the record (AR644-57). Further, the Board granted in part and denied in part ABC's motion to supplement the record, accepting three documents dated prior to the March 31, 2006 date of the Agency's permit determination, but declining to accept two documents that post-dated March 31, 2006 (C197-204).

On November 6, 2006, ABC filed a second motion to supplement the record (C274-313). On November 20, 2006, the Board hearing officer conducted a public hearing (Tr.) at the Madison County Administration Building in Edwardsville. On the record at hearing, the hearing officer granted ABC's second motion to supplement the record, which was unopposed. Tr. at 5. Post-hearing briefs were filed by the parties in November and December 2006 and January 2007. On January 26, 2007, the Board issued its opinion and order, finding that the NPDES permit, as issued, violated the Board's NPDES permit regulations because the Agency failed to hold the requested public hearing on the proposed permit. The Board therefore held that the permit was invalid. C477-91. On May 3, 2007, the Board issued an order denying separate motions to reconsider filed by U.S. Steel and the Agency. C599-600. On June 21, 2007, the Board issued an order denying U.S. Steel's motion for stay of the Board's January 26 and May 3, 2007 orders. C638-40.

U.S. Steel and the Agency appealed to the Fifth District Appellate Court. The Board filed the record on appeal with the court (C1-640; Tr.; AR1-657). On July 22, 2008, the court issued an opinion vacating the Board's decision and remanding the cause to the Board for further consideration using the correct standard of review. United States Steel Corp. v. PCB, 384 Ill. App. 3d 457, 465, 892 N.E.2d 606, 612-13 (5th Dist. 2008) (U.S. Steel). On September 8, 2008, the Board received the court's September 5, 2008 mandate.

In an order of September 16, 2008, the Board directed its hearing officer to establish a briefing schedule for the parties. The Board further stated that the, consistent with the court's ruling, the briefs must address whether the Agency abused its discretion in deciding not to hold a public hearing concerning the proposed NPDES permit for U.S. Steel. On November 5, 2008,

ABC filed its brief on remand (ABC Br.). On November 26, 2008, the Agency (Agency Br.) and U.S. Steel (USS Br.) filed their respective response briefs on remand. On December 10, 2008, ABC filed its reply brief on remand (ABC Reply Br.).

### **LEGAL FRAMEWORK**

Under the Act (415 ILCS 5 (2008)), the Agency is the permitting authority, responsible for administering Illinois' regulatory programs to protect the environment, including the NPDES. NPDES permits are required for discharges of contaminants from point sources to surface waters. If the Agency grants or denies an NPDES permit, "a third party, other than the permit applicant or Agency, may petition 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." 415 ILCS 5/40(e)(1) (2008). On appeal, the third-party petitioner has the burden of proving that the permit, as issued, would violate the Act or the Board's regulations. Prairie Rivers Network v. PCB, 335 Ill. App. 3d 391, 401, 781 N.E.2d 372, 379 (4th Dist. 2002); 415 ILCS 5/40(e)(3)(ii) (2008).

The Board will now set forth the regulation at issue in this appeal, 35 Ill. Adm. Code 309.115(a), followed by several critical passages of the Fifth District Appellate Court's U.S. Steel decision. Section 309.115(a) of the Board regulations addresses requests for public hearings on proposed NPDES permits:

- a) 1) 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.
- 2) Any person, including the applicant, may submit to the Agency a request for a public hearing or a request to be a party at such a hearing to consider the proposed permit or group of permits. Any such request for public hearing shall be filed within the 30-day public comment period and shall indicate the interest of the part[y] filing such a request and the reasons why a hearing is warranted. 35 Ill. Adm. Code 309.115(a).

In its U.S. Steel decision remanding this matter to the Board, the court stated:

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. The regulation does not state that the Agency must hold a hearing *whenever there is a significant degree of public interest*. It states that the Agency must hold a public hearing *whenever it determines* that there is a significant degree of public interest in the permit. This language can be read no way other than vesting discretion in the Agency to determine when and if there is a significant degree of public interest in

a proposed permit. 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.

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Despite this clear grant of discretion to the Agency to determine whether there is sufficient public interest in a proposed permit to warrant a public hearing thereon, the Board did not review the Agency's decision on whether to hold a public hearing to determine whether the Agency had abused its discretion, but the Board reviewed the Agency's decision not to hold the hearing using a *de novo* standard of review. The Board examined the public comment letters received and concluded that they evidenced a significant degree of public interest in the proposed permit. The Board gave no deference to the Agency's decision but reviewed the public comments independently and made its own determination that there was significant public interest to warrant a public hearing.

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The Board erred as a matter of law in applying the incorrect standard of review to the Agency's decision not to hold a public hearing. Accordingly, we vacate the final order of the Board invalidating the NPDES permit issued to U.S. Steel and remand this cause to the Board for review using the correct standard of review. In determining whether the permit as issued violates the Act or regulations because the Agency did not hold a public hearing, the Board must use an abuse-of-discretion standard. It must review the Agency's decision not to hold a public hearing 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. Only if the Agency abused its discretion in failing to hold a public hearing would the permit as issued violate the Act or regulations. *U.S. Steel*, 384 Ill. App. 3d at 463-65, 892 N.E.2d at 611-13 (emphasis in original; citation omitted).

## **FACTUAL BACKGROUND**

### **Granite City Works (GCW) and Application for Renewal of NPDES Permit**

On October 17, 2002, the Granite City Division of National Steel Corporation applied to renew NPDES permit No. IL0000329 for its integrated steel mill. The facility, which produces flat rolled steel products, is located at 20th and State Streets in Granite City, Madison County. AR135-37, 518, 522, 545. The NPDES permit application sought permission to continue discharging treated process wastewater through a flume to Horseshoe Lake. AR135-36, 148, 152, 545, 601. The application was later amended to reflect, among other things, that U.S. Steel had purchased much of the facility. AR260, 317, 518, 545, 601.

### **Public Notice and Comment Period**

In mid-December 2004, the Agency arranged for public notice of a draft NPDES permit for U.S. Steel's discharge to Horseshoe Lake. AR512-28. Notice appeared in the *Granite City Press-Record Journal* on December 19, 2004. AR512-13, 522. The Agency also forwarded the notice to the Granite City Municipal Clerk for 30 days' posting. AR514.

The Agency's public notice stated that the Agency had made a tentative determination to issue an NPDES permit to U.S. Steel and had prepared a draft permit and an associated fact sheet. AR518. According to the notice, U.S. Steel's plant operation results in an average discharge of 25 million gallons per day of treated process wastewater from outfall 001 to the receiving water, Horseshoe Lake, which is classified as a "general use" water.<sup>1</sup> *Id.* The notice provides that Horseshoe Lake is on the Section 303(d) list of "impaired" waters<sup>2</sup>; that specified parameters have been identified as the "pollutants causing impairment" (polychlorinated biphenyls (PCBs), pH, suspended solids, excessive algal growth, ammonia (unionized), nutrients, phosphorus, total ammonia-N); and that "Potential Contributors" are "[a]griculture, crop-related sources, non-irrigated crop production, habitat modification, stream bank modification/destabilization." AR519. The notice identifies the specific load limits and concentration limits for numerous parameters in the outfall 001 treated process wastewater. AR519-20.

The Agency's notice further provided as follows:

[T]he treated wastewater is pumped through a flume and into Horseshoe Lake for discharge at Outfall 001.

The application, draft permit and other documents are available for inspection and may be copied at the Agency between 9:30 AM. and 3:30 P.M. Monday through Friday. A Fact Sheet containing more detailed information is available at no charge. \*\*\*

Interested persons are invited to submit written comments on the draft permit to the Agency at the above address. \*\*\* All comments received by the Agency not later than 30 days from the date of this publication shall be considered in making the final decision regarding permit issuance.

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<sup>1</sup> Water quality standards for the designated use of general use "will protect the State's water for aquatic life (except as provided in Section 302.213), wildlife, agricultural use, secondary contact use and most industrial uses and ensure the aesthetic quality of the State's aquatic environment. Primary contact uses are protected for all General Use waters whose physical configuration permits such use." 35 Ill. Adm. Code 302.202.

<sup>2</sup> This refers to waters listed as "impaired" pursuant to Section 303(d) of the Clean Water Act (33 U.S.C. § 1313(d)) based on the water body not attaining its designated use. Generally, states must establish total maximum daily loads (TMDLs) of pollutants as necessary to attain the designated use for such impaired waters.

Any interested person may submit [a] written request for a public hearing on the draft permit, stating their name and address, the nature of the issues proposed to be raised and the evidence proposed to be presented with regards to these issues in the hearing. Such requests must be received by the Agency not later than 30 days from the date of this publication.

If written comments and/or requests indicate a significant degree of public interest in the draft permit, the permitting authority may, at its discretion, hold a public hearing. AR522.

The Agency's notice also stated that the public notice period would begin on December 19, 2004, and end on January 18, 2005. AR518. The notice further provided: "Response to comments will be provided when the final permit is issued. For further information, please call Beth M. Burkard at [phone number]." *Id.*

### **Public Comments**

The Agency received three public comments on the draft NPDES permit by the January 18, 2005 deadline. AR531, 532, 533, 549, 601. The first comment came from U.S. Steel on January 13, 2005, which stated, among other things, that U.S. Steel was not requesting a public hearing. AR531.

