

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JUL 28 2006

STATE OF ILLINOIS
Pollution Control Board

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

PCB 06-171
(3rd Party NPDES Permit
Appeal)

NOTICE OF FILING

Dorothy Gunn, Clerk
Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

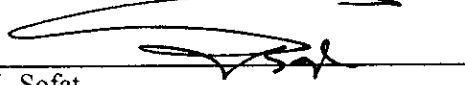
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board an original and four (4) copies the AGENCY'S RESPONSE TO PETITIONER'S MOTION TO SUPPLEMENT THE RECORD of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: 
Sanjay K. Sofat
Assistant Counsel
Division of Legal Counsel

Dated: July 26, 2006
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62794-9276
(217) 782-5544

THIS FILING PRINTED ON RECYCLED PAPER

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AGENCY'S RESPONSE TO PETITIONER'S MOTION TO SUPPLEMENT THE RECORD

NOW COMES the Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by one of its attorneys, Sanjay K. Sofat, Assistant Counsel, and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, hereby requests that the Illinois Pollution Control Board ("Board") **Partially Grant** the Petitioner American Bottom Conservancy's ("ABC") request to amend the record. The Agency opposes the inclusion of Exhibit A and B in the record. In support of this motion, the Agency states as follows:

1. On May 18, 2006, the Board issued an order accepting ABC's appeal of a National Pollutant Discharge Elimination System ("NPDES") permit issued by the Agency on March 31, 2006, to United States Steel Corporation, Granite City Works ("US Steel").
2. On June 5, 2006, the Agency filed the record.

3. On June 22, 2006, the Agency filed a motion for leave to amend the record to include: correspondence from Alan Keller to C. Daniel Baker, Jr., U.S. Steel Law Department (dated March 31, 2006), correspondence from Alan Keller to Kathleen Logan Smith (dated March 31, 2006), and correspondence from Alan Keller to ABC (dated March 31, 2006).
4. On June 27, 2006, during the status conference call, ABC raised concerns regarding the five documents it believes should be included in the record.
5. On July 11, 2006, the Agency responded to ABC's request to amend the record. The Agency objected to the inclusion of two of the five documents. Specifically, the Agency objects to the inclusion of Exhibits A and B, but agrees with the inclusion of Exhibits C, D, and E.
6. On June 28, 2006, the Hearing Officer directed ABC to file any motion to supplement the record with the Board, if the issue could not be resolved informally between the parties.
7. The Agency objects to the following documents
 - i. Correspondence dated April 10, 2006, from the Agency to counsel for ABC (Exhibit A)
 - ii. Correspondence dated April 5, 2006, from Director Douglass Scott to counsel for ABC (Exhibit B).
8. The Agency issued the US Steel NPDES permit on March 31, 2006, pursuant to Section 39 (a) of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/39 (2004).

9. ABC challenged the Agency's decision to issue the US Steel NPDES permit under 40(e).
10. Section 40(e) of the Act, specifically provides that "the Board shall hear the petition . . . exclusively on the basis of the record before the Agency." 415 ILCS 5/40(e)(3) (*emphasis added*).
11. Section 40(e)(3) of the Act directs the Board to consider the petition "exclusively on the basis of the record before the Agency." 415 ILCS 5/40(e)(3) (2004). The Board has long held that in permit appeals, its review is limited to the record that was before the Agency at the time the permitting decision was made. *See Community Landfill Company v. IEPA*, PCB 01-48, PCB 01-49 (consolidated) (April 5, 2001); *Panhandle Eastern Pipe Line Company v. IEPA*, PCB 98-102 (January 21, 1999).
12. Thus, all correspondence documents that were received after March 31, 2006, when the permit was issued, were not before the Agency at the time of the final NPDES permit decision. Therefore, these documents should not be included in the record. Consequently, the Agency objects to the inclusion of Exhibits A and B as part of the Agency record.
13. ABC's desire to include the two documents directly conflicts with the mandate of Section 40(e) and Board's long held position. Moreover, the Agency fails to understand the ABC's purpose to include these documents if the documents were not before the Agency at the time of the Agency's final decision. These documents and their content could not have been used to meaningfully impact the

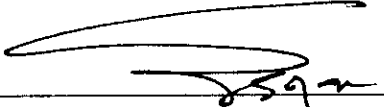
Agency's decision to issue or not issue the NPDES permit, as they were created after the disputed decision.

14. Citing 35 Ill. Adm. Code 105.212(b)(2), ABC contends that Exhibits A and B should be included in the record. Section 105.212(b)(2) states that, “[c]orrespondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application.” 35 Ill. Adm. Code 105.212(b)(2). However, ABC should read Section 105.212(b)(2) in conjunction with Section 105.212(b)(5), which states that, “any other information the Agency relied upon in making its final decision.” 35 Ill. Adm. Code 105.212(b)(2) (*emphasis added*). Clearly, only information the Agency “relied upon in making its final decision” should be included in the record. Exhibits A and B were not before the Agency upon making its final decision, and therefore, should not be included in the record.
15. The Agency does not object to the inclusion of Exhibits C, D, and E because they are dated before the issuance of the permit on March 31, 2006. These three documents are:
 - i. Correspondence dated March 7, 2006 from ABC to Agency. *See* Exhibit C.
 - ii. E-mail correspondences dated March 7, 2006, and March 14, 2006, between the Agency and ABC. *See* Exhibit D.
 - iii. Correspondence dated March 24, 2006, from ABC's counsel to the Agency. *See* Exhibit E.

16. In summary, since ABC challenged the Agency's decision to issue the US Steel NPDES permit under 40(e), the Board shall "shall hear the petition . . . exclusively on the basis of the record before the Agency." 415 ILSC 5/40(e)(3). Furthermore, based on the Board's long held position in permit appeals, its review is limited to the record that was before the Agency at the time the permitting decision was made. See *Community Landfill Company v. IEPA*, PCB 01-48 (consolidated) (April 5, 2001); *Panhandle Eastern Pipe Line Company v. IEPA*, PCB 98-102 (January 21, 1999). Thus the Agency requests that Exhibits A and B be excluded from the record as they were not considered by the Agency in its final decision to issue the US Steel's NPDES permit.

WHEREFORE, the Agency respectfully requests that the Board **Partially Grant** Petitioner's motion to supplement the record.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By:  _____

Sanjay K. Sofat
Assistant Counsel
Division of Legal Counsel

DATED: July 26, 2006
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

THIS FILING PRINTED ON RECYCLED PAPER

STATE OF ILLINOIS)
)
COUNTY OF SANGAMON) SS

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached **AGENCY'S RESPONSE TO PETITIONER'S MOTION TO SUPPLEMENT THE RECORD** upon the persons to whom it is directed, by placing a copy in an envelope addressed to:

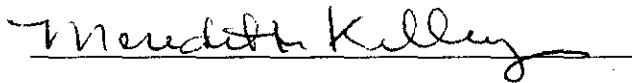
Dorothy Gunn, Clerk
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and mailing it from Springfield, Illinois on July 26, 2006, with sufficient postage affixed as indicated above.



SUBSCRIBED AND SWORN TO BEFORE ME
this day of July 26, 2006.


Notary Public

