

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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MAR 09 2007

STATE OF ILLINOIS  
Pollution Control Board

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

Case No. PCB 2006-171  
(NPDES Permit Appeal)

NOTICE OF FILING

To: Sanjay K. Sofat  
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Carol Webb, Hearing Officer  
Illinois Pollution Control Board  
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P.O. Box 19274  
Springfield, IL 62794-9274

**PLEASE TAKE NOTICE** that on March 9, 2007 there was filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original and executed copies of the **United States Steel Corporation's Amended Motion to Reconsider Order of January 26, 2007 and United States Steel Corporation's Memorandum in Support of Amended Motion to Reconsider Order of January 26, 2007**, copies of which is herewith served upon you.

Dated: March 9, 2007

Respectfully submitted,

Carolyn S. Hesse  
David T. Ballard  
**Barnes & Thornburg LLP**  
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**United States Steel Corporation - Granite City Works,**  
By: Carolyn S. Hesse  
One of Its Attorneys


**CERTIFICATE OF SERVICE**

I, the undersigned, an attorney, certify that I caused to be served the attached, **United States Steel Corporation's Amended Motion to Reconsider Order of January 26, 2007 and United States Steel Corporation's Memorandum in Support of Amended Motion to Reconsider Order of January 26, 2007**, by U.S. Mail, postage prepaid, from One North Wacker Drive, Suite 4400, Chicago, Illinois 60606, on this 9<sup>th</sup> Day of March, upon the following:

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\_\_\_\_\_  
Carolyn S. Hesse

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STATES STEEL CORPORATION - )  
GRANITE CITY WORKS, )  
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**UNITED STATES STEEL CORPORATION'S AMENDED MOTION  
TO RECONSIDER ORDER OF JANUARY 26, 2007**

Respondent, United States Steel Corporation - Granite City Works ("U. S. Steel"), pursuant to 35 Ill. Adm. Code §§ 101.520 and 101.902, moves the Board to reconsider its January 26, 2007 Order.<sup>1</sup> In support of its Amended Motion, U. S. Steel states as follows:

1. On May 4, 2006, the American Bottom Conservancy ("ABC") filed a third-party appeal of the final NPDES permit issued to U. S. Steel's Granite City Works facility ("Granite City Works") on March 8, 2006 (the "Final Permit"), alleging that IEPA violated its administrative duties by denying ABC's request for a public hearing on the proposed permit.

2. On January 26, 2007, the Board entered an Opinion and Order (the "Board's Order") in favor of ABC and found that IEPA should have held a public hearing before issuing the Final Permit. Because of IEPA's purported failure to hold a public hearing, the Board invalidated the Final Permit.

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<sup>1</sup> On February 22, 2007, U. S. Steel filed a Motion to Reconsider. By the filing of this Amended Motion to Reconsider, U. S. Steel withdraws its previously-filed Motion.

3. U. S. Steel now moves the Board to reconsider its Order because the Board misapplied existing law.

4. As an initial matter, the Board should reconsider its invalidation of the Final Permit because ABC did not present any evidence to support such an invalidation, and did not meet its burden of proof to show that the permit should be invalidated. Section 39(a) of the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.* (the “Act”) provides that it “shall be the duty of” IEPA to issue an NPDES permit where an applicant shows that its facility’s operations will not cause a violation of the Act, or its attendant water quality standards or regulations. IEPA met that duty.

5. Although the Board found that IEPA violated Section 309.115(a) because IEPA failed to hold a public hearing as ABC requested, ABC presented no evidence and did not meet its burden to demonstrate that Granite City Works facility’s operations and permitted discharges under the Final Permit would violate the Act or any water quality standards or related regulations.

6. In the absence of any such violation by the facility, and considering the prejudice to U. S. Steel if the Final Permit is invalidated, the Board should instead allow U. S. Steel to continue operating under the Final Permit pending the outcome of the issue related to the public hearing ordered by the Board. After such hearing is conducted, if any is conducted, IEPA can determine whether any modification of the Final Permit is necessary.