On January 17, 2005, Kathleen Logan Smith submitted a comment to the Agency on behalf of the Board of Health & Environmental Justice-St. Louis (HEJ). AR532. The comment asked that the Agency hold a public hearing on the U.S. Steel draft NPDES permit to "give citizens an opportunity to ask questions about the permit, voice concerns, and hear explanations." *Id.* The comment also requested that the Agency extend the public comment period for three weeks. According to this comment, the permit "warrants public involvement because it impacts directly a recreational body of water promoted by the Illinois Department of Natural Resources for boating, fishing, bird watching, and waterfowl hunting." *Id.* The comment continued:

This permit would allow additional discharges of toxic heavy metals known to accumulate in biological organisms. Over three, five or ten years, the quantity of lead, a persistent, bioaccumulative toxin, discharged into the Lake, would add up to hundreds of pounds and may have a serious detrimental effect on organisms living in the lake. \*\*\* The lake is [a] favored spot for fishing, often for individuals who rely on fish caught as protein sources. These individuals, who are often low income and minority individuals, are already exposed to excessive levels of PCB's from fish consumption. At least two species of fish, channel catfish and carp, carry consumption advisories. This permit would add several other toxins to their body burden. Hunters who consume waterfowl from Horseshoe Lake could also be potentially exposed. *Id.*

On January 18, 2005, a joint public comment was submitted on behalf of five organizations: Kathy Andria on behalf of ABC; Kathleen Logan Smith on behalf of HEJ;

Kathleen O’Keefe on behalf of Neighborhood Law Office; Jack Norman on behalf of Sierra Club; and Yvonne Homeyer on behalf of Webster Groves Nature Study Society (WGNSS). AR533, 536. According to the joint comment, Horseshoe Lake at Horseshoe Lake State Park is “used recreationally by outdoor enthusiasts, bird watchers, nature lovers, fishers, hunters and families” and is used by “low-income and minority folks for subsistence fishing.” AR533, 535-36. The comment further states that Horseshoe Lake is “impaired” and maintains that U.S. Steel’s effluent should be added to the list of potential contributors to the lake’s impairment. *Id.* at 533. The comment asserts that “[w]e have seen fish caught at Horseshoe Lake with melanoma” and that “[a]n IDNR fish biologist confirmed fish with melanoma at Horseshoe.” *Id.*

The joint comment continues that Southern Illinois University-Edwardsville (SIUE) testing of the sediment at Horseshoe Lake showed “high concentrations of lead.” AR533. Those studies, according to the joint comment, show that “Canteen Lake, which is part of the same lake, but privately owned, tested high in cadmium.” *Id.* The joint comment states that the permit would allow U.S. Steel to put additional lead and ammonia into Horseshoe Lake, which, according to the comment, appears to be contrary to supporting the aquatic life and recreational designated uses of the lake. *Id.* The joint comment asserts that the facility has been listed as noncompliant and subject to enforcement regarding aspects of its NPDES permit (*e.g.*, “[T]he facility has significantly violated its ammonia limits. Horseshoe Lake is impaired with ammonia.”), its Clean Air Act (CAA) permit, and its Resource Conservation and Recovery Act (RCRA) permit. AR533-35.

The joint comment states that “[o]ur organizations request that the Agency hold a public hearing” on the draft U.S. Steel NPDES permit. AR533. The comment maintains that a hearing would “allow citizens to ask questions and present information and testimony,” adding that “[w]e have just recently received the SIUE reports and have not had time to review them or to get technical guidance as to their meaning.” AR535. The joint comment asks that if the Agency denies the hearing request, the Agency meet with the organizations and extend the public comment period by 30 days. *Id.*

### **Beth Burkard Notes of January 2005**

On January 24, 2005, Agency permit engineer Beth Burkard prepared notes regarding the two public hearing requests and forwarded her notes to the Agency’s Blaine Kinsley, Industrial Unit Manager of the Permit Section. AR544-46. After noting the requests for hearing made by the organizations, Ms. Burkard observed that the HEJ Board comment’s “concern is the bioaccumulation of lead and other heavy metals that may adversely affect the fish population, and the public who consume the fish and waterfowl.” AR545. Ms. Burkard then states that the joint comment’s:

major concern is that Horseshoe Lake is impaired, which has a negative impact on the community that utilizes the Lake for recreation and for a food source. The comment specifically relating to the permit reissuance is the increase in load limits for lead and ammonia. Regarding Lead, the load limits included in the updated permit are production-based. It is not considered backsliding if limits increase because of increased production or facility alter[ation]. Regarding

Ammonia-N, the new limits are based upon water quality standards. The Planning Department's updated method for calculating water quality-based Ammonia-N standards does not constitute backsliding even if the new limits are less stringent than previous limits. The other comments address GCW's noncompliance with its NPDES permit, CAA Permit, and RCRA permit. GCW has had 6 quarters with non-compliance, (one quarter of Significant Non-compliance (SNC)) for NPDES permit in past 3 years. AR545-46.

Ms. Burkard prepared "30-Day Public Notice Review Notes" dated January 31, 2005. AR549-52. The notes included descriptions of concerns raised in the two hearing requests, followed by a "Response" and "Action" with respect to particular concerns. AR551-52. Regarding the joint comment's concern over the draft permit allowing U.S. Steel to put additional lead and ammonia into Horseshoe Lake, Ms. Burkard prepared the following response and action:

Response: \*\*\*

Regarding Lead, the load limits included in the updated permit are production-based. It is not considered backsliding if limits increase because of increased production, as is outlined in 40 CFR 122.44(1)(2)(i).

Regarding Ammonia-N, the new limits are based upon water quality standards. At the time of previous issuance, the Planning Department provided water quality standards for Ammonia-N in April-October (Summer) and November-March (Winter). The current and proposed limits for Ammonia-N are water-quality-based, and depend upon temperature and pH of the receiving waters. The increase in limits does not constitute backsliding.

Action: Draft letter to Group, explaining the increased load limits for Lead and Ammonia-N. Possible Public Meeting or Hearing. AR552.

Regarding the HEJ Board comment's concern over the bioaccumulation of lead and other heavy metals, Ms. Burkard drafted the following response and action:

Response: The limits included in the draft permit for Lead and Zinc are based upon the production-based categorical limits provided in 40 CFR 420.

Action: Draft a letter to Health and Environmental Justice of East St. Louis clarifying the increase in load limits for Lead. *Id.*

Ms. Burkard's January 31, 2005 notes concluded with the following:

Action: Submit a summary of above information to Bureau of Water Management for review. If Public Hearing or Public Meeting is necessary, issue appropriate notices. If no meetings are necessary, send responses to all interested



parties, explaining Agency rationale and thanking them for their participation. *Id.*

### **Beth Burkard Notes of May 2005**

On April 25, 2005, U.S. Steel submitted responses to the comments made in the two public hearing requests. AR553-57. U.S. Steel maintained that the organizations' comments were "largely irrelevant to the permit" and that a public hearing was "unjustified." AR553. On May 13, 2005, representatives of U.S. Steel and the Agency met to discuss the concerns posed by the two public hearing requests, as well as U.S. Steel's responses to those concerns. AR560-63.

Ms. Burkard prepared a status report dated May 20, 2005. AR601. In the report, she briefly summarized the organizations' concerns and U.S. Steel's responses from its April 25, 2005 letter:

- Bioaccumulation of Lead and heavy metals in fish (people consume the fish)
- Increase of Lead and Ammonia load limits
  - Response: Lead: Increased Lead load limit is due to production changes, and load limit is consistent with ELGs [Effluent Limitations Guidelines] established at 40 CFR 420; Ammonia: The new Ammonia-N limits are based upon the pH and temperature in Horseshoe Lake
- Horseshoe Lake is impaired per 303(d) list
  - Response: Horseshoe Lake has been evaluated as a Medium Priority, impaired for PCBs (not generated at US Steel), SS [suspended solids], Algae, Ammonia (Unionized), Nutrients, Phosphorus, and Total Ammonia-N; Horseshoe Lake is not impaired for Lead or heavy metals; Industrial Point Sources is *not* a source of impairment
- US Steel-GCW has been non-compliant with NPDES, CAA, and RCRA permits
  - Response: USEPA [United States Environmental Protection Agency] has issued one NOV [notice of violation] and One Formal Enforcement Action to GCW

*Id.* (emphasis in original).

Ms. Burkard's May 20, 2005 status report also summarized the May 13, 2005 meeting between the Agency and U.S. Steel "to discuss the Public Hearing issue." AR601. Among other things, the Agency permit engineer, the Agency Industrial Unit Manager, and three U.S. Steel representatives discussed the following at the meeting: "The facility does not use Lead, and the increased load limits are due to increased production. The U.S. Steel employees noted that Horseshoe Lake is currently and has historically been a hunting ground, and lead shot may be contaminating the lake." *Id.*

Also on May 20, 2005, Ms. Burkard prepared responses to the concerns of the organizations that requested a public hearing. AR602-05. In this document, Ms. Burkard first paraphrased the HEJ Board concerns ("Comment Letter") and the corresponding U.S. Steel responses ("US Steel"), after which she provided an assessment ("Response"):

- Comment Letter: Requests a Public Hearing, and extension of comment period. Group has interest because receiving water is a recreational lake promoted by IDNR. Permit allows discharge of bioaccumulative heavy metals, especially Lead. Discharge of metals may have detrimental effects on lake organisms eventually.
  - US Steel: Reissuance of existing NPDES permit. Permit protects water quality, will not adversely affect lake flora, fauna, and surrounding wildlife. Lead load limit is based on ELG for BAT [best available technology economically achievable], per 40 CFR 420, and 35 IAC 302.
  - Response: Acceptable.
  - Comment Letter: The IDNR promotes fishing in Horseshoe Lake. Many low-income residents rely on fish from Horseshoe Lake for sustenance. Channel catfish and carp have Fish Consumption Advisories. The permit will allow discharge of additional bioaccumulative compounds. Also, hunters may consume waterfowl from the lake and be exposed.
  - US Steel: The fish advisories are for PCBs only. US Steel is not a source of PCBs.
  - Response: Acceptable.
- AR602 (underlining added).

In this May 20, 2005 document, Ms. Burkard also paraphrased the joint comment's concerns ("Comment Letter") and the corresponding U.S. Steel responses ("US Steel"), after which she provided an assessment ("Response"):

- Comment Letter: Requests Public Hearing. Lake is used for recreation, as part of Horseshoe Lake State Park in Madison County. Also used for sustenance in low-income and minority citizens. The lake is 303(d) listed with sources of impairment as PCBs, pH, Suspended Solids, Excessive Algal Growth, Ammonia (Unionized), Nutrients, Phosphorus, and Total Ammonia-N. Group has witnessed fish caught in Horseshoe Lake to have melanoma, as confirmed by an IDNR fish biologist.
- US Steel: The 303(d) listing is as Moderately Impaired, with sources of agriculture, crop-related sources, non-irrigated crop production, habitat modification, and stream bank modification/destabilization. The IL Dept of Health issued the Fish Consumption Advisories for Channel Catfish and Carp because of PCBs found in those species' fish tissue in fish from Horseshoe Lake. US Steel is not a source of PCBs. Of the 303(d) sources of impairment, PCBs is the only parameter with a high confidence level, with all other parameters listed as "no confidence level". US Steel feels the fish with melanoma statement to be anecdotal.
- Response: The 303(d) list does not specify Industrial Point Sources as a source of the impairment. 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?

