

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

AMERICAN BOTTOM CONSERVANCY,)
)
Petitioner,)
)
v.) PCB No. 2006-171
) (3rd Party NPDES Permit Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY, and UNITED)
STATES STEEL CORPORATION -)
GRANITE CITY WORKS,)
)
Respondents.)

UNITED STATES STEEL CORPORATION'S RESPONSE BRIEF ON REMAND

Respondent, United States Steel Corporation - Granite City Works ("U. S. Steel"), submits its Response Brief on Remand from the Fifth District Illinois Appellate Court, and requests that Petitioner American Bottom Conservancy's ("ABC") Petition for Review of a Decision by the Illinois Environmental Protection Agency ("IEPA") and request for a public hearing to IEPA be denied. In support of its Brief, U. S. Steel states as follows:

INTRODUCTION

On remand from the Fifth District Appellate Court, there is only one issue before the Board: whether IEPA abused its discretion by not holding a public hearing on the proposed NPDES permit for U. S. Steel's Granite City Works facility. As a review of the administrative record and relevant law shows, IEPA did not abuse its discretion in denying ABC's request for a public hearing.

The central regulation involved in this case, 35 Ill. Adm. Code § 309.115(a) provides that IEPA "shall hold a public hearing on the issuance . . . of an NPDES Permit . . . *whenever the Agency determines* that there exists a significant degree of public interest in the proposed permit .

. . (instances of doubt shall be resolved in favor of holding the hearing), to warrant the holding of such a hearing.” (emphasis added) During the public comment period for the proposed NPDES permit for U. S. Steel’s Granite City Works, two letters were submitted to IEPA on January 17 and 18, 2005 that requested a public hearing under 35 Ill. Adm. Code § 309.115(a). IEPA properly found that the January 17 and 18, 2005 letters did not demonstrate that a public hearing was warranted. IEPA 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. As thoroughly explained below, IEPA’s determination that a public hearing was not warranted was not arbitrary, without using conscientious judgment, or an overstepping of the bounds of reason. In other words, IEPA did not abuse its discretion.

ABC raises a litany of issues in comments sent to IEPA after the close of the public comment period, in the petition that it filed with the Board to appeal U. S. Steel’s permit, and in its brief that were not raised in any comments to IEPA during the public comment period for the proposed permit. Such a strategy ignores the rule that the Board cannot consider any issues that were not raised during the public notice period. *See* 415 ILCS 5/40(e)(2)(A). Thus, IEPA was justified in ignoring those issues that were not raised in the January 17 or January 18, 2005 letters when determining whether to hold a public hearing on the proposed NPDES permit. Similarly, the Board should ignore any arguments or facts that were not included in the letters. Given that ABC has failed to point to any portions of the January 17 or 18, 2005 letters that demonstrate a significant degree of public interest in the proposed NPDES permit for Granite City Works to warrant a public hearing, IEPA did not abuse its discretion in denying the public

hearing requests. Accordingly, ABC's Petition for Review and request for a public hearing should be denied.

BACKGROUND FACTS

I. IEPA's issuance of the Permit and denial of ABC's request for a public hearing.

On October 14, 2002, U. S. Steel submitted to IEPA an application to renew its NPDES permit for its U. S. Steel facility located in Granite City, Illinois. R 135-155.¹ After conducting a thorough analysis of the facility and its discharges into Horseshoe Lake, on December 19, 2004, IEPA issued a proposed NPDES permit for the Granite City facility (the "Proposed Permit"), which would allow the facility to continue to discharge into Horseshoe Lake in compliance with Illinois water quality standards. R 518-523. The Proposed Permit stated that the public notice period started on December 19, 2004 and ended on January 18, 2005. R 518. The Notice for the Proposed Permit stated that "If written comments or requests indicate a significant degree of public interest in the draft permit, the permitting authority may, at its discretion, hold a public hearing. . . . For further information, please call Beth M. Burkard [at IEPA]." R 518. The Proposed Permit further provided:

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.

R 522.

¹ Citations of "R ___," will be to the Administrative Record filed on June 5, 2006, "C ___," will be to the Board's Record that was prepared for and filed with the Appellate Court, which includes ABC's Second Supplement to the Administrative Record filed on November 6, 2006, and "Trans. ___," will be to the Transcript from the November 20, 2006 hearing before the Chief Administrative Officer.

On January 17, 2005, Kathleen Logan Smith submitted a comment to IEPA on behalf of the Health & Environmental Justice - St. Louis (“HEJ”). R 532. That letter requested that IEPA hold a public hearing on the Proposed Permit, but did not describe the issues that would be raised or evidence that would be presented if a hearing were held. *Id.* The letter asserted that the Proposed Permit would allow lead to be discharged into Horseshoe Lake. *Id.* However, U. S. Steel does not use lead in its processes. R 601. The letter did not state or describe any evidence to support its assertion about lead, nor did it indicate that such evidence could reasonably be expected to be presented if a public hearing on the Permit were held. The letter did not identify any regulations or sections of the Illinois Environmental Protection Act (the “Act”) that would be violated if the permit were issued as it was drafted. R 532.

On January 18, 2005, Katherine Andria and four other individuals submitted comments on behalf of ABC, HEJ, Neighborhood Law Office (East St. Louis), Sierra Club, and Webster Groves Nature Study Society and requested that a public hearing be held. R 537-539. The January 18, 2006 letter commented that Horseshoe Lake is impaired for PCBs, pH, suspended solids, excessive algal growth, ammonia (unionized), nutrients, phosphorus, total and ammonia-N, and that “[w]e have seen fish caught at Horseshoe Lake with melanoma.” R 537. However, Ms. Andria did not, and could not, state that IEPA had determined that U. S. Steel caused Horseshoe Lake to be impaired, and did not provide any further information regarding her claim about the alleged fish with melanoma. The letter also stated that Professor Richard Brugam at Southern Illinois University at Edwardsville showed that the testing of sediments in Horseshoe Lake shows high concentrations of lead. R 537. Yet, ABC never provided IEPA a copy or even a citation to a copy of any report or study by Professor Brugam even though ABC claimed to have a copy of the report. R 539.