7. In addition, the Board should reconsider its Order because it applied an incorrect standard of review, and should have applied an abuse of discretion standard to evaluate whether IEPA violated Section 309.115(a). Applying the proper abuse of discretion standard, the Board should find that IEPA did not abuse its discretion in finding that there was not a significant

degree of public interest in U.S. Steel's permit to warrant a public hearing and, thus, IEPA was justified in deciding not to hold a public hearing.

8. Moreover, applying either the abuse of discretion standard or the standard used in the Board Order, ABC did not satisfy its burden of showing facts and circumstances available to the Agency, at the time of its decision on whether to hold a hearing, demonstrated that there was a significant degree of public interest in the draft permit, such that IEPA should have held a public hearing. The Board should reconsider its Order to address this misapplication of existing law.

9. U. S. Steel hereby incorporates its Memorandum in Support of Amended Motion to Reconsider Order of January 26, 2007 filed currently herewith.

WHEREFORE, U. S. Steel requests that the Board reconsider its January 26, 2007 Order and grant all relief it deems fair and just.

Dated: March 9, 2007

Respectfully submitted,

**U. S. Steel Corporation - Granite City Works**

By: Carolyn S. Hesse  
One of Its Attorneys

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**UNITED STATES STEEL CORPORATION'S MEMORANDUM IN SUPPORT OF  
AMENDED MOTION TO RECONSIDER ORDER OF JANUARY 26, 2007**

Respondent, United States Steel Corporation - Granite City Works ("U. S. Steel"), pursuant to 35 Ill. Adm. Code §§ 101.520 and 101.902, moves the Board to reconsider its January 26, 2007 Order. In support of its Motion, U. S. Steel states as follows:

**INTRODUCTION**

The American Bottom Conservancy ("ABC") filed a third-party appeal of the Illinois Environmental Protection Agency's ("IEPA" or the "Agency") IEPA's issuance of the final NPDES permit issued to U. S. Steel's Granite City Works facility ("Granite City Works") on March 8, 2006 (the "Final Permit"). ABC appealed the terms of the permit and alleged that IEPA violated its administrative duties by denying ABC's request for a public hearing on the proposed permit. On September 21, 2006, the Board dismissed all substantive issues raised in ABC's petition except the request for a public hearing. On January 26, 2007, the Board entered an Opinion and Order (the "Board Order") in favor of ABC and found that IEPA should have held a public hearing before issuing the Final Permit. Because of IEPA's purported failure to hold a public hearing, the Board invalidated the Final Permit.

The Board should reconsider its invalidation of the Final Permit because ABC did not present any evidence to support such an invalidation and the Board's decision was erroneous. Section 39(a) of the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.* (the "Act") provides that it "shall be the duty of" IEPA to issue a NPDES permit where an applicant shows that its facility will not cause a violation of the Act, or its attendant water quality standards or regulations. Even though ABC presented no evidence and failed to meet its burden of proof that Granite City Works' operations and discharges under the Final Permit violate the Act or any water quality standards, the Board found that IEPA violated Section 309.115(a) of the Board's regulations because the Agency failed to hold a public hearing. The Board did not conclude that Granite City Works' operations and discharges under the Final Permit would cause a violation or that U.S. Steel had violated the Act or any regulation. In the absence of any such violation by U.S. Steel's Granite City Works operations, and considering the prejudice to Granite City Works if the Final Permit is invalidated, the Board should allow Granite City Works to continue operating under the Final Permit pending the outcome of the public hearing ordered by the Board, if the Board's substantive decision of January 26, 2007 is upheld. If a public hearing on the permit is conducted, IEPA can then assess whether any modification of the Final Permit is necessary in light of information obtained at the hearing.