- Comment Letter: A professor at SIU-E performed a study on sediment of Horseshoe Lake, demonstrating high Lead concentration. The sediment from Canteen Lake (part of Horseshoe Lake, but privately owned) was high in Cadmium.
  - US Steel: The comment provides insufficient information-what constituted elevated Lead, what was the comparison, what was the source of Lead, where were the samples collected, what was the QA/QC [quality assurance/quality control] of the study. Canteen Lake is not 303(d) listed by IEPA. Cadmium is not a pollutant generated by US Steel and is not limited by the permit
  - Response: A copy of the SIU-E study would be beneficial to determine its relevance in this matter. The application Form 2C, Part V, of October 17, 2002, indicates a concentration of <0.002 mg/L [milligrams per liter] as the maximum daily Cadmium concentration. Cadmium is not a parameter of concern.
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- Comment Letter: Additional loading of Lead and Ammonia to the lake. Appears contrary to CWA [Clean Water Act] and BOW [Bureau of Water] Mission Statement.
  - US Steel: See above comment. Ammonia limit is based on water quality criteria at 35 IAC 355. Lead is not listed in 303(d) as an impairment in the lake.
  - Response: The increased loading of Lead is based upon the ELGs at 40 CFR 420, which are based upon production. As production increases at the facility, the amount of Lead they are authorized to discharge increases proportionally. The ELGs were developed with consideration of Best Available Technology, and are based upon the best-designed, well-operated plants available. The discharge must still meet the concentration limits.
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- Comment Letter: Lists the 303(d) sources of impairment. Group believes that GCW's effluent should be added to the list of sources.
  - US Steel: Based on the IEPA five year Ambient Lake Monitoring Program studies, the IEPA did not find that USS-GCW effluent was a source of impairment. Commentors present no scientific evidence for the inclusion of the effluent as a source of impairment.
  - Response: Agreed. The IEPA study did not show that the effluent from the facility was a contributing source of impairment to Horseshoe Lake.
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- Comment Letter: USEPA ECHO [Enforcement & Compliance History Online] reports GCW has been non-compliant with the permit in six quarters of the past three years. One informal compliance action, and one formal compliance action were taken.
  - US Steel: The ECHO reports are misleading due to the quarterly reporting-a violation of permit limits for one parameter appears as a violation for the quarter. All but one of those events were single parameter violations in each quarter. Many of the violations were concentration limit violations in which

the loadings were below permit loading limits. One quarter of noncompliance involved a treatment plant upset that caused Ammonia-N exceedences.

- Response: The IEPA and USEPA have monitored the compliance and have take[n] appropriate actions in response to permit exceedences.
- Comment Letter: Per USEPA ECHO, USS-GCW is in non-compliance with the Clean Air Act and RCRA permits.
- US Steel: Not relevant to NPDES permit.
- Response: Agreed-not relevant.
- Comment Letter: Requests Public Hearing. Group has not reviewed the aforementioned study thoroughly.
- US Steel: Assuming the study referred to is Professor Brugam's study with SIU-E students, the study is not relevant to the permitted discharge, as the study is regarding Lead and Cadmium in sediments (per the commentors).
- Response: Agency management will evaluate the requests and determine whether the Agency will initiate a Public Hearing. The commentors did not provide a copy of the study, and thus it is not possible to know the nature of the study. The following is an Abstract for Prof. Brugam's study.

Brugam, Richard, Indu Bala, Jennifer Martin, Brian Vermillion, and William Retzlaff

The Sedimentary Record of Environmental Contamination in Horseshoe Lake, Madison County, Illinois

Industrial development over the last 110 years has contaminated many parts of the American Bottoms, an extensive floodplain of the Mississippi River just east of St. Louis, MO. Water resources in this region have been severely impacted by long-term mismanagement of hazardous waste disposal by local industries. Toxic refuse from metal smelting, steel making, and wood-treatment industries has been released on site to percolate into the ground or to run off into local streams (Colten 1988). A record of metal contamination exists in the sediment of Horseshoe Lake, a natural oxbow lake in the most industrialized portion of the American Bottoms. We examined two dated sediment cores from Horseshoe Lake to reconstruct the historical record of environmental contamination. We used isotopes of nitrogen to track the history of sewage contamination finding that sediment  $d^{15}N$  [nitrogen isotope ratio] increased to values  $> 10$  o/oo in the 1920's. Because such high values of  $d^{15}N$  are only associated with the presence of human or animal wastes, we deduce that major contamination of the lake by sewage began at that time. Lead, cadmium, and zinc concentrations increased in the sediment after the 1940's. The 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. Our results provide a physical record of contamination that is consistent with Colten's (1988) description of hazardous waste disposal in the American Bottoms.

This text is excerpted from [http://www.il-st-acad-sci.org/transactions/96\\_3a.html](http://www.il-st-acad-sci.org/transactions/96_3a.html), Transactions of the Illinois State Academy of Science Volume 96, number 3, 2003. This indicates that the study did not specifically study the area around the US Steel GCW discharge point. It indicates that the study authors acknowledged that lead shot from hunting activities is a source of Lead in the lake water. The finding of cadmium is not relevant, as Cadmium is not found in the US Steel GCW effluent, and Zinc is limited in the permit by the federal effluent limitation guidelines. AR602-05 (underlining added).

### **Toby Frevert Memo of February 8, 2006**

Toby Frevert, Manager of the Agency's Division of Water Pollution Control, prepared a February 8, 2006 memo to Marcia Willhite, Chief of the Agency's Bureau of Water. C286. In the memo, Mr. Frevert recommended that the NPDES permit be issued to U.S. Steel "without any further delay." *Id.* Mr. Frevert gave the reasons for his recommendation:

[T]he issues raised by environmental groups regarding permit limits and past violations are easily answered, and the overall concerns for Horseshoe Lake have been and continue to be addressed in 303(d) discussions and hearings that have opportunity for public participation. The comments do not provide any additional information the Agency would use for inclusion in the reissued permit. *Id.*

Mr. Frevert observed that "only comments received prior to the close of Public Notice can be considered in determining the merits for granting of Public Hearing." C286. Mr. Frevert stated that the comments "cite impairments to the lake as detailed in the 303(d) report" and "couple the impairments with the observation that Horseshoe Lake provides some sustenance to low income persons in the area who consume fish from the lake." *Id.* Mr. Frevert also referred to the comments taking "issue with the Draft NPDES permit in that it allows for an increase in the loading of lead and ammonia to the lake." Mr. Frevert addressed these concerns as follows:

With regard to the lead concern, it should be noted that lead is not listed as an impairment of Horseshoe Lake. The listed fish consumption concern is due to PCB's. In [a]ddition, USSGCW does not use lead in its processes or as a raw material. A lead limit appears in the NPDES permit solely due to Federal Categorical regulatory requirements that would apply to any steel mill in that category. The permit limits for categorical steel mills are production based. Therefore, any increase in production would necessitate a corresponding increase in limits for all categorical parameters (including lead in this case). This creates a paper increase, which is confusing to citizens, and advocacy groups. With regard to ammonia, the difference in the limits in the draft permit and the current permit reflects a revision in the water quality criteria used to develop standards. The same flow was used to calculate the limits in both the current permit and the draft. Back-sliding of the limits is not an issue due to the compliance history of the facility. In addition, the comment letter discusses potential violations of the

current permit. The Agency is aware of the issues and has taken action to resolve them.

As a final note, it should be mentioned that the American Bottoms Conservancy did participate in a recent hearing regarding 303(d) listed water bodies and did make specific comments regarding Horseshoe Lake. *Id.*

### **Marcia Willhite E-Mail of February 27, 2006**

Ms. Willhite sent an e-mail to Agency Director Doug Scott on February 27, 2006, concerning the NPDES permit for U.S. Steel's GCW. C288. In the e-mail, Ms. Willhite noted the pending request for a public hearing on the permit renewal and explained that, due to staff losses, "a year has passed since we public noticed the permit." *Id.* Ms. Willhite stated:

We would like to move forward to issue the permit and recommend that a meeting with the environmental group be held instead of a public hearing.

American Bottoms Conservancy (Kathy Andria, principal) requested the hearing due to concerns about increased loading of pollutants to Horseshoe Lake. There will be no actual increase in loading--the limits in the draft renewal permit are different than the previous permit for reasons that are easily explained.

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. *Id.*

A March 3, 2006 e-mail from Ms. Willhite to Mr. Kinsley indicated that Director Scott approved of proceeding to issue the permit. The message further directed that Ms. Andria of ABC be contacted and offered a meeting. C289.

### **Meeting Correspondence**

On March 3, 2006, the Agency's Kenneth Page, Manager of the Office of Compliance Assistance and Environmental Justice, sent an e-mail to Ms. Andria of ABC, stating that he needed to speak with her about having "an EJ [Environmental Justice] meeting" to discuss with her and others "subsistence fishing, PCB's and Horseshoe Lake." AR630. Ms. Andria responded by e-mail later that day, maintaining that a public hearing was warranted. AR631. Mr. Page then e-mailed Ms. Andria to inform her that the Agency had scheduled "the Environmental Justice meeting" for 10:00 a.m. on March 15, 2006, at the Agency headquarters in Springfield. AR633. He added that "[w]e will discuss subsistence fishing at Horseshoe Lake" and that this was the time that he "could bring the key people in the Agency together." *Id.* Ms. Andria responded by sending an e-mail on March 7, 2006, to Mr. Page, thanking him for scheduling the meeting. *Id.*

On March 14, 2006, Ms. Andria e-mailed Mr. Page to inform him that "we will be unable to come to Springfield for this meeting." C143. She explained that some of the local community

residents could not attend “on such short notice,” others believed the meeting should be held locally, and some felt the meeting “could be viewed as an attempt to circumvent” the requested public hearing. *Id.* Ms. Andria also expressed uncertainty about the status of the permit and “our repeated requests for a public hearing.” *Id.* Mr. Page replied to her by e-mail later that day as follows: “As discussed this was an EJ meeting to discuss the subsistence fishing issues at Horseshoe Lake that you raised. I will inform everyone of your decision.” *Id.*

### **NPDES Permit Issuance and Reissuance**

On March 8, 2006, the Agency issued the final NPDES permit to U.S. Steel. AR635. The permit had an effective date of April 1, 2006. AR637. On March 24, 2006, counsel for ABC informed Director Scott that despite the Agency’s issuance of the final permit, the Agency had not yet issued responses to the timely public comments. Also on March 24, 2006, the Agency issued responses to the organizations, which are discussed below. AR646-47, 649-50; C145-46, 303-06, 312-13. The Agency thereafter rescinded the permit that had been issued on March 8, 2006. On March 31, 2006, the Agency reissued the final NPDES permit, keeping the April 1, 2006 effective date. AR644, 651.