The January 18, 2005 letter also raised lead discharges as a concern, even though U. S. Steel does not use lead in its processes. R 601. The Proposed Permit set a limit for lead because the regulations at 40 C.F.R. § 420 require lead limits in NPDES permits for steel mills even if they do not use lead or increase the amount of lead in their waste water discharges. C 286; R 601. The letter also raised concerns about high cadmium levels in a lake connected to Horseshoe Lake. R 537. Cadmium, however, was not even detected in U. S. Steel's water discharges. R 342. Thus, this comment is not relevant to U. S. Steel's permit.

The letter also raised questions about U. S. Steel's Granite City facility's compliance history. R 537-38. However, compliance issues are addressed through a different mechanism by IEPA, and not by its permit writers. Finally, the letter stated "We ask that you hold a public hearing in order to allow citizens to ask questions and present information and testimony." R 539. ABC's letter failed to describe any testimony or evidence that would be presented or to identify any provisions of the Act or regulatory standards for the protection of water quality that would be violated if the permit were issued as drafted. R 537-539. The letter concludes by stating that "If you deny this request for a hearing, we ask for a meeting with you and your staff, . . ." R 539.

After considering public comments and analyzing the allowable discharge limits for the facility, IEPA determined that a hearing on the permit was not warranted because none of the comments would lead IEPA to make any changes to the Proposed Permit. C 286, 288. On March 8, 2006, IEPA issued a final permit (the "Final Permit") for U. S. Steel's facility. R 637-643. On March 31, 2006, IEPA reissued the Final Permit to coincide with its issuance of the responses to the comments it received. C 109, C 112, and C 115-119. The effective date of the Final Permit was April 1, 2006.

II. Review by the Board and the Fifth District Appellate Court.

On May 4, 2006, ABC filed its Petition for Review to the Illinois Pollution Control Board raising numerous issues that ABC did not raise during the public comment period and alleging, among other things, that IEPA improperly denied ABC's request for a public hearing on the Proposed Permit. C 13-14. In response, U. S. Steel and IEPA filed motions to dismiss, and on September 21, 2006 the Board dismissed all issues except whether IEPA should have held a public hearing on the Proposed Permit. C 197-204. Accordingly, the only issue that proceeded to hearing was whether IEPA should have held a public hearing regarding the Proposed Permit. On November 20, 2006, a hearing was held before the Board's Hearing Officer on whether IEPA improperly denied ABC's request for a public hearing. Trans. 1.

On January 26, 2007, the Board issued an Order finding that IEPA's decision not to hold a public hearing prior to the issuance of the Final Permit violated 35 Ill. Adm. Code § 309.115(a)(1) of the Board's regulations. C 477-491. Specifically, the Board found "that the two public comments filed in this case evidence a significant degree of public interest in the proposed permit." C 490. Moreover, the Board held that "In reviewing the Agency's decision not to hold a public hearing, the Board applies the standard applicable to all reviews of an Agency's permit decision - whether or not the issuance of the permit violates the Act or Board regulations. Thus, the Board does not apply an 'abuse of discretion' standard as advocated by U.S. Steel." C 489. On March 9, 2007, U. S. Steel filed an Amended Motion to Reconsider that requested that the Board reconsider all aspects of its January 26, 2007 Order. On March 12, 2007, IEPA also filed a Motion to Reconsider to the Board. On May 3, 2007, the Board denied both Motions to Reconsider. C 599-600.

On May 25, 2007, U. S. Steel filed a Petition for Review of the January 26, 2007 and May 3, 2007 Orders to the Fifth District Appellate Court. IEPA also filed a Petition for Review of the Orders on June 5, 2007. On July 22, 2008, the Appellate Court issued an opinion granting U. S. Steel's and IEPA's Petitions for Review, vacating the Board's Orders, and remanding the case for further consideration. *U. S. Steel, Corp. v. Illinois Pollution Control Board*, 892 N.E.2d 606, 613 (5th Dist. 2008). The Appellate Court found that the Board employed the incorrect standard of review for determining whether IEPA had erred in denying ABC's request for a public hearing, and that IEPA has discretion "to determine when and if there is a significant degree of public interest in a proposed permit." *Id.* at 611. Accordingly, the Court provided that "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." *Id.* at 612-13. The Court provided further instructions on remand for determining whether IEPA acted within its discretion:

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. *In re Marriage of Munger*, 339 Ill. App. 3d 1104, 1107, 791 N.E.2d 573, 274 Ill. Dec. 481 (2003). Only if the Agency abused its discretion in failing to hold a public hearing would the permit as issued violate the Act or regulations.

Id. at 613. The case is now before the Board on remand for a determination as to whether IEPA abused its discretion in denying ABC's request for a public hearing.

ARGUMENT

I. Standard of review.

A. Abuse of discretion for IEPA's denial of ABC's request for public hearing.

Under 35 Ill. Adm. Code § 309.115(a)(1), IEPA determines whether a party has demonstrated a significant degree of public interest sufficient to warrant the holding of a public hearing. The regulation provides:

a) 1) The Agency shall hold a public hearing on the issuance or denial of the an NPDES Permit or group of permits *whenever the Agency determines* that there exists a significant degree of public interest in the proposed permit or group of permits (instances of doubt shall be resolved in favor of holding the hearing), to warrant the holding of such a hearing.

35 Ill. Adm. Code § 309.115(a)(1)(emphasis added). As the Appellate Court found, “[t]he 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 regulations do 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.” *U. S. Steel*, 892 N.E.2d at 611 (emphasis in original).

Under the abuse of discretion standard, an agency abuses its discretion when it makes a decision “without employing conscientious judgment or when the decision is clearly against logic.” *Deen v. Lustig*, 337 Ill. App. 3d 294, 302, 785 N.E.2d 521, 529 (4th Dist. 2003) (citing *Bodine Electric of Champaign v. City of Champaign*, 305 Ill App. 3d 431, 435, 711 N.E.2d 471, 474 (4th Dist. 1999) (“the question is whether . . . the court exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted.”)); *see also Whirlpool Corp. v. Certain Underwriters at Lloyd's London*, 295 Ill. App. 3d 828, 839, 692 N.E.2d 1229,

1237 (1st Dist. 1998); *Modine Manufacturing Co. v. PCB*, 192 Ill. App. 3d 511, 519, 548 N.E.2d 1145, 1150 (2d Dist. 1989) (no abuse of discretion unless the agency acted “unreasonably or arbitrarily.”) As the Appellate Court in this case stated, the Board “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.” *U. S. Steel*, 892 N.E.2d at 613. Under this standard of review, IEPA did not abuse its discretion and properly denied ABC’s request for a public hearing on the Proposed Permit.