In addition, the Board should reconsider its ruling that IEPA should have held a public hearing as requested by ABC because the Board applied the wrong standard of review in assessing ABC's claim for a public hearing. Specifically, the Board found that the standard of review was whether the issuance of the Final Permit without a public hearing will cause a violation of the Act or Board regulations. That standard, however, was incorrectly applied. If the standard were correctly applied to Section 309.115(a), the Board would first consider

whether IEPA considered the timely filed comments and made a decision on whether to hold a hearing. The Record shows that IEPA did consider the comments and whether to hold a public hearing and decided to not hold a hearing. SR. X, XII, and XIII.<sup>1</sup> Because the Agency decision on whether to hold a hearing is discretionary, the Board should consider whether IEPA's decision to not hold a hearing was an abuse of discretion. As provided by the Appellate Courts, the proper standard of review for determining whether a public hearing should have been held is whether IEPA abused its discretion in assessing whether there was a significant degree of public interest in the proposed NPDES permit to warrant holding a hearing. The Board should reconsider its Order based on its application of the improper standard of review, and find that IEPA did not abuse its discretion in deciding to issue the Final Permit without a public hearing. In addition, under either an abuse of discretion standard or the standard applied in the Board Order, ABC did not satisfy its burden of proof to show that facts and circumstances available to the Agency at the time of its decision on whether to hold a hearing demonstrated there was a significant degree of public interest in the proposed permit for Granite City Works to warrant holding a public hearing. Accordingly, the Board should reconsider its January 26, 2007 Order.<sup>2</sup>

### **BACKGROUND FACTS**

1. On October 14, 2002, U. S. Steel submitted an application to renew its NPDES permit to IEPA for its Granite City Works facility located in Granite City, Illinois. R. 135. This facility has had NPDES permits ever since such permits have been required. R. 554. After conducting a thorough analysis of the facility and its discharges into Horseshoe Lake, on

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<sup>1</sup> Citations of "R. \_\_\_," will be to the Administrative Record, "SR. \_\_\_," will be to ABC's Second Supplement to the Administrative Record, and "Trans. \_\_\_," will be to the Transcript from the November 20, 2006 hearing before the Chief Administrative Officer.

<sup>2</sup> On February 22, 2007, U. S. Steel filed a Motion to Reconsider. By the filing of its Amended Motion to Reconsider, U. S. Steel withdraws its previously-filed Motion.



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.

2. On January 17, 2005, Kathleen Logan Smith submitted a comment to IEPA on behalf of the Health & Environmental Justice - St. Louis (“HEJ”). R. 532. The letter raised a question about the permit allowing lead to be discharged into Horseshoe Lake. However, U.S. Steel does not use lead in its processes. R. 601. The increased limits that appear on paper are due to production changes and are consistent with calculations of allowable discharges under the effluent limitation guidelines and federal rules at 40 C.F.R. 420. *Id.* The letter did not identify any regulations or sections of the Act that would be violated if the Proposed Permit were issued. R. 532.

3. 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. R. 537-539. The January 18, 2006 letter provided numerous comments on issues that are unrelated to whether Granite City Work’s permit, if issued, would result in a violation of the Act or water regulations. ABC’s letter did not identify any provisions of the Act or regulatory standards for the protection of water quality that would be violated if the Proposed Permit was issued as drafted. R. 537-539.

4. On March 8, 2006, IEPA issued the Final Permit for U. S. Steel’s Granite City Works facility. R. 637.

5. On March 31, 2006, IEPA reissued the Final Permit to coincide with its issuance of the responses to the comments it received. R. 645, 648, 651-657.

6. On May 4, 2006, ABC filed by mail its Petition for Review alleging, among other things, that IEPA improperly denied ABC's request for a public hearing. Petition for Review, ¶¶ 27-29.

7. On September 21, 2006, the Board dismissed all issues raised in ABC's Petition except for ABC's request for a public hearing. ABC did not seek to amend its Petition to include the issues it raised in its timely filed comment letter.