### **Agency Responses Sent to Organizations**

Alan Keller, Manager of the Agency’s Permit Section of the Division of Water Pollution Control, prepared two letters dated March 24, 2006: one to Ms. Logan Smith on behalf of the HEJ Board and the other to Ms. Andria on behalf of ABC, HEJ, Neighborhood Law Office, Sierra Club, and WGNSS. AR646-47, 649-50. Each letter stated that it was in response to the respective public comments of January 17 and 18, 2005, from the organizations. AR646, 649. Both letters state:

1. Horseshoe Lake impairment and concern over discharges of lead and ammonia by Granite City Works (GCW).

Response. As you are aware, lead is not listed as an impairment of Horseshoe Lake. Fish consumption advisories have been issued for Channel Catfish and Carp because of PCB’s. GCW is not listed as a source of impairment. The Illinois EPA has taken note of your concern, both in your comment letter regarding GCW and in your comments during recent 303(d) hearings at the Agency. In addition, lead is not used as a raw material or an additive in the steel making process. The increased load limit for lead is based on Federal Categorical production standards. These standards must be placed in categorical discharge permits regardless of the reasonable potential of any one parameter to exceed a water quality standard. Regarding ammonia, the permit reflects revised ammonia water quality standards which were not in place at the time of the last renewal.

2. Compliance history of GCW.

Response. The Agency is aware of the compliance history of the GCW facility. The Agency has taken, and will continue to take, all necessary and appropriate action regarding compliance issues with this facility. AR646, 649.

Mr. Keller expressed his regret that the organizations' representatives were unable to attend the scheduled meeting and then stated that "[w]e are still willing to meet with you should you wish to reschedule." AR647, 650.

## **PARTIES' ARGUMENTS**

### **ABC's Brief**

ABC makes two overarching arguments on remand. First, ABC argues that the Agency unlawfully acted as if it had unfettered discretion in rejecting the two requests for public hearing. ABC Br. at 6-13. Second, ABC argues that the two public comment letters in which the hearing requests were made demonstrated significant public interest in the draft NPDES permit. *Id.* at 13-20. According to ABC, the Agency abused its discretion by failing to consider the public interest in the draft permit, and by denying the hearing requests "in the face of apparent public interest in the permit." *Id.* at 21. ABC asks that the Board "vacate the U.S. Steel permit as issued" and direct the Agency "not to re-issue the permit without first holding a public hearing thereon." *Id.*

### **ABC Argues That the Agency Acted as if It Had Unfettered Discretion**

In making its first argument, ABC asserts that the Agency failed to evaluate the "sole criterion" by which the Agency is required to assess hearing requests: the public interest in the permit. ABC Br. at 6. ABC maintains that neither U.S. Steel's written response to the comment letters nor the Agency permit engineer's memo concerning a meeting with U.S. Steel about the hearing requests provided any analysis of the public interest in the permit. *Id.* at 7. ABC further argues that the February 8, 2006 memo from Mr. Frevert to Ms. Willhite does not evaluate the public interest in the permit, but rather explains why a public hearing would not be of interest to the Agency. *Id.* at 7-8.

The Frevert memo, continues ABC, acknowledged that certain permit conditions were confusing to citizens and advocacy groups but then failed to recognize the value of a public hearing as a means to explain why the apparently increased discharge limits should not be of concern to them. ABC Br. at 8. According to ABC, public hearings provide members of the public, including subsistence fishermen, their "only opportunity to ask questions of and seek clarification from the IEPA regarding the 'confusing' aspects of technically complex permits." *Id.* at 8-9, quoting AR286.

ABC also maintains that the Frevert memo improperly advises against holding a public hearing on the draft permit because the commenters have an opportunity for a public hearing with respect to Horseshoe Lake through Section 303(d) of the Clean Water Act. ABC Br. at 9. ABC argues that aside from the fact that there is no exception to the permit hearing requirement where other hearings are available, Mr. Frevert's remark essentially acknowledges that there is hearing-worthy public interest in U.S. Steel's discharge. *Id.* ABC further asserts:

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. *Id.*

In addition, ABC attacks the February 27, 2006 e-mail from Ms. Willhite to Agency Director Scott for failing to evaluate the public interest. ABC Br. at 10. ABC construes the e-mail as recommending a hearing denial based on the need to quickly issue the permit and the misunderstanding that a hearing could be denied “for any reason or no reason.” *Id.* ABC also criticized the Agency’s responses to the commenters. The responses do not evaluate the public interest or offer any explanation for denying the hearing requests. *Id.* at 10-11.

According to ABC, the Agency abused its discretion by never evaluating the public interest, thereby making its “hearing denial decision outside of the bounds of the governing regulation.” ABC Br. at 11. The Agency further abused its discretion, continues ABC, because the Agency record:

fail[s] 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.” [quoting *Lewis v. Hayes*, 152 Ill. App. 3d 1020, 1024, 505 N.E.2d 408, 411 (3rd Dist. 1987).] 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. *Id.* at 11-12; *see also id.* at 5.

ABC argues that the Agency still further abused its discretion by “implicitly acknowledging that there was public interest in the permit yet denying the public hearing.” ABC Br. at 12. ABC notes the Frevert memo’s reference to a Section 303(d) hearing for Horseshoe Lake and the Willhite e-mail’s reference to a “meeting” with citizens, and then asserts that these references amount to an implicit acknowledgment by the Agency that public interest in the draft permit was “significant enough to warrant a public forum” under Section 309.115. *Id.* at 12-13.

### **ABC Argues That The Comments Demonstrated Significant Public Interest in the Permit**

According to ABC, 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 the draft permit, including U.S. Steel being allowed to discharge “additional bioaccumulative toxins for which the Lake was already listed as impaired.” ABC Br. at 13. ABC maintains that “[i]t 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.” *Id.* at 14.

ABC cites the transcript from the Board hearing for examples of the public uses of Horseshoe Lake and to support the contention that various members of the public would have attended a public hearing on the draft permit had the Agency held one. ABC Br. at 14-16, citing Tr. at 25-26, 49-51, 57-58, 61, 65, 101, 107, 111-15. ABC further cites the Board hearing

transcript for information on the purpose and membership size of four of the five organizations (ABC, WGNSS, Sierra Club, HEJ) that asked the Agency to hold a public hearing, and also for the proposition that 650 of Sierra Club's 26,000 Illinois members reside in the area around Horseshoe Lake. ABC Br. at 16-17, citing Tr. at 23-24 (ABC has about 100 members), 110-11 (WGNSS has over 400 members), 116, 126-27 (Sierra Club), 144 (HEJ has about 500 members).

ABC argues that the joint comment letter pointed out both the SIUE sediment studies and the reports of Horseshoe Lake fish with melanoma, yet the Agency failed to obtain a copy of the studies and failed to take "any action to determine whether pollution might be causing diseased fish in the Lake." ABC Br. at 17-20. The Agency permit engineer noted that further information was needed on these matters, which matters should have been investigated by the Agency through a public hearing, according to ABC. *Id.*

### **The Agency's Response Brief**

#### **The Agency Argues That It Evaluated What It Was Supposed to Evaluate and Did Not Abuse Its Discretion**

The Agency first emphasizes that according to the U.S. Steel decision, the Agency may properly consider only hearing requests that "(1) are filed *within* the public comment period that indicate a party's interest, and (2) express *why* a hearing is warranted." Agency Br. at 10 (emphasis in original). Accordingly, the Agency continues, the court made clear that the Agency is not to 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." *Id.* (emphasis in original); *see also id.* at 11, 15, 20-22 (the Frevert memo "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.").

The Agency claims that the Fifth District Appellate Court and Section 309.115(a)(2) place the burden on the party requesting a hearing to show, through the filed request, why a hearing is warranted. Agency Br. at 11. The Agency does not dispute that the purpose of public hearings is to provide an opportunity for the public to understand and comment on proposed Agency actions, but the Agency asserts that "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." *Id.* at 22 (emphasis in original).

The Agency notes that at the January 18, 2005 close of the comment period, only two comment letters had requested a public hearing on the draft permit. Agency Br. at 11. The Agency describes the contents of the hearing requests as so generalized, obvious, or irrelevant as to fail to show a significant degree of public interest in the proposed permit to warrant a hearing. *Id.* at 11-14. For example, the Agency explains that it does not consider the "addition or deletion of sources or causes of impairment of a water body such as Horseshoe Lake at an NPDES permit public hearing," but rather in a separate process under Sections 305(b) and 303(d) of the Clean Water Act. *Id.* at 13-14.

The Agency asserts that various memoranda and correspondence in the record reflect that the Agency thoughtfully reviewed the information presented in the hearing requests to determine whether a significant degree of public interest existed in the proposed permit. Agency Br. at 11.<sup>3</sup> For example, according to the Agency, the Burkard memos reasoned that because the Section 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.” *Id.* at 12.

Further, according to the Agency, ABC misinterpreted the Frevert memo’s reference to a Section 303(d) hearing in two respects: first, the Agency was not rationalizing that a Section 309.115(a) hearing was not required or necessary because of the availability of a Section 303(d) hearing opportunity; and second, the memo’s discussion of a Section 303(d) hearing was not an acknowledgement by the Agency that there was a significant degree of public interest in the proposed permit. Agency Br. at 22-23. The Agency asserts that the Frevert memo’s reference to a Section 303(d) hearing was obviously addressing statements in the hearing requests “concerning *water quality concerns* for Horseshoe Lake.” *Id.* at 23 (emphasis in original). The Agency explains that “an NPDES permit addresses the *allowable limits for discharges of a facility* into Horseshoe Lake” while “a 303(d) regulatory process independently and specifically addresses *water quality standards* and implementation plans of Horseshoe Lake.” *Id.* (emphasis in original). According to the Agency:

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. \*\*\* 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. \*\*\* [T]he 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. *Id.* at 24-25 (emphasis in original).

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<sup>3</sup> For this proposition, the Agency’s brief also cites April 10, 2006 correspondence from the Agency to ABC’s counsel. However, in denying in part ABC’s motion to supplement the record, the Board declined to accept that post-decisional document into the record. American Bottom Conservancy v. IEPA and United States Steel Corporation - Granite City Works, PCB 06-171, slip op. at 7 (Sept. 21, 2006).