ABC attempts to nullify the abuse of discretion standard by arguing that “the regulation hems in that discretion in three critical respects.” ABC Br. at 4. Most notably, ABC argues that “the regulation states that IEPA ‘shall’ - not ‘may’ - hold a public hearing when there is significant public interest in the permit,” implying that IEPA’s discretion to determine if there is significant public interest is somehow limited. *Id.* This argument ignores the Appellate Court’s ruling that specified the inquiry on remand. *U. S. Steel*, 892 N.E.2d at 613. The Appellate Court thoroughly reviewed 35 Ill. Adm. Code § 309.115(a)(1), and did not find that the “shall” in the regulation hemmed IEPA’s discretion. The Court repeatedly emphasized that IEPA has the discretion to determine whether there is a significant public interest in a proposed permit to warrant a public hearing, and not that “the Agency must hold a hearing *whenever there is a significant degree of public interest.*” *U. S. Steel*, 892 N.E.2d at 611 (emphasis in original). Indeed, the Court held that the 35 Ill. Adm. Code § 309.115(a)(1) provided that “the Agency must hold a public hearing whenever *it determines* that there is a significant degree of public interest in the permit.” *Id.* (emphasis in original). As a result, ABC is wrong that IEPA must hold a public hearing “when there is a significant public interest in the permit.” (ABC Br. at 4),

Instead, a public hearing is only required when IEPA determines, within its discretion, that there is a significant degree of public interest in a proposed permit to warrant a public hearing.

B. IEPA's review was limited to only the comments and issues raised during the public notice period.

The Illinois Environmental Protection Act provides that only issues raised during the public notice period for a proposed NPDES permit can be the basis for a third party appeal of IEPA's issuance of a NPDES permit, and requires a third party petitioner to make "a demonstration that the petitioner raised the issues contained within the petition during the public notice period . . ." 415 ILCS 5/40(e)(1)(A). Moreover, 35 Ill. Adm. Code § 309.115(a)(2) provides that a request for a public hearing "shall be filed with[in] the 30-day public comment period . . ." Under these two provisions, the only issues that ABC can raise in this appeal are the issues that were stated during the public notice period from December 19, 2004 to January 18, 2005. R 518. Thus, the only issues that can be raised now are issues that were raised in the two letters, the January 17, 2005 and January 18, 2005 comments, from five individuals who claim to represent the various organizations.² The Appellate Court recognized that review is limited to "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*, 892 N.E.2d at 611. Because ABC is limited to raising only the issues that were before IEPA in those two letters, 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, as such testimony and information that was not before IEPA when it made its decision that is at issue in this case.

² ABC not only submitted comments on January 18, 2005, but also submitted comments on October 3, 2005 and December 9, 2005. These comments, however, were received outside of the public notice period for the Proposed Permit that ended on January 18, 2005. R 518. Accordingly, IEPA justifiably disregarded these comments under 415 ILCS 5/40(e) and 35 Ill. Adm. Code § 309.115(a)(2).

II. IEPA did not abuse its discretion in denying ABC's request for a public hearing.

A. ABC failed to present any evidence of public interest specific to the Proposed Permit that would warrant holding a public hearing.

The regulations at 35 Ill. Adm. Code § 309.115(a)(1) provide that IEPA “shall hold a public hearing on the issuance . . . of an NPDES Permit . . . whenever the Agency determines that there exists a significant degree of public interest *in the proposed permit . . . to warrant the holding of such a hearing.*” (emphasis added). In other words, ABC must demonstrate that the public interest is not generally in Horseshoe Lake or some other aspect of IEPA's regulation of discharges to Horseshoe Lake, but the interest must be specific to the NPDES permit proposed by IEPA to be issued to U. S. Steel's Granite City Works. *U. S. Steel*, 892 N.E.2d at 611. The January 17 and 18, 2005 comments failed to raise any public interest specific to the Proposed Permit, and, thus, IEPA did not abuse its discretion in denying ABC's request for a public hearing.

The January 17, 2005 and January 18, 2005 comments do not demonstrate that there was a significant degree of public interest in the Permit. Instead, the comments discuss issues unrelated to the Proposed Permit. For instance, the January 17, 2005 comment states that discharges of lead from the Granite City Works facility over a period of years “would add up to hundreds of pounds and may have a serious detrimental effect on organisms living in the lake.” R 532. HEJ, however, was unable to state that the alleged lead discharges would violate any water quality standard or other regulation, such that the discharges under the Proposed Permit limits would be illegal. Contrary to the implications of the comments, U. S. Steel does not use lead in its processes. R 601. HEJ failed to provide evidence to support its contention about lead discharges to the Lake and failed to identify any such evidence that could reasonably be expected if a public hearing were held. In other words, the comment may involve an issue with regard to

Horseshoe Lake generally or an issue that is attributable to other sources, but it does not address any particular provision in the Proposed Permit, or indicate that a hearing on the subject could reasonably be expected to illicit relevant information. Accordingly, ABC failed to demonstrate that the January 17, 2005 comment shows that there was a public interest that was particularly connected to the Proposed Permit. Thus, IEPA did not abuse its discretion by failing to provide a public hearing on this issue.