8. On November 20, 2006, a hearing was held before the Board Hearing Officer on whether IEPA improperly denied ABC's request for a public hearing.

9. 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 Section 309.115(a) of the Board's regulations. *See* Jan. 26, 2007 Order, p. 14. Based on its ruling that IEPA improperly failed to hold a public hearing, the Board found that "the permit issued by the Agency on March 31, 2006, to U.S. Steel for its steelmaking facility at 20<sup>th</sup> and State Streets, in Granite City, Madison County is invalid." *Id.*<sup>3</sup>

## ARGUMENT

### **I. Standard of review for motion to reconsider.**

Under the standard for a motion to reconsider, the Board should reconsider the rulings in its Order as errors in the application of existing law under the Act. A party can file a motion to reconsider "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or **errors in the [Board's] previous application of existing law.**" *People v. Community Landfill Co, Inc.*, PCB No. 03-191, 2006 Ill.

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<sup>3</sup> According to 35 Ill. Adm. Code § 101.520(a), "Any motion for reconsideration . . . of a final Board order must be filed within 35 days after the receipt of the order." U. S. Steel received a copy of the Board's Order on February 5, 2007. Because the deadline for filing a motion to reconsider is March 12, 2007, this Amended Motion is timely filed.

Env. LEXIS 323, \*2-3 (June 1, 2006) (emphasis added). Moreover, a “motion to reconsider may specify ‘facts in the record which were overlooked.’” *Id.* (quoting *Wei Enterprises v. IEPA*, PCB No. 04-23, slip op. at 5 (Feb. 19, 2004)).

**II. The Board should reconsider its invalidation of the Final Permit because there is no evidence that U. S. Steel’s operation of the Granite City facility under the Final Permit will cause a violation of the Act or its regulations.**

Under Section 39(a) of the Act, “[w]hen the Board has by regulation required a permit for the construction, installation, or operation of any type of facility . . . , the applicant shall apply to the Agency for such permit and it **shall be the duty** of the Agency to issue such a permit upon proof by the applicant that **the facility** . . . will not cause a violation of this Act or of regulations hereunder.” 415 ILCS 5/39(a) (emphasis added). Under this section, U. S. Steel timely filed an application with IEPA for an NPDES permit and met its burden for the issuance of such a permit. Accordingly, IEPA was required to issue the Final Permit to Granite City Works because the permitted discharges from the facility will not cause a violation of the Act or its regulations. IEPA met its duty and issued the Final Permit.

The standard that applies to whether the Agency is required to issue a permit is whether the facility will cause a violation of the Act or applicable regulations. *See* 415 ILCS 5/39(a). The Board misread Section 39(a) and stated in its Order on page 12 that “A petitioner in a third party NPDES permit appeal bears the burden of establishing that the permit as issued would violate the Act or Board regulations.” While the Board correctly noted that Petitioner has the burden of proof, the Board incorrectly applied that burden to how the permit was issued by IEPA. The Board then erroneously concluded that “the Agency’s decision not to hold a public hearing prior to the issuance of the U.S. Steel permit violates Section 309.115(a) of the Board’s regulations. Accordingly, . . . the permit as issued would violate the Act and Board

Regulations. . . .” Jan. 26, 2007 Order, P. 14. (emphasis added) The Board’s misreading of the plain language of Section 39(a) of the Act is in error. *See People v. Whitney*, 188 Ill. 2d 91, 97, 720 N.E.2d 225, 228 (Ill. 1999) (“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).