The Agency maintains that it reviewed all of the issues raised in the comments and used its discretion in examining the hearing requests to determine whether a significant degree of public interest was presented for purposes of holding a public hearing. In doing so, the Agency argues that it “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.” Agency Br. at 26-27.

### **The Agency Argues That ABC Has Failed to Meet Its Burden of Proof**

The Agency argues that ABC has failed to meet the burden of proof on appeal of demonstrating that the Agency abused its discretion in declining to hold a public hearing on the draft permit. Agency Br. at 15-16. The Agency notes that the requirement to hold a public hearing applies not when there is just a “mere interest” in the proposed permit but rather “only if a significant degree of interest is present in the proposed permit.” *Id.* at 27. Moreover, the Agency continues, ABC:

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 [] 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. *Id.* at 29.

The Agency maintains that while the requesting organizations may have large numbers of members, “that rationale by itself does not satisfy a significant degree of public interest.” *Id.* at 17. According to the Agency, if it must 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,” the Agency may have to hold 300 NPDES permit public hearings per year, adding approximately six to nine months to each permitting proceeding. *Id.* The Agency could not issue “more than a couple” NPDES permits each year. *Id.* at 18. The Agency argues that this result is not intended by the Clean Water Act and would render the Agency’s discretionary role under Section 309.115(a) “meaningless.” *Id.* at 17-18.

### **The Agency Argues That the Denial of Hearing Did Not Require a Separate Written Determination**

According to the Agency, ABC wrongly asserts that the Agency’s denial of the public hearing requests required “an articulated decision,” similar to an “administrative adversarial hearing wherein a final decision is rendered.” Agency Br. at 29, 31. The Agency asserts that a Section 309.115 public hearing is “not an adversarial proceeding, nor is it a contested hearing where an identifiable property right is at stake.” *Id.* at 31. At the end of the public hearing, continues the Agency, “no decision is rendered, no findings of fact are issued, and no conclusions of law are reached [and] [n]o dispositional right or penalty is decided, denied, conferred, or rewarded.” *Id.* The only “outcome” of the public hearing would consist of the

Agency summarizing the questions, comments, and statements provided by the public and the Agency considering that information for purposes of its eventual decision on the issuance of a permit. *Id.*, citing 35 Ill. Adm. Code 309.118.

The Agency argues that Lewis, relied upon by ABC, is distinguishable. Lewis involved a “protectable property interest” necessitating “due process protections through a hearing” and requiring the Board of Police and Fire Commissioners to “articulate a sufficient explanation for its action and decision.” Agency Br. at 32, citing Lewis, 152 Ill. App. 3d at 1024. Moreover, according to the Agency, “*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).” Agency Br. at 33 (emphasis in original). Further, ABC’s standing to appeal 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.” *Id.* at 32. The Agency maintains that its decision to not hold a public hearing, and its rationale, “must be read together circumstantially with all documents in the Record.” *Id.* at 34.

### **The Agency Argues That Members of the Public May Address Their Issues and Concerns Through Properly Filed Written Comments**

The Agency describes as “flawed” ABC’s statement that a public hearing is the only forum where the public can provide comment on a proposed permit, ask questions about permit limits, and create a record for a possible appeal. Agency Br. at 25-26. The Agency concedes that “oral” comment is restricted to a hearing, but observes that “[t]he public can provide comments, ask questions, and create a record for a possible appeal through written comments.” *Id.* at 26, citing 415 ILCS 5/40(e)(2)(A) (2008), 35 Ill. Adm. Code 309.109(b). Even if ABC’s statement were entirely true, continues the Agency, ABC still failed to make the required “initial showing” of significant public interest in the draft permit. Agency Br. at 26.

### **U.S. Steel’s Response Brief**

According to U.S. Steel, the Agency properly found that the two hearing request letters did not show that a public hearing was warranted under Section 309.115(a). USS Br. at 1-2. Under that regulation, U.S. Steel continues, a public hearing is required only when the Agency “determines, within its discretion, that there is a significant degree of public interest in a proposed permit to warrant a public hearing.” *Id.* at 10.

U.S. Steel echoes the Agency’s argument that the Agency’s consideration of the hearing requests was “limited to only the comments and issues raised during the public notice period.” USS Br. at 10, 16-17. U.S. Steel further asserts that it follows that “any testimony from the November 20, 2006 hearing or other factual assertions that were not raised in the January 17 and January 18, 2005 letters should be disregarded in determining whether IEPA abused its discretion in denying ABC’s public hearing request.” *Id.* at 10.

U.S. Steel argues that the Agency properly exercised its discretion in denying the public hearing requests because, “while the requests may have raised concerns about Horseshoe Lake generally, they failed to establish a sufficient interest particular to the proposed NPDES permit to

warrant a public hearing on the proposed permit.” USS Br. at 2. U.S. Steel maintains that the Board must find that the Agency did not abuse its discretion because ABC has not pointed to any portions of either hearing request letter that demonstrated a significant degree of public interest in the proposed NPDES permit. *Id.* at 2-3.

**U.S. Steel Argues That ABC Failed To Present Any Evidence of Public Interest Specific to the Proposed Permit That Would Warrant Holding a Public Hearing**

U.S. Steel stresses that Section 309.115(a)(1) refers to “public interest *in the proposed permit . . . to warrant the holding of such a hearing.*” USS Br. at 11 (quoting 35 Ill. Adm. Code 309.115(a)(1) (emphasis added by U.S. Steel). Accordingly, continues U.S. Steel, ABC must demonstrate not that the public interest is “generally in Horseshoe Lake or some other aspect of IEPA’s regulation of discharges to Horseshoe Lake,” but rather “the interest must be specific to the NPDES permit proposed by IEPA to be issued to U.S. Steel’s Granite City Works.” *Id.* The two comments, however, discuss issues unrelated to the proposed permit, according to U.S. Steel. *Id.*

For example, U.S. Steel asserts that it does not use lead in its processes and that the HEJ Board does not claim the alleged lead discharges would violate any regulation. Further, U.S. Steel continues, the comment does not address any particular provision in the proposed permit or indicate that a public hearing could reasonably be expected to illicit relevant information in support of the HEJ Board’s contention about lead. USS Br. at 11-12.

U.S. Steel takes issue with the joint comment’s reference to Horseshoe Lake being impaired for various pollutants. That matter, U.S. Steel explains, is properly addressed through the Section 303(d) process related to impaired waters and the development of a total maximum daily load (TMDL), “not during the NPDES permitting process for individual permits.” USS Br. at 12. Likewise, U.S. Steel asserts that the joint comment’s concern about GCW’s compliance history is out of place:

This issue, however, is not a permitting issue, but involves IEPA’s enforcement of permit limits and was being addressed under relevant enforcement mechanisms.

\*\*\* If ABC has an issue with IEPA’s enforcement of NPDES permit limits, such an issue should be taken up with IEPA’s enforcement division, and not IEPA’s NPDES permit writer. *Id.* at 12-13.

Further, U.S. Steel describes the joint comment’s statement about fish with melanoma in Horseshoe Lake as being unsubstantiated “speculation” and asserts that the Agency correctly found the statement to be inconclusive. USS Br. at 13. U.S. Steel adds that most importantly, ABC “could not connect its alleged observations of melanoma with the Proposed Permit.” *Id.* at 14.

According to U.S. Steel, because ABC did not demonstrate that the concerns within the two comments were connected to the proposed permit, the comments did not evidence a significant degree of public interest in the proposed permit, and ABC therefore failed to show that the Agency abused its discretion in declining to hold a public hearing on the proposed

permit. USS Br. at 12-14.

**U.S. Steel Argues That ABC Improperly Attempts to Shift the Burden of Proof**

According to U.S. Steel, ABC is wrong in arguing that because the Agency did not sufficiently investigate the SIUE studies, a public hearing is required. USS Br. at 14-15. U.S. Steel states that it was the joint commenters' burden to provide the studies to the Agency or to communicate the substance of the studies to the Agency. *Id.* at 15. The Agency nevertheless tried to analyze the substance of the studies by downloading an abstract. U.S. Steel concludes that the Agency properly assessed the issue and that the Agency did not abuse its discretion, as the information about the studies that was provided in the joint comment did not warrant a public hearing on the proposed permit. *Id.* at 15-16.

**U.S. Steel Argues That the Agency Properly Determined That the Comments Failed to Demonstrate a Significant Degree of Public Interest in the Proposed Permit to Warrant a Public Hearing**

U.S. Steel emphasizes that “[o]nly two requests were made for a public hearing” and neither of those letters identified anyone from the public who would be interested in attending a public hearing or who would be adversely affected by the permit. USS Br. at 20, 22. U.S. Steel also calls into question whether all of the organizations whose names appear on the joint comment letter were involved in its preparation. *Id.* at 20-21. Further, the statements in ABC’s brief about the number of members in the various organizations was not provided to the Agency in the public comments and therefore should be disregarded by the Board, according to U.S. Steel. *Id.* at 21; *see also id.* at 10. U.S. Steel also notes that “not one member of the public, independent of any private organization, submitted a comment.” *Id.*

**U.S. Steel Argues That The Agency Did Not Abuse Its Discretion by Allowing a Meeting with ABC, Instead of a Public Hearing**

U.S. Steel argues that it was the joint comment that asked for a public hearing *or* a meeting with Agency staff. USS Br. at 22-23. The Agency, in turn, offered to meet with Ms. Andria *as requested*, only to have the scheduled meeting “unilaterally cancelled” by Ms. Andria. *Id.* at 24. According to U.S. Steel, “[s]ince ABC’s letter of January 18, 2006 asked for a meeting if a hearing was not held, ABC waived its right to either a hearing or a meeting when its representatives cancelled the meeting.” *Id.*

**U.S. Steel Argues That the Agency Conducted a Proper Review of the Requests for a Public Hearing**

U.S. Steel maintains that ABC “nitpicks” over the Frevert memo and the Willhite e-mail, but those two documents demonstrate that the Agency assessed the public hearing requests and properly found, within its discretion, that there was not a significant degree of public interest *in the proposed permit* to warrant a public hearing on it. USS Br. at 26. U.S. Steel describes the Frevert memo as follows:

The Memo notes in the first paragraph that the January 17 and January 18, 2005 letters raise concerns not with the Proposed Permit, but with “overall concerns for Horseshoe Lake [that] have been and continue to be addressed in 303(d) discussions and hearings that have opportunity for public participation.” C 286. The Frevert Memo then addresses ABC’s substantive comments with explanations for why they would not [a]ffect any of the provisions of the Proposed Permit. *Id.* As a final note, the Frevert Memo noted that because of ABC’s general concern over Horseshoe Lake, “it should be mentioned that [ABC] did participate in a recent hearing regarding 303(d) listed water bodies and did make specific comments regarding Horseshoe Lake.” *Id.* This analysis was entirely appropriate given the lack of any evidence of significant public interest in the Proposed Permit itself. USS Br. at 26-27.