Similarly, the January 18, 2005 letter states that Horseshoe Lake is impaired for various pollutants. That issue, however, is properly addressed through the section 303(d) process related to impaired waters and the development of a total maximum daily load under section 303(d) of the federal Clean Water Act, and not during the NPDES permitting process for individual permits. ABC is aware of that fact, as Ms. Andria from ABC was actively involved in the section 303(d) listing process for Horseshoe Lake, and attended a public hearing regarding 303(d) listed water bodies that addressed the impairment of Horseshoe Lake. Trans. 56, 84; C 286. (“As a final note, it should be mentioned that the American Bottom Conservancy did participate in a recent hearing regarding 303(d) listed water bodies and did make specific comments regarding Horseshoe Lake.”) As stated in section III, *infra*, IEPA accommodated ABC with numerous opportunities for their concerns to be heard, yet it was ABC that failed to take advantage of those opportunities.

The January 18, 2005 letter also raises the compliance history of the Granite City Works facility with its permit limits by citing information from an U.S. EPA Enforcement and Compliance Online (ECHO) report. This issue, however, is not a permitting issue, but involves IEPA’s enforcement of permit limits and was being addressed under relevant enforcement mechanisms. R 604. (“The IEPA and US EPA have monitored the compliance and have taken

appropriate actions in response to permit exceedences.”) Further, the information in the ECHO report can be misleading because a single exceedence in a grab sample or 24-hour composite sample during a quarter appears in the ECHO report as a violation for the quarter. R 556, 604. A person who is not familiar with the report or does not investigate further could end up with the misimpression that a facility with a violation in a single sample for a single parameter was out of compliance for the whole quarter. 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.

In addition, ABC argues that IEPA should have held a public hearing because fish were allegedly caught with melanoma in Horseshoe Lake. ABC Br. at 19-20. This argument should be rejected because it is based on speculation, not admissible evidence. Specifically, the January 18, 2005 letter stated that “We have seen fish caught at Horseshoe Lake with melanoma. An IDNR fish biologist confirmed fish with melanoma at Horseshoe.” R 537. U. S. Steel provided a comment on this issue, which IEPA considered. R 603 (“US Steel feels the fish with melanoma statement to be anecdotal.”) IEPA then analyzed the issue, but found ABC’s statement to be inconclusive. *Id.* (“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?”) IEPA’s response to ABC’s vague comment was entirely appropriate, and IEPA did not abuse its discretion in not using ABC’s comment to hold a public hearing. There is no evidence in the record of any specific finding of fish in Horseshoe Lake with melanoma. More importantly, there is no evidence that U. S. Steel’s discharges cause melanoma in fish in Horseshoe Lake. No expert or scientific testimony was submitted during the public comment period (or even at the November 20, 2006 hearing) that would make such a

connection. ABC's argument is based on nothing other than conjecture that U. S. Steel is responsible for a problem that may or may not exist in fish in Horseshoe Lake. ABC's unsubstantiated comments are not sufficient to determine that IEPA should have held a public hearing to receive comments on the issue. Because ABC did not establish that there was an increased rate of melanoma in Horseshoe Lake and could not connect its alleged observations of melanoma with the Proposed Permit, IEPA did not abuse its discretion in finding that there was no significant public interest specific to the Proposed Permit and that a public hearing on the Proposed Permit was not warranted.

ABC's comment letter also charged that "Canteen Lake, which is part of the same lake, but privately owned, tested high in cadmium." R 537. Again, this comment would not have affected the issuance of U. S. Steel's permit as cadmium was not detected by the facility in its effluent samples, "nor was any [cadmium] in 19 Agency samples." R 342. The Agency concluded "that no regulation of cadmium is necessary and that no monitoring beyond the routine requirements is needed." *Id.* This lack of connection between ABC's comments and U. S. Steel's permit further documents that IEPA did not abuse its discretion by not holding a public hearing on the draft permit.

In the end, ABC fails to show that IEPA abused its discretion in finding that a public hearing was not warranted and that the January 17 and 18, 2005 requests did not establish a significant degree of public interest in the Proposed Permit.

B. ABC improperly attempts to shift the burden of proof for establishing a significant degree of public interest.

ABC argues that because it stated in the January 18, 2005 letter that Professor Brugam had studied bottom sediments in Horseshoe Lake, and because IEPA did not sufficiently investigate Brugam's studies, IEPA was required to hold a public hearing to resolve the issue.

ABC Br. at 18. This argument is wrong. First, ABC implies that it was IEPA's burden to analyze Brugam's studies, and that IEPA failed to "seek or obtain a copy of the study." *Id.* As the case law clearly states, "the party requesting a public hearing has the burden of showing why it is warranted." *Borg-Warner Corp. v. Mauzy*, 100 Ill. App. 3d 862, 867, 427 N.E.2d 415, 419 (3d Dist. 1981); *see also U. S. Steel*, 892 N.E.2d at 611. Thus, it was ABC's burden to provide Brugam's study to IEPA, or to communicate the substance of Brugam's study to IEPA. ABC even admitted in its January 18, 2005 letter "that studies had been obtained only recently and had not been reviewed thoroughly by the commentors." ABC Br. at 18. (emphasis added). This begs the question, why did ABC withhold the Brugam studies instead of simply submitting them to IEPA if they were critical to addressing the Proposed Permit? ABC does not answer that question, and instead tries to shift its error to IEPA, who in fact attempted to analyze the study by downloading an abstract of a study from the Internet, even though "The commentors did not provide a copy of the study, and thus it is not possible to know the nature of the study." R 604. IEPA properly analyzed the issue with the information that was provided to it during the public notice period. Any lack of information that was not before IEPA was ABC's own doing. Perhaps the reason that ABC did not provide a copy of the study is that ABC knew that Brugam concluded that the source of the lead sediments was the lead smelters in the area and particularly NL Industries. Indeed, during the hearing Ms. Andria stated "It is clear that most of the lead in the sediment from 1900 to the present represents anthropogenic input. We believe that the major source of this lead was the National Lead Industry smelter in Granite City." Trans. 82. NL Industries is a Superfund site due to lead contamination. Trans. 78. Accordingly, ABC did not meet its burden and IEPA did not abuse its discretion in not holding a public hearing as a result

of any information that ABC submitted in its January 18, 2005 letter regarding Professor Brugam's studies.

C. ABC improperly raises issues that were not raised in its comments.

In determining whether there is a significant degree of public interest in a proposed permit, IEPA makes that determination "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*, 892 N.E.2d at 611. ABC, however, insists on raising issues in its brief that were not raised in the January 17 or January 18, 2005 comments.