Despite U. S. Steel’s compliance with section 39(a), the Board’s Order invalidated the Final Permit. That invalidation should be reconsidered and reversed because the Board’s decision was predicated on the Board’s view that IEPA violated section 309.115(a) and, thus, the permit violated the Board’s regulations. At the hearing of this case, ABC did not present any evidence that any issue in the January 17, 2005 or January 18, 2005 comments would demonstrate that the operation of the Granite City facility would cause a violation of the Act or its regulations thereunder. *See* R. 532, 537-539.<sup>4</sup> Specifically, neither the January 17, 2005 nor January 18, 2005 letters raise any issues alleging that there is a potential for the regulated discharge to exceed established water quality standards if the Proposed Permit were issued as drafted. Instead, the comments discussed issues unrelated to Granite City Work’s operations under 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. Contrary to the implications contained in the comments, U. S. Steel

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<sup>4</sup> In its Order, the Board properly found that as a third-party petitioner ABC was required to show that it raised the issues contained in the petition during the public comment period. Thus, the only evidence from ABC that could be considered was the January 17 and 18, 2005 letters because those were the only documents submitted to IEPA during the public comment period. *See* Jan. 26, 2007 Order, pp. 12-13; *see also* 415 ILCS 5/40(e)(2) (a third-party petition “shall include . . . a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held; . . .”).

does not use lead as an additive in its processes (R. 601),<sup>5</sup> and HEJ failed to provide evidence to support its contention concerning lead discharges to the Lake. In other words, the comment may involve an issue with regard to Horseshoe Lake generally, but it did not show that any particular provision in the Proposed Permit or the operation of Granite City Works would cause a violation of the Act or its regulations.

Similarly, the January 18, 2005 letter states that Horseshoe Lake is impaired for various pollutants. That issue, however, is properly addressed through the process related to impaired waters and the development of total maximum daily loads under section 303(d) of the federal Clean Water Act, and is irrelevant to whether the issuance of a permit may allow a facility to violate a provision of the Act or its regulations. The January 18, 2005 letter also raises the compliance history of Granite City Works with its permit limits by citing information from an U.S. EPA Enforcement and Compliance Online (ECHO) report. That, 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.")<sup>6</sup>

In addition, ABC alleged that fish were caught with melanoma in Horseshoe Lake. R. at 537. Assuming *arguendo* that the allegation is true, ABC presented no evidence that Granite City Works discharges cause such melanoma, or that discharges under the Final Permit would violate the Act or its regulations. ABC did not establish an increased rate of melanoma in Horseshoe Lake that could be connected to potential discharges under the Proposed Permit. As a

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<sup>5</sup> Specifically, IEPA found that "The facility does not use lead, and the increased load limits are due to increased production." R. 601.

<sup>6</sup> In addition, the information in the ECHO report can be misleading, because a single exceedance 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 erroneously conclude that a facility with a violation in a single sample for a single parameter was out of compliance for the whole quarter.

third party challenging the Final Permit, under Section 40 (e)(3) of the Act, ABC had the burden of demonstrating such a causal relationship and ABC failed to meet that burden. Accordingly, these comments did not demonstrate a need for a hearing and the Final Permit should not have been invalidated.

ABC's comment letter charged that "Canteen Lake, which is part of the same lake, but privately owned, tested high in cadmium." R. 537. Again, this comment is irrelevant to the issuance of the Final Permit; cadmium was not detected by the facility in its effluent samples, "nor was any [cadmium] in 19 Agency samples." R. 342. IEPA concluded "that no regulation of cadmium is necessary and that no monitoring beyond the routine requirements is needed." *Id.*

ABC's comment letter raised the issue of lead in the sediments of Horseshoe Lake and referred to a study by Professor Richard Brugam. However, ABC did not provide a copy of the study of Horseshoe Lake sediments and failed to meet its burden as a third party challenging the Final Permit. Further, as mentioned above, Granite City Works does not use lead in its process and the lead concentrations listed in the permit are based on the applicable regulatory provisions.