U.S. Steel states that the Willhite e-mail explained that the hearing request was “based on an erroneous concern, *i.e.*, ‘increased loadings of pollutants to Horseshoe Lake,’ and, thus, IEPA could exercise its discretion to find that a hearing was not warranted as there was not a significant degree of public interest in the Proposed Permit.” USS Br. at 27.

### **ABC’s Reply Brief**

#### **ABC Argues That the Agency Based its Decision to Deny the Public Hearing Requests on Factors Other Than Public Interest in the Permit**

ABC argues that one indication of an abuse of discretion is arbitrariness and a decision is arbitrary when an agency “relies on factors that the legislature did not intend for the agency to consider.” ABC Reply Br. at 2, citing Greer v. Illinois Housing Development Authority, 122 Ill. 2d 462, 505 (1988). Here, ABC continues, the Agency failed to base its public hearing determination on the only relevant criterion (*i.e.*, whether there was a significant degree of public interest in the permit) and instead grounded that determination in other factors. *Id.* at 1-2.

For example, ABC asserts that the Frevert memo “considers summarily the substance of the comments from the Agency’s perspective but contains absolutely no discussion of the sole factor relevant to the public hearing regulation,” the public interest. ABC Reply Br. at 2. According to ABC, the Agency improperly based its hearing denial on the conclusions that (1) the comments did not provide additional information that the Agency would use in drafting the permit and (2) the general concerns about impairment to Horseshoe Lake could be addressed in separate proceedings under Section 303(d) of the Clean Water Act. *Id.* at 5. According to ABC, the Agency’s response to the commenters “offered no explanation” of the Agency’s denial of the hearing requests. *Id.* at 2.

#### **ABC Argues That the Comment Letters Demonstrated Significant Public Interest in the Permit**

ABC characterizes the respondents’ distinction between “the pollution discharged” under the NPDES permit and “the water quality in Horseshoe Lake” as “artificial.” ABC Reply Br. at 7. First, ABC states that U.S. Steel discharges “massive amounts of pollutants – up to 25 million



gallons per day – into Horseshoe Lake, and is the sole industrial discharger into this state park lake.” *Id.* Second, Horseshoe Lake is listed as “impaired” because it is not meeting water quality standards for, among other pollutants, ammonia, the discharge limit for which was to be increased in the permit. Third, the joint comment letter “stated a related concern that U.S. Steel had a history of excess ammonia discharges, and that U.S. Steel was contributing to excess concentrations of ammonia in the Lake.” *Id.* ABC argues that whether the Agency agrees or disagrees with these concerns is “irrelevant”; what matters is that the concerns “indicate significant, bona fide concerns of the public regarding the permit.” *Id.* Moreover, continues ABC, although the Agency’s public notice suggests that U.S. Steel “plays no role in the water quality degradation of Horseshoe Lake, the commenters expressed the contrary concern.” *Id.*

ABC also discounts the Agency’s “bogeyman argument” about having to hold 300 hearings per year if the requirement is triggered merely by public use of a water body and a large membership in the requesting organization. ABC Reply Br. at 8. This case, according to ABC, is “compelling” and it is “inconceivable” that such facts are present in 300 discharge applications each year: an enormous and sole industrial discharge to an already-impaired lake that is the “centerpiece of a heavily-used urban state park” and hearing requests from organizations representing approximately 27,000 members. *Id.* Further, ABC argues, there is no support in the record for the Agency’s “guesstimate of 300 hearings,” and the Board should ignore it. *Id.*

In addition, ABC disputes the contention that the evidence from the Board’s hearing should be disregarded. ABC Reply Br. at 12. According to ABC, the testimony relied upon in its brief “simply elaborated on issues the comment letters raised with IEPA, which directly concerns the public interest.” *Id.* ABC argues that to disregard such information “would make a mockery of the public’s statutory right of appeal and right to an evidentiary hearing” under Section 40(e) of the Act. *Id.*

### **ABC Argues That It Did Not Waive Its Right to a Public Hearing by Requesting a Meeting**

ABC argues that U.S. Steel’s “spurious” argument for waiver is unsupported by the joint comment. ABC Reply Br. at 13. Further, according to ABC, the Agency did not offer the meeting until it was “on the verge of issuing the permit” and “a private meeting unknown and inaccessible to members of the public who, for example, fish at Horseshoe Lake, does not come close to fulfilling the purposes of a public hearing.” *Id.*

## **DISCUSSION**

In its prior decision, the Board found U.S. Steel’s NPDES permit invalid because the Agency issued the permit without first holding the requested public hearing, which the Board determined was a violation of Section 309.115(a) of the Board’s NPDES permit regulations (35 Ill. Adm. Code 309.115(a)). The Fifth District Appellate Court vacated the Board’s decision and remanded the matter to the Board to apply an “abuse of discretion” standard in reviewing the Agency’s determination not to hold a public hearing. Below, the Board will first provide brief legal and factual overviews of the case on remand, after which the Board will rule on several threshold matters contested by the parties. The Board will then turn to whether the Agency

abused its discretion in declining the requests to hold a public hearing on the proposed NPDES permit.

### Legal Overview

Under the Board's permitting regulations, the Agency must hold a public hearing on the issuance or denial of an NPDES permit whenever the Agency determines that there is a significant degree of public interest in the draft NPDES permit to warrant holding such a hearing. 35 Ill. Adm. Code 309.115(a)(1). Instances of doubt over whether there is a significant degree of public interest in a draft permit must be resolved in favor of holding the hearing. *Id.*

Any person asking the Agency to hold a public hearing must do so within the time period for submitting public comments. The Agency's determination on whether to hold a public hearing must be based on hearing requests that are filed within the public comment period. U.S. Steel, 384 Ill. App. 3d at 463, 892 N.E.2d at 611. Each hearing request must state both the interest of the party making the request and the reasons why a public hearing is warranted. *Id.*; 35 Ill. Adm. Code 309.115(a)(2). Accordingly, a person requesting a public hearing on a draft NPDES permit before the Agency has "the burden of showing why it is warranted." U.S. Steel, 384 Ill. App. 3d at 463, 892 N.E.2d at 611, citing Borg-Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 867, 427 N.E.2d 415 (3rd Dist. 1981).

If a hearing is held by the Agency, "[t]he applicant or any person shall be permitted to submit oral or written statements and data concerning the proposed permit or group of permits." 35 Ill. Adm. Code 309.117. Unlike a Board hearing in a permit appeal, an Agency hearing on a proposed NPDES permit is not an adjudicatory or "contested case" hearing. Borg-Warner, 100 Ill. App. 3d at 866, 868, 427 N.E.2d at 418-19; National Pollutant Discharge Elimination System Regulations, R73-11, 73-12 (consol.), slip op. at 4-5 (Dec. 5, 1974).

The Board must hear a third-party NPDES permit appeal "exclusively on the basis of the record before the Agency." 415 ILCS 5/40(e)(3)(ii) (2008); *see also* 35 Ill. Adm. Code 105.214(a). The third-party petitioner before the Board has the burden of proving that the NPDES permit, as issued, would violate the Act or the Board's regulations. Prairie Rivers, 335 Ill. App. 3d at 401, 781 N.E.2d at 379; 415 ILCS 5/40(e)(3)(ii) (2008). On appeal, ABC therefore bears the burden of proving that the NPDES renewal permit, as issued to U.S. Steel, violates Section 309.115(a). As the Fifth District Appellate Court stated in U.S. Steel:

Section 309.115(a) of the regulations gives the Agency discretion to determine when to hold a public hearing. Therefore, a permit that is issued without a public hearing violates section 309.115(a)--and is invalid--only when the Agency abuses its discretion in deciding not to hold a hearing. But if the Agency properly exercises its discretion, then the permit does not violate section 309.115(a), even if the Board might have made a different decision in the first instance. U.S. Steel, 384 Ill. App. 3d at 464, 892 N.E.2d at 612.

### **Factual Overview**

On October 17, 2002, the application to renew NPDES permit No. IL0000329 for the GCW integrated steel mill was submitted to the Agency. The application sought permission to continue discharging treated process wastewater into Horseshoe Lake. On December 19, 2004, the Agency provided public notice of the draft NPDES permit that the Agency proposed to issue to U.S. Steel. The notice stated, among other things, that any public comments or requests for a hearing on the proposed permit must be submitted to the Agency by January 18, 2005.

The Agency received two timely requests for a public hearing on the proposed NPDES permit. One request came on January 17, 2005, in a public comment submitted on behalf of the HEJ Board, and the other was made on January 18, 2005, in a public comment submitted on behalf of five organizations, namely ABC, HEJ, Neighborhood Law Office, Sierra Club, and WGNSS. As the Fifth District Appellate Court found, “[t]he Agency considered the matters raised in the comment letters, declined to hold a public hearing, sent written responses to the organizations that had sent the comment letters, and issued a final permit to U.S. Steel on March 31, 2006.” U.S. Steel, 384 Ill. App. 3d at 459, 892 N.E.2d at 608.

### **Board Rulings on Threshold Matters**

#### **Waiver**

U.S. Steel claims that because the joint comment letter requested a meeting with Agency staff if the public hearing was denied, and yet ABC cancelled the meeting scheduled by the Agency, ABC “waived its right” to a public hearing. USS Br. at 23-24. ABC contests this point. ABC Reply Br. at 13.

U.S. Steel cites no authority for its waiver argument and does not explain how the meeting cancellation evidenced waiver of the hearing request. Waiver is “the intentional relinquishment of a known right.” Ryder v. Bank of Hickory Hills, 146 Ill. 2d 98, 104, 585 N.E.2d 46, 49 (1991). “There must be both knowledge of the existence of the right, and an intention to relinquish it.” Pantle v. Industrial Commission, 61 Ill. 2d 365, 372, 335 N.E.2d 491, 496 (1975). The joint comment requesting the hearing does not suggest any intent to waive (AR535) and ABC continued to ask the Agency for a hearing until the time of permit reissuance (AR631; C142, 143, 145, 292, 296). Though ABC did not have a “right” to an Agency hearing (Borg-Warner, 100 Ill. App. 3d at 866, 427 N.E.2d at 418-19), even if such a right existed, the Board finds that the record does not establish the intentional relinquishment element of waiver.