For example, ABC argues that IEPA failed to ensure that U. S. Steel's discharges are in compliance with the narrative water quality standard that provides that "Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin." 35 Ill. Adm. Code § 302.203. This argument should be disregarded because it was not raised in either the January 17 or January 18, 2005 comments during the public comment period. R 532, 537-539. Nor was the issue even raised in ABC's Petition. Thus, according to the Board's earlier decision on U. S. Steel's and IEPA's Motions to Dismiss on September 21, 2006, because issues involving narrative water quality standards were not raised during the public notice period, they cannot be asserted now as part of ABC's Petition. *See* 415 ILCS 5/40(e); 35 Ill. Adm. Code § 309.115(a)(2); *see also U. S. Steel*, 892 N.E.2d at 611.

ABC also argues in its brief that it is "troubling" that IEPA did not investigate Horseshoe Lake sediments because the Proposed Permit allowed U. S. Steel "to discharge up to 4,380 pounds of zinc and 2,044 pounds of lead into the Lake each year." ABC Br. at 19. There are critical flaws with ABC's arguments. First, like the narrative water quality standard argument, ABC did not raise this issues in its January 18, 2005 letter, nor did HEJ raise the issues in the

January 17, 2005 letter. In fact, neither letter raised any concerns with zinc. Thus, the arguments related to zinc are not properly raised now pursuant to 415 ILCS 5/40(e)(2), as zinc issues were never before IEPA during the public notice period. R 532, 537-539. With respect to lead, ABC's arguments, even if they had been properly raised, are without merit as U. S. Steel does not use lead in its process and the loading limits that appear on paper in the permit are calculated from allowable levels in the federal standards at 40 C.F.R. 420 that apply to U. S. Steel's operations. R 601; C 286. Further, merely stating the total amount that a permit would allow to be discharged over the course of a year does not address the central issue of whether U. S. Steel's discharges under the Proposed and Final Permits violate water quality standards. Again, ABC has not submitted any evidence that shows that IEPA's issuance of the Final Permit will cause a violation of the Act or any regulation. ABC has not met its burden to prove that the Final Permit should not have been issued. Accordingly, IEPA's denial of ABC's public hearing request and issuance of the Final Permit was not an abuse of discretion.³

In addition, ABC charges in its brief that because U. S. Steel allegedly failed chronic toxicity tests in the past, and because IEPA removed toxicity testing requirements from the Proposed Permit before it issued the Final Permit, there is somehow a concern that justifies a public hearing. ABC Br. at 20. As with numerous other issues raised in its brief, this issue was not raised during the public notice period, is not properly before the Board, and, thus, should be disregarded. 415 ILCS 5/40(e)(2). Assuming *arguendo* that it is properly before the Board, ABC's argument is factually incorrect. Numerous results of whole effluent toxicity tests are in the record. See R 1-3, R 65-89, R 156-252, R 272-273. Of the eight acute toxicity tests that

³ ABC also raises in its comment letter that "Granite City Steel . . . would be allowed to put additional ammonia into the lake." R 537. However, the record is clear that the limits for ammonia were set at levels protective of the new water quality standards for Horseshoe Lake. R 545, 508-509. Further, ammonia degrades in the environment.

were performed, none of them determined that the effluent was toxic, even at 100% effluent concentrations. *Id.* The chronic test that ABC is referring to was a study that compared the growth rate of green algae (*selenastrum capricornutum*) in Granite City Works' effluent to its growth in water from Horseshoe Lake. R 156. Initially, this study found that the algae did not grow as well in the effluent as it did in water from Horseshoe Lake. R 157, 158, 168. Given that Horseshoe Lake is impaired for nutrients because the nutrients levels are too high and for excessive algae growth (R 519) the possibility exists that the difference in growth rates was attributable to higher nutrient levels in the lake water. Further, a repeat of this test determined that "The effluent sample was not chronically toxic to [green algae] at all concentrations tested." R 158. ABC failed to mention in its brief that the same report included chronic toxicity tests on daphnia (*Ceriodaphnia dubia*) and fathead minnows, and concluded that "The effluent samples were not chronically toxic to *Ceriodaphnia dubia* through the 100 percent concentration." R 158. In addition, "The effluent samples were not chronically toxic to fathead minnows through the 100 percent concentration." R 158, 170. When reviewing the permit application, IEPA analyzed the tests of the effluent toxicity and found that "A review of recent whole effluent toxicity test results found that no acute toxicity was present in the effluent." R 478. Thus, IEPA correctly concluded that amount of whole effluent toxicity testing could be reduced. "This significantly reduced the burden of toxicity testing," and only required Acute Toxicity Screening for *Ceriodaphnia* and fathead minnow. R 478-479. Accordingly, this issue was properly considered by IEPA, and resulted in the testing being taken out of the Final Permit.

Moreover, at the hearing and in its brief, ABC and its witnesses spent a considerable amount of time testifying that many people use Horseshoe Lake State Park and that the ecosystem has a diversity of habitat. *See e.g.*, Trans. 113-114. ("It is a fantastic place for all

different types of birds because it has a variety of habitat. . . . It's a good place to look at butterflies, for the same reason it's got a diversity of habitat."); *see also*, ABC Br. at 14-15. Yet ABC ignores the fact that the steel mill now owned by U. S. Steel has operated under previous NPDES permits and that the NPDES permit at issue is merely a renewal of an existing permit that essentially maintains the status quo. R 135.⁴ In fact, the water discharged by Granite City Works helps to keep the lake from drying up during periods of drought and thus, helps maintain critical habitat. R 600. ("The Department [of Conservation] finds the discharge beneficial; it sustains a constant normal pool for the lake. Without it, this would not be the case. . . .").⁵

ABC has not been able to point to any evidence in the January 17 and January 18, 2005 letters that suggests that there was a significant degree of public interest in the Proposed Permit. Accordingly, IEPA did not abuse its discretion in denying ABC's public hearing request.

D. IEPA properly determined that ABC failed to demonstrate a significant degree of public interest in the Proposed Permit to warrant a public hearing on the Proposed Permit.

Again, according to 35 Ill. Adm. Code § 309.115(a)(1), IEPA will hold a public hearing if it determines "that there is a significant degree of public interest in the proposed permit" to warrant a public hearing on the proposed permit. In determining the statutory meaning of the words "significant degree of public interest," the words are to be applied according to their plain and ordinary meaning. *People v. Whitney*, 188 Ill. 2d 91, 97, 720 N.E.2d 225, 228 (Ill. 1999)

⁴ The permit limits in the renewal permit increased for lead, zinc and ammonia because the load limits for lead and zinc are based on the federal categorical limits at 40 C.F.R. 420, which are production-based and because the ammonia water quality standard in Horseshoe Lake changed. R 601. It should also be noted that the concentration-based limits were set to meet the water quality standards for Horseshoe Lake. *See* Correspondence from Alan Keller at IEPA, dated April 10, 2006 (as attached to ABC's First Motion to Supplement the Record), p. 3 ("the Agency has concluded that the NPDES permit issued March 31, 2006 is protective of water quality . . ."); *see also, id.*, pp. 2-5.

⁵ In its brief, ABC provides extensive selections of testimony from the November 20, 2006 hearing. That testimony, however, should be ignored to the extent it sets forth any information that was not before IEPA when it denied ABC's request for a public hearing and issued the Permit. 415 ILCS 5/40(e)(1)(A); 35 Ill. Adm. Code § 309.115(a)(2).

(“The language of a statute is the best means of determining legislative intent. The statutory language should be given its plain and ordinary meaning.”) (citation omitted). The plain meaning of the word “public” is “of, relating to, or affecting all the people or the whole area of a nation or state.” Merriam-Webster Online Dictionary, <<http://www.m-w.com/dictionary/public>> (as of Nov. 17, 2008). ABC has not made the required showing that there was a significant interest from all the people that use Horseshoe Lake, such that IEPA abused its discretion in denying ABC’s request.

Only two requests were made for a public hearing. The first was in HEJ’s January 17, 2005 comment. R 532. Although it submitted a public hearing request in that comment, HEJ did not deem its interest sufficiently significant to file a Petition for Review of IEPA’s denial of HEJ’s public hearing request. Trans. at 147. Moreover, the January 17, 2005 letter does not identify one person from the public who would potentially desire to be involved in a public hearing, but only speculates that a public hearing would give unnamed “citizens an opportunity to ask questions about the permit, voice concerns, and hear explanations.” R 532.

The other public hearing request of January 18, 2005 was purportedly submitted on behalf of multiple organizations. R 537-539. However, the January 18, 2005 letter appears to have been written by Kathy Andria, with representatives of other organizations only commenting on Ms. Andria’s letter and allowing their names to be added to the signature block. Trans. 97-98; Trans. 145 (Representative of HEJ “submitted” January 17, 2005 letter and only “signed onto” January 18, 2005 letter); Trans. 119 (Representative of Webster Groves Nature Study Society did not participate in the drafting of the January 18, 2005 letter and did not have any independent knowledge of the water issues in the letter). Indeed, the Sierra Club’s representative at the November 20, 2006 hearing did not even read the January 18, 2005 letter until a week

before her deposition was taken on November 6, 2006. Trans. 132.⁶ Two of the individuals whose names appear on the January 18, 2005 letter (Kathleen O'Keefe and Jack Norman) did not even testify at the November 20, 2006 hearing as to their participation in preparing the letter. Moreover, only ABC deemed IEPA's denial of the public hearing request sufficiently important to appeal IEPA's denial of the public hearing request, with HEJ, Neighborhood Law Office, East St. Louis, Sierra Club, and Webster Groves Nature Study Society all declining to file Petitions for Review.

ABC attempts to avoid its lack of evidence of public interest by stating that ABC and the other organizations that allegedly signed⁷ the January 18, 2005 letter represent "thousands of members." ABC Br. at 16-17. This argument is misleading. First, none of the information stated in pages 16-17 of ABC's brief regarding the number of members of the organizations was provided to IEPA during the public notice period in the January 17 or January 18, 2005 comments. Because the information was never properly before IEPA, it should be disregarded by the Board. *See* 415 ILCS 5/40(e)(2), *U. S. Steel*, 892 N.E.2d at 611. Moreover, ABC ignores the fact that only five individual representatives were listed on the January 18, 2005 letter, and that no other individual members of the organizations were identified or submitted separate public hearing requests. Secondly, ABC did not present any evidence that it asked its membership whether members were interested in a public hearing. More tellingly, not one member of the public, independent of any private organization, submitted a comment, or was

⁶ Three members of the public testified at the hearing on November 20, 2006: Robert Johnson (Trans. 101-107); Cathy Copley (Trans. 107-108), and Jason Warner (Trans. 140-143). None of these individuals, however, submitted comments or information to IEPA during the public notice period from December 19, 2004 to January 18, 2005. Trans. 104 (Mr. Johnson admitted that he did not submit any comments on the Proposed or Final Permit.) Accordingly, none of the comments can be used to support ABC's claim for a public hearing.

⁷ Although ABC has argued that the January 18, 2005 letter was signed by ABC, Sierra Club, Webster Groves Nature Study Society, HEJ, and the Neighborhood Law Office, no letter was ever submitted to IEPA that was actually signed by a representative of any of the organizations.

identified in the organizations' comments as wanting to attend a potential public hearing. R 532, 537-539. In addition, even if the Board accepts ABC's analysis that all of the members of the organizations can be counted as making a request for a public hearing (*i.e.*, approximately 27,000 members requested a public hearing), then it follows that only "approximately 100" of those members (ABC's members) deemed the denial of the public hearing request sufficiently important to appeal to the Board. ABC Br. at 16. In other words, less than one percent (0.4%) of the members whose public hearing requests were denied actually deemed the denial sufficiently important to file an appeal of IEPA's decision.