#### **Board Consideration of Hearing Testimony**

U.S. Steel and ABC dispute whether the Board can consider certain testimony from the Board’s November 20, 2006 hearing when deciding whether the Agency abused its discretion in declining the public hearing requests. U.S. Steel argues that testimony from the Board hearing must be disregarded by the Board to the extent the information was not provided in either of the two hearing requests. USS Br. at 10, 19 n.5, 21. ABC argues that the testimony merely “elaborated on issues” raised in the hearing requests. ABC Reply Br. at 12.

Section 40(e) of the Act plainly provides that a third party may petition the Board “for a hearing to contest the decision of the Agency.” 415 ILCS 5/40(e) (2008). U.S. Steel does not argue that *no* evidence from the Board hearing can be considered. Such an interpretation would render the statutory language meaningless. People v. Agpro, Inc., 214 Ill. 2d 222, 227, 824 N.E.2d 270, 273 (2005) (“If possible, we will avoid constructions that render any term superfluous or meaningless.”). Moreover, it is well settled that when the Board hears permit appeals, the Board hearing affords the opportunity to challenge the reasons for the Agency’s decision, although new matter not considered by the Agency in making its decision is typically not admitted at hearing or considered by the Board. Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Prairie Rivers Network v. IEPA, PCB 01-112, slip op. at 10 (Aug. 9, 2001), *aff’d sub nom. Prairie Rivers Network v. PCB*, 335 Ill. App. 3d 391, 781 N.E.2d 372 (4th Dist. 2002); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170, slip op. at 4 (Dec. 6, 2001), *aff’d sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

The primary contention here concerns testimony elicited by ABC at the Board hearing concerning the number of members in the various organizations. Witnesses called by ABC testified that ABC has approximately 100 members (Tr. at 24), HEJ has 400 or 500 members (Tr. at 144), WGNSS has over 400 members (Tr. at 110), and Sierra Club has 26,000 members in Illinois and 650 members in its local branch (Tr. at 126-27).<sup>4</sup> The two timely hearing requests identify the names of the organizations requesting a public hearing and the names of their respective individual representatives, and the HEJ Board comment lists in the comment’s letterhead the names of the 13 HEJ Board members. AR532, 535-36. It is undisputed, however, that the two hearing requests do not identify the number of members in ABC, HEJ, Sierra Club, or WGNSS.

The U.S. Steel court stated that the Agency’s determination as to whether there is a significant degree of public interest in a proposed permit is to be “*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.” U.S. Steel, 384 Ill. App. 3d at 463, 892 N.E.2d at 611 (emphasis added). Accordingly, on remand, the Board is charged with reviewing the Agency’s consideration of the two timely hearing requests to decide if the Agency abused its discretion by declining to hold a hearing. ABC cites the hearing testimony and argues that the organizations represent some 27,000 members. ABC Br. at 6, 13, 16-17. U.S. Steel maintains that none of the information regarding the number of members of the organizations was provided to the Agency in the hearing requests received during the public comment period. USS Br. at 21.

ABC does not explain how the testimony about the number of members in the organizations is based on the timely hearing requests. The requests do not mention the membership size, numerical or otherwise, of ABC, HEJ, Sierra Club, or WGNSS. The Board hearing in a permit appeal is not an opportunity for a petitioner to supplement its submittals to the Agency with new matter. Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280; IEPA

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<sup>4</sup> No testimony was provided regarding the Neighborhood Law Office’s organization.

and Village of New Lenox v. PCB, 386 Ill. App. 3d 375, 390, 896 N.E.2d 479, 492 (3rd Dist. 2008). The Board finds that the testimony concerning the number of members in the organizations constitutes matter outside of the timely hearing requests. The Board declines to consider such new matter in determining whether the Agency erred in refusing these requests. However, even if the Board were to consider the testimony, the Board would not, as a result, rule that the Agency *abused its discretion* in concluding that the two requests did not warrant a public hearing, as explained below.

### **Burden Before the Agency**

The Board disagrees with U.S. Steel's suggestions that to warrant a public hearing before the Agency, the comment letters requesting a hearing had to identify the provisions of the Act or regulations that would be violated by U.S. Steel's discharge if the proposed permit issued. USS Br. at 4, 5, 11, 17. The burden on a third-party petitioner before the Board is to demonstrate that the permit, as issued, would violate the Act or regulations (Prairie Rivers, 335 Ill. App. 3d at 401, 781 N.E.2d at 379), but the burden on these organizations before the Agency was to show why a public hearing was warranted (U.S. Steel, 384 Ill. App. 3d at 463, 892 N.E.2d at 611).

Similarly, contrary to the argument of U.S. Steel, a hearing requester does not have to claim to be so situated as to be adversely affected by the permit. USS Br. at 22. Accepting this argument would improperly inject, into Section 309.115(a), an element of the Act's standing requirement for third-party appeals to the Board. 415 ILCS 5/40(e)(2)(B) (2008). Further, Section 309.115(a)(2) does not require that a hearing request (1) include the information that the requester would provide at the hearing or (2) list, by name, those individuals who would attend the hearing, despite U.S. Steel's suggestions to the contrary. USS Br. at 11, 20, 22.

While all of these matters, if raised in a hearing request, may be relevant for the Agency to consider in the exercise of its discretion, a hearing request under Section 309.115(a)(2) is not required to include them, and U.S. Steel cites no authority dictating otherwise.

### **USEPA Decisions**

The Agency argues that several decisions of the USEPA Environmental Appeals Board (EAB) should serve as non-binding but persuasive precedent for the Board in rendering today's decision. Agency Br. at 7-8, 17, 19-20, 27-29. ABC counters that the decisions are inapplicable. ABC Reply Br. at 10-12. The Board need not resolve these arguments. In carrying out the Fifth District Appellate Court's order, the Board's ruling on remand does not rely upon any of the cited decisions of the EAB.

### **Analysis of Whether the Agency Abused Its Discretion**

#### **Section 309.115(a)**

For convenience, the Board again sets forth Section 309.115(a) of the Board's NPDES permit regulations:

- a) 1) 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.
- 2) Any person, including the applicant, may submit to the Agency a request for a public hearing or a request to be a party at such a hearing to consider the proposed permit or group of permits. Any such request for public hearing shall be filed within the 30-day public comment period and shall indicate the interest of the part[y] filing such a request and the reasons why a hearing is warranted. 35 Ill. Adm. Code 309.115(a).

In this case then, when the Agency considered the two hearing requests under Section 309.115(a), the ultimate issue for the Agency to decide was not, for example, whether there was *any* public interest in the proposed permit or whether there was a significant degree of public interest in *Horseshoe Lake*. Instead, under the Board’s regulation, the Agency was required to determine whether there was a *significant degree of public interest in the proposed permit to warrant holding a public hearing on the permit*. 35 Ill. Adm. Code 309.115(a)(1). The Board will not read any of this language out of its regulation. See U.S. Steel, 384 Ill. App. 3d at 464, 892 N.E.2d at 612 (Agency must “determine whether there is sufficient public interest in a proposed permit to warrant a public hearing thereon”); Agpro, 214 Ill. 2d at 227, 824 N.E.2d at 273 (2005) (avoid constructions that render any term superfluous or meaningless); Granite City Div. of Nat’l Steel Co. v. PCB, 155 Ill. 2d 149, 162, 613 N.E.2d 719, 724 (1993) (rules governing the interpretation of regulatory language are the same as those applied in the construction of statutes).

### **Agency Consideration of the Two Hearing Requests**

In the two requests for public hearing, the concerns raised that were specific to the provisions of the draft NPDES permit, according to the Agency, related to the proposed increase in load limits for lead and ammonia; the other concerns related to Section 303(d) use impairment of Horseshoe Lake and various compliance enforcement matters at GCW. The issue of increased load limits in the draft permit for lead and ammonia were addressed in internal Agency correspondence and ultimately in letters to the organizations. AR545-46, 552, 601-05, 646, 649; C286. The Agency likewise addressed the issues of use impairment and past non-compliance. AR545-46, 601-05, 646, 649; C286.

The Board cannot find that the Agency was arbitrary or irrational in concluding that the concerns articulated over new lead and ammonia load limits did not constitute a significant degree of public interest in the draft permit to warrant a public hearing on the permit. The Agency determined that these permit limits were not based on actual increased loading of those pollutants to Horseshoe Lake, but rather on categorical production standards and revised water quality standards, as the Agency indicated in responses to the organizations. AR646, 649; C286,

288; *see also* AR602-03. The Agency responses further noted that “lead is not used as a raw material or an additive in the steel making process.” AR646, 649.

Nor can the Board find that the Agency was arbitrary or irrational in arriving at the conclusion that concerns articulated over matters of Section 303(d) use impairment and past exceedences did not constitute a significant degree of public interest in the proposed permit to warrant a hearing on the permit. As explained by the Agency in the letters responding to the organizations, fish consumption advisories were issued for channel catfish and carp “because of PCB’s”; GCW was not listed as a source of impairment of Horseshoe Lake; and lead is not listed as an impairment of the lake. AR646, 649; *see also* AR602-03. The Agency also observed in its record that the Agency and USEPA had monitored past NPDES compliance issues at GCW and taken appropriate actions in response to permit exceedences, adding that non-compliance with the Clean Air Act and RCRA permits was irrelevant to the draft NPDES permit. AR602-05; *see also* AR646, 649. That some of these issues may be the subject of public forums under other laws does not prove that a public hearing on the draft permit is warranted under Section 309.115(a).

The HEJ Board’s hearing request mentioned “additional discharges of toxic heavy metals known to accumulate in biological organisms,” but specifically identified only lead. AR532. According to the joint hearing request, the SIUE reports showed that Canteen Lake tested high in cadmium, but the request did not elaborate upon or provide citation to the reports. AR533, 604. These matters were nevertheless addressed by the Agency in its record. Ms. Burkard, the Agency permit engineer, noted that Horseshoe Lake is not impaired for heavy metals and that cadmium is not found in U.S. Steel’s effluent. In addition, Ms. Burkard observed that the draft permit’s zinc load limit, like its lead load limit, is set by production-based categorical limits provided in 40 C.F.R. 420. AR552, 601, 603, 605; *see also* AR 602.