ABC has failed to demonstrate that IEPA abused its discretion in denying ABC's public hearing request. At the November 20, 2006 hearing before the Board, multiple witnesses admitted that the January 17 and January 18, 2005 comments did not identify any individual of the public who would be adversely affected by U. S. Steel's Permit. Trans. 135, 146. Nor do either of the comments identify any individual of the public that would have an interest in attending a public hearing. R 532, 537-539. ABC has only been able to demonstrate that it alone would be interested in a public hearing, which is insufficient to show that IEPA abused its discretion in determining that there was not a significant degree of public interest in the Proposed Permit.

III. IEPA did not abuse its discretion by allowing a meeting with ABC, instead of a public hearing, as requested by ABC.

In its brief, ABC asserts that IEPA somehow acknowledged that there was significant public interest in the Proposed Permit because IEPA stated in an email that it should hold a meeting with ABC instead of a public hearing. ABC Br. at 12. IEPA's suggestion that a meeting be scheduled instead of a public hearing, however, was entirely consistent with ABC's request in its January 18, 2005 letter. That letter clearly asks IEPA for the option of a public

hearing *or* a meeting with Agency staff. R 539 (“If you deny this request for a hearing, we ask for a meeting with you and your staff . . .”). Yet, ABC did not take advantage of the numerous opportunities it had to ask IEPA questions about the Proposed and Final Permits. In its January 18, 2005 letter, ABC stated that IEPA should hold a public hearing for the purpose of allowing “citizens to ask questions and present information and testimony.” R 539. Although IEPA denied that request for a public hearing, ABC had numerous opportunities to raise the issues that were stated in its January 18, 2005 letter to IEPA. As an initial matter, the Notice for the Proposed Permit provided the name and telephone number of an IEPA employee who could be contacted with questions. The Proposed Permit provided “For further information, please call Beth M. Burkard [at IEPA]” R 518. This opportunity for asking questions was not limited to the 30-day public notice period, and ABC could have called Ms. Burkard at any time prior to the issuance of the Final Permit. *Id.* However, there is nothing in the Record to show that Ms. Andria attempted to reach Ms. Burkard.

Moreover, IEPA considered ABC’s comments where it requested a public hearing or, in the alternative, a meeting with ABC and IEPA, and decided to schedule a meeting with ABC to address its January 18, 2005 comments. This decision was entirely consistent with ABC’s request which stated, “If [IEPA denies] this request for a hearing, we ask for a meeting with you and your staff . . .” R 539. Specifically, on February 27, 2006, IEPA stated in an email from Marcia Wilhite, Director of IEPA’s Bureau of Water, to Doug Scott, Director of IEPA, that the Agency had received ABC’s public hearing request and that it “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.” C 288. IEPA further provided in the email that

American Bottoms [sic] 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. The IEPA Director subsequently decided to issue the Final Permit and meet with Ms. Andria, **as ABC had requested in its January 18, 2005 letter.** C 289. IEPA then scheduled a meeting with ABC through Kathy Andria for March 15, 2006. C 291 (“There will be a meeting at the Agency on March 15th with Kathy Andria to discuss Horseshoe Lake, Frank Holten State Park and issues regarding the Granite City Steel NPDES permit.”) The Interdisciplinary Environmental Clinic at Washington University in St. Louis, who is representing ABC in this appeal, then confirmed that the meeting would be going forward with one of their representatives being present. C 294. On March 14, 2006, however, Kathy Andria unilaterally cancelled the March 15, 2006 meeting with IEPA. C 296 - 300. That meeting was never rescheduled. Since 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.

Finally, IEPA also found that “it should be mentioned that the American Bottoms [sic] Conservancy did participate in a recent hearing regarding 303(d) listed water bodies and did make specific comments regarding Horseshoe Lake.” C 286. At the November 20, 2006 hearing, Ms. Andria confirmed that ABC participated in a meeting regarding the 303(d) list that involved the impairment of Horseshoe Lake. Trans. 84. Again, ABC had a forum for addressing the same issues that it presented in its January 18, 2005 letter at a meeting involving Horseshoe Lake as a 303(d) listed water body. R 537 (“Horseshoe Lake is impaired.”) Because of the numerous opportunities for ABC to present its concerns about Horseshoe Lake, which it

requested in its January 18, 2005 letter, IEPA did not abuse its discretion in denying ABC's public hearing request.

IV. IEPA conducted a proper review of the requests for a public hearing on the Proposed Permit.

ABC attempts at length to analyze only particular sections of the record to show that IEPA "acted as though it had unfettered discretion . . ." ABC Br. at 6. ABC's purported analysis is wrong, as IEPA properly assessed the comments and requests before it in the January 17 and January 18, 2005 comments to determine whether there was a significant degree of public interest in the Proposed Permit, and not just significant public interest in Horseshoe Lake generally.

ABC first argues that the public notice for the Proposed Permit is somehow evidence of IEPA's discretion run amok. The public notice stated that with regards to a public hearing that "Any interested person may submit 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 issue in the hearing." R 522. This was entirely consistent with the Appellate Court subsequent decision, which provides that the requests for a public hearing must "indicate the party's interest and why a hearing is warranted . . ." *U. S. Steel*, 892 N.E.2d at 611. The notice then states that "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." R 522. While not identical to the Appellate Court's language (as ABC argues it should have been), this provision accurately provided that IEPA has discretion to determine whether there is a significant degree of public interest in the Proposed Permit to warrant a public hearing. *U. S. Steel*, 892 N.E.2d at 611. IEPA properly exercised that discretion in finding that there was not a significant degree of public interest in the Proposed

Permit to warrant a public hearing on the Proposed Permit, and did not, as ABC argues, deny the hearing requests “on the assumption that it could do so for any reason or no reason.” ABC Br. at 6.

ABC then nitpicks over two IEPA documents, a Memorandum from Toby Frevert (the “Frevert Memo”) (C. 286) and an email from Marcia Willhite (the “Willhite email”) (C. 288), attempting to show that IEPA abused its discretion. Those two documents, however, demonstrate that IEPA assessed the public hearing requests and found that, within its discretion, there was not a significant degree of public interest in the Proposed Permit to warrant a public hearing on it. As stated earlier, ABC continues to ignore that the public interest must be “in the proposed permit or group of permits.” 35 Ill. Adm. Code § 309.115(a)(1). Indeed, ABC completely omits that provision and restates the standard in its own interest, arguing that “the point of the governing regulation . . . asks whether there is significant public interest . . . in a public hearing,” (ABC Br. at 8), omitting that the public interest must be in the proposed permit. This omission is telling, as the “in the proposed permit” requirement in 35 Ill. Adm. Code § 309.115(a)(1) dooms ABC’s argument that IEPA abused its discretion, as provided thoroughly in section II *supra*. In looking at IEPA’s actions with the “in the proposed permit” language in mind, the record shows that IEPA did not abuse its discretion.

First, the Frevert Memo shows that IEPA considered the public hearing requests and found that they did not demonstrate a significant degree of public interest in the Proposed Permit. 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 effect 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.

Moreover, as to the Willhite email, that document also shows that IEPA considered ABC's request, and, within its discretion, did not find that there was a significant degree of public interest in the Proposed Permit. The Willhite email acknowledges that IEPA has the discretion as to the public hearing issue, and asks whether Doug Scott of IEPA would be comfortable denying the public hearing request, having a private meeting with ABC (as requested by ABC), and issuing the Final Permit. C 288. The Willhite email also 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. Like the Frevert Memo, the Willhite email demonstrates that IEPA properly used its discretion to deny ABC's request for a public hearing.

In its brief, ABC raises several further points that do not undermine IEPA's denial of the requests for public hearings. ABC states that public hearings are held "to provide opportunity for the public to understand and comment on the permit," citing 35 Ill. Adm. Code § 106.111(b). ABC Br. at 8. As an initial matter, there is no regulation at 35 Ill. Adm. Code § 106.111(b). Assuming that ABC meant to cite 35 Ill. Adm. Code § 166.101(b) - the only regulation where the quoted language appears, that section applies to hearing on plans to close hazardous waste

facilities, and not NPDES permits. 35 Ill. Adm. Code § 166.120. The same or similar language does not appear in 35 Ill. Adm. Code § 309.115(a), and the omission of that language should be read to mean that it does not apply in the NPDES context. *See e.g., McHenry County Defendants, Inc. v. City of Harvard*, 384 Ill. App. 3d 265, 891 N.E.2d 1017, 1032 (2d Dist. 2008) (“where a statute lists the thing or things to which it refers, the inference is that all omissions are exclusions, even in the absence of limiting language.”). Regardless, even if that language applied to this case, it does not overcome the fact that IEPA properly exercised its discretion in finding that there was not a significant degree of public interest in the Proposed Permit, as outlined extensively above.

ABC also argues in its brief that a public hearing should have been held for subsistence fishermen, because they “are not likely to have the time or expertise to work through a ‘confusing’ and technical permit, but they should nonetheless have an opportunity to ask questions of and express concerns of IEPA in the more information setting of a public hearing.” ABC Br. at 9. This argument, however, should be ignored, as it was not raised in any of the comments before IEPA. *U. S. Steel*, 892 N.E.2d at 611. Nor has ABC identified any subsistence fishermen who would have participated in a hearing on the Proposed Permit. Thus, IEPA did not have to consider this issue in determining whether there was a significant degree of public interest in the Proposed Permit. IEPA did not abuse its discretion in denying a public hearing.

V. IEPA did not commit any procedural error in denying ABC’s public hearing request.

ABC argues that “IEPA abused its discretion by failing to offer a legally sufficient rationale for its decision.” ABC. Br. p. 11. This argument is incorrect and should be denied. In assessing whether it should hold a public hearing, as it did in this case, IEPA can only assess one criteria: whether “there exists a significant degree of public interest in the proposed permit . . . to

warrant the holding of such a hearing.” 35 Ill. Adm. Code § 309.115(a)(1), *U. S. Steel*, 892 N.E.2d at 611. If IEPA decides to hold a public hearing, it follows that IEPA found a significant degree of public interest during the public notice period to warrant a hearing. If IEPA decides not to hold a public hearing, as it did in this case, there is only one reason why it could have made such a decision: it did not find that a significant degree of public interest in the proposed permit was demonstrated during the public notice period. *Id.* Under the singularly-focused inquiry under 35 Ill. Adm. Code § 309.115(a)(1), IEPA could not have denied a public hearing for any other reason than the fact that it did not find there was a significant degree of public interest. For ABC to now claim that it does not know the reason why its public hearing request was denied is disingenuous and ignores the straightforward analysis that IEPA is obligated to apply under 35 Ill. Adm. Code § 309.115(a)(1). As a result, ABC is well aware that the explanation for why IEPA denied its public hearing request is that IEPA did not find that a significant degree of public interest in the permit was demonstrated during the public notice period. Thus, IEPA did not abuse its discretion in denying the ABC’s request for a public hearing.⁸

⁸ If the Board is inclined to accept ABC’s argument regarding IEPA’s purported lack of explanation for its denial of ABC’s public hearing request, the proper remedy is only to remand for IEPA to provide a written explanation of its denial, as that is the only procedural defect that ABC complains is lacking.

CONCLUSION

For the foregoing reasons, U. S. Steel requests that ABC's Petition for Review and request for a public hearing to IEPA be denied, and that the Board grant all relief it deems fair and just.

Dated: November 26, 2008

Respectfully submitted,

U.S. Steel Corporation - Granite City Works

By: /s/ David T. Ballard
One of Its Attorneys

Carolyn S. Hesse
David T. Ballard
Barnes & Thornburg LLP
One North Wacker Drive - Suite 4400
Chicago, Illinois 60606
(312) 357-1313

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn upon oath, and under penalties pursuant to 735 ILCS 5/1-109, deposes and states that one copy of the foregoing, United States Steel Corporation's Response Brief on Remand, was served via electronic communication to the following attorneys of record:

Jason R. Boltz
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
jason.boltz@illinois.gov

Maxine I. Lipeles
Kevin J. Moore
Interdisciplinary Environmental Clinic
Washington University School of Law
One Brookings Drive
Campus Box 1120
St. Louis, MO 63130-4899
milipele@wulaw.wustl.edu

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
webbc@ipcf.state.il.us

/s/ David T. Ballard

David T. Ballard