The Board finds that the record demonstrates the Agency’s conscientious judgment in considering the articulated concerns of the organizations that requested a public hearing. Ultimately, the Agency observed that the matters that were raised in the hearing requests could be readily addressed for the organizations without a public hearing on the draft permit. C286, 288.

### **Reliance Upon Improper Factors**

ABC argues that the Agency abused its discretion by relying upon factors other than the public interest to deny the hearing requests. ABC Reply at 2. ABC cites the Illinois Supreme Court’s decision in Greer, 122 Ill. 2d 462, 524 N.E.2d 561 (1988). In Greer, the Supreme Court stated that “[w]hile it is probably not possible to enumerate all the kinds of acts or omissions which will constitute arbitrary and capricious conduct,” one of the ways an agency acts arbitrarily and capriciously is if the agency “relies on factors which the legislature did not intend for the agency to consider.” Greer, 122 Ill. 2d at 505, 524 N.E.2d at 581. The Greer court observed that “agency action can be set aside if the agency exercises its discretion in an ‘arbitrary or capricious manner,’” a standard of review that “is often equated with ‘abuse of discretion.’” Greer, 122 Ill. 2d at 496-97, 524 N.E.2d at 576-77. The Supreme Court added that

“[t]he standard is one of rationality.” Greer, 122 Ill. 2d at 506, 524 N.E.2d at 581. For the reasons below, the Board finds that the record does not substantiate ABC’s argument.

First, it is true that the Mr. Frevert observed that the public comments in which the hearing requests were made did not provide “any additional information the Agency would use for inclusion in the reissued permit.” C286. However, under the Board’s regulations, regardless of whether the Agency holds a hearing, changes to draft permits may necessitate that the Agency reopen the public comment period, with corresponding delay. 35 Ill. Adm. Code 309.120. Mr. Frevert’s notation comes in a memo not only advising that a public hearing is not required, but also recommending that the permit issue without delay.

Second, the Agency did arrange to have a meeting with the organizations, but little can be made of that fact as the organizations specifically requested a meeting with Agency staff should the hearing request be denied. AR535. Finally, it is true that the Agency eventually moved quickly to issue the final permit. However, the Agency’s dispatch in issuing the permit came after over a year’s delay due to staff losses and does not negate the Agency’s due consideration of the organizations’ concerns. C288.

At bottom, none of these facts demonstrate that the Agency failed to “determine whether there [was] sufficient public interest in [the] proposed permit to warrant a public hearing thereon.” U.S. Steel, 384 Ill. App. 3d at 464, 892 N.E.2d at 612. The Board finds that ABC has not proven that the Agency relied upon improper factors in denying the hearing requests.

### **Rational Explanation for Denial of Hearing**

ABC argues that the Agency abused its discretion by not providing a written decision explaining the reasons for denial of the hearing requests. ABC Br. at 5, 11-12; *see also* ABC Reply Br. at 1, 2, 3-4 (Agency “offered no contemporaneous explanation of its decision to deny the public hearing requests”). ABC relies upon Lewis, in which the Third District Appellate Court stated that “an 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, 152 Ill. App. 3d at 1024-25, 505 N.E.2d at 411 (citation omitted).

The Board finds Lewis distinguishable. In Lewis, the court ruled that a probationary police officer could be fired only for cause where the village’s rules required that terminations take place with the commission’s consent after the chief submits “written reasons for the termination.” Lewis, 152 Ill. App. 3d at 1024, 505 N.E.2d at 411. The court held that the dismissed police officer had a “protectable property interest” requiring “due process safeguards,” whereas an “at will” probationary patrolman has no constitutionally protected property interest and can be discharged without a hearing. Lewis, 152 Ill. App. 3d at 1023-24, 505 N.E.2d at 410-11.

Here, ABC did not have a “right” to an Agency hearing. Borg-Warner, 100 Ill. App. 3d at 866, 427 N.E.2d at 418-19. Such a hearing may or may not be granted by the Agency, subject to “abuse of discretion” review by the Board, as held in U.S. Steel. Further, an Agency hearing



is not a “contested case” hearing. The Agency hearing provides no due process protections; “[t]he safeguards of a due process hearing are absent until the hearing before the Board.” IEPA v. PCB, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986). The Agency hearing is non-adversarial and results not in a final decision determining rights or liabilities, but rather a “hearing file,” which is to include copies of written statements, summaries of oral statements, and an estimate of the number of attendees. 35 Ill. Adm. Code 309.118(a); 5 ILCS 100/10-50 (2008) (final decision or order adverse to a party in a contested case must be in writing or stated in the record, and must include findings of fact and conclusions of law).

ABC cites no provision of the Act or Board regulations requiring a separate written decision from the Agency that sets forth the Agency’s reasons for denying a request for a public hearing. Moreover, the Agency’s denial of a hearing request under Section 309.115(a) is itself not a final, appealable agency action. Denying a hearing request is therefore substantially different from the Agency’s determination to grant or deny an NPDES permit. *See* 415 ILCS 5/39(a), (b), 40(e) (2008).

When the final NPDES permit is issued, the Agency does have to issue a written response to comments, which response must, among other things, “[b]riefly describe and respond to all significant comments on the draft permit . . . raised during the public comment period, or during any hearing.” 40 C.F.R. 124.17(a); *see also Illinois Power Co. (Hennepin Power Plant) v. IEPA*, PCB 85-119, slip op. at 3 (Mar. 27, 1986) (“40 CFR 124.17 . . . is specifically made applicable to states such as Illinois which have permitting authority under the NPDES program pursuant to 40 CFR 123.25”). As discussed, the Agency did respond in writing to the organizations’ public comments. AR646-47, 649-50.

To the extent the Lewis court’s “sufficient explanation” requirement applies beyond contested cases, it has been satisfied here. The Agency’s record memoranda and responses reflect an examination of the organizations’ concerns and a rational articulation of why the Agency believed those concerns did not warrant a public hearing under Section 309.115(a).

The Board finds no abuse of discretion by the Agency based on Lewis.

### **Board Ruling on Remand**

ABC, as the third-party petitioner, has the burden of proof on appeal. 415 ILCS 5/40(e)(3)(ii) (2008). A “third-party petitioner must show that the permit, as issued, would violate the Act or the Board’s regulations.” Prairie Rivers, 335 Ill. App. 3d at 401, 781 N.E.2d at 379. Accordingly, ABC bears the burden of proving that the NPDES permit, as issued to U.S. Steel, violates Section 309.115(a). The only remaining ground of this appeal is the Agency’s denial of the public hearing requests. U.S. Steel, 384 Ill. App. 3d at 459-60, 892 N.E.2d at 608; American Bottom Conservancy v. IEPA and United States Steel Corporation – Granite City Works, PCB 06-171, slip op. at 1 (Jan. 26, 2007).

The thrust of ABC’s position on appeal is that the Agency failed to consider the public interest in the draft permit. Hearing requests are required to indicate the interest of the party making the request and the reasons why a hearing is warranted, and the Agency’s decision on

whether to hold a hearing is to be based on the timely hearing requests. U.S. Steel, 384 Ill. App. 3d at 463, 892 N.E.2d at 611.

In declining the requests for a public hearing, the Agency correctly recognized that “only comments received prior to the close of Public Notice can be considered in determining the merits for granting of Public Hearing.” C286. The two timely hearing requests set forth a number of concerns. The record demonstrates that the Agency considered those concerns. ABC does not convincingly argue otherwise. The record also presents no instances of doubt within the meaning of the Section 309.115(a). Considering all of the circumstances, it was not arbitrary or irrational for the Agency to conclude that of all the concerns articulated in the two comment letters, some concerns did not evidence public interest *in the draft permit* while the other concerns did not evidence *a significant degree of public interest in the draft permit to warrant a public hearing on the permit*.

The Board cannot find on this record that the Agency, in declining to hold a public hearing, made an arbitrary determination, without using conscientious judgment, or, in view of all the circumstances, overstepped the bounds of reason, ignored the law, and thereby caused substantial prejudice. U.S. Steel, 384 Ill. App. 3d at 465, 892 N.E.2d at 613. ABC has failed to prove that the Agency abused its discretion in concluding that these two hearing requests did not amount to a significant degree of public interest in U.S. Steel’s draft NPDES permit to warrant holding a public hearing on the permit.

“Only if the Agency abused its discretion in failing to hold a public hearing would the permit as issued violate the Act or regulations.” U.S. Steel, 384 Ill. App. 3d at 465, 892 N.E.2d at 613. Because the Agency did not abuse its discretion in denying the hearing requests, the Board finds that ABC has failed to prove that issuance of the renewal permit without a public hearing violated Section 309.115(a). As the denial of hearing is the only ground left in ABC’s appeal, the Board affirms the Agency’s issuance of the NPDES permit to U.S. Steel.

### CONCLUSION

On January 26, 2007, the Board issued an opinion and order finding that the NPDES permit issued by the Agency for U.S. Steel’s GCW was invalid. Applying a *de novo* standard of review, the Board found that the Agency erred in denying the requests from several organizations for a public hearing on the proposed permit. Specifically, the Board ruled that the Agency was required to have held a hearing because the two timely hearing requests evidenced “a significant degree of public interest in the proposed permit.” American Bottom, PCB 06-171, slip op. at 14 (Jan. 26, 2007). The Board therefore held that in the absence of a public hearing before the Agency, the permit, as issued, violated Section 309.115(a) of the Board’s NPDES permitting regulations (35 Ill. Adm. Code 309.115(a)). After U.S. Steel and the Agency appealed, the Fifth District Appellate Court vacated the Board’s decision and remanded the matter to the Board to apply an “abuse of discretion” standard in reviewing the Agency’s determination not to hold a public hearing.

On remand, the Board has analyzed all of the arguments made by the parties and, as directed by the court, considered whether the Agency properly used its discretion under 35 Ill.

Adm. Code 309.115(a). For all of the reasons set forth in this opinion, the Board finds that the Agency did not abuse its discretion in declining the requests to hold a public hearing on the proposed permit. The Board therefore affirms the Agency's determination to issue the NPDES permit to U.S. Steel.

**ORDER**

1. The Board affirms the Agency's March 31, 2006 NPDES permit issuance to U.S. Steel for GCW.
2. The Board directs its Clerk to file a copy of this opinion and order with the Clerk of the Fifth District Appellate Court.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 6, 2010, by a vote of 5-0.



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board