ABC also commented on ammonia discharges to Horseshoe lake and again failed to demonstrate that the permitted discharges would cause a violation of water quality standards. In fact, the ammonia discharge limits reflected water quality criteria that were used to develop standards. SR. X. Further, part of the reason the discharge levels changed from the prior permit is that the Board revised the ammonia water quality standards for Horseshoe Lake. *Id.*

The lack of connection between ABC's comments and the Final Permit, and the failure of ABC to demonstrate that the facility would violate the Act or regulations demonstrates that ABC did not meet its burden of proof.<sup>7</sup> Because there was no evidence presented by ABC that the

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<sup>7</sup> The Final Permit load limits for some parameters changed: lead, zinc (daily maximum) and ammonia increased because the limits for lead and zinc are based on the federal categorical limits at 40 C.F.R. 420, which are

permitted discharges from Granite City Works' facility would cause a violation of the Act or its regulations, the Final Permit should not be invalidated. Instead, the Board should reconsider its Order invalidating the Final Permit and allow Granite City Works to continue operating under the Final Permit pending resolution of all motions to reconsider and appeals, if any are taken, or the outcome of a public hearing if the Board's January 26, 2007 decision is upheld.

If a public hearing is ultimately held, IEPA can then determine whether the Final Permit needs to be modified as the result of any comments or issues raised at the public hearing. Such a remedy is not only legally proper under section 39(a) of the Act, but it is also a necessary practical solution for addressing the permitted discharge at Granite City Works. Granite City Works has been operating under the Final Permit for almost a year, and has made modifications to its facility and operations as a result of the requirements contained in the Final Permit. Unless the Board reconsiders its Order and allows Granite City Works to continue operating under the Final Permit pending the outcome of a public hearing, U. S. Steel will have to operate under its old permit, which would be administratively continued. *See* 415 ILCS 5/12(f), 40 CFR 122.6(d). The Final Permit contains a number of improvements over the old permit and if U. S. Steel had to go back to the old permit, U. S. Steel would have to deconstruct certain modifications to comply with its previous NPDES permit until IEPA issues a new permit after the public hearing. If IEPA decides to reissue a permit with the same provisions as the Final Permit, U. S. Steel will

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production-based, and because the ammonia water quality standard in Horseshoe Lake changed since the prior permit was issued. R. 601. However, the 30-day average load limit for zinc decreased. It should also be noted that the concentration-based limits were set at levels that took into account meeting 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. For example, the Final Permit contains a new 30-day average concentration limit for zinc which is 0.17 ppm, whereas, the old permit had instead a daily maximum limit of 1.0 ppm for zinc.

then have to construct the modifications again to address the new permit.<sup>8</sup> The Final Permit also specifies use of a method to test for cyanide that is more accurate than the test method specified in the prior permit. If U. S. Steel were forced to go back to the previous permit, it would have to use the less accurate test method. The Board's invalidation of the Final Permit should be reconsidered and reversed.

**III. The Board Order applied the wrong standard of review for determining whether IEPA should have held a public hearing.**

In its Order, the Board held that the standard of review was that "American Bottom must establish that the permit issued to U.S. Steel will violate the Act or Board regulations in order for the Board to find for American Bottom in this matter." Jan. 26, 2007 Order, p. 13. Further, the Board held that "the Board does not apply an 'abuse of discretion' standard as advocated by U.S. Steel." *Id.* Both holdings were improper and should be reconsidered.

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. IEPA's decision to hold a public hearing "is a discretionary decision to be made by the Agency." *Borg-Warner Corp. v. Mauzy*, 100 Ill. App. 3d 862, 867, 427 N.E.2d 415, 419 (3d Dist. 1981). The *Borg-Warner* Court further explained the standard for demonstrating that IEPA should allow a public hearing, stating that 35 Ill. Adm. Code 309.115:

establishes that the party requesting a public hearing has the burden of showing why it is warranted. Certainly, agency action

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<sup>8</sup> For example, U. S. Steel constructed piping to transport landfill leachate to its treatment system. This piping was constructed in reliance on the issuance of the Final Permit, which includes a new internal monitoring point. If the Final Permit is invalidated, U. S. Steel will be forced to deconstruct the piping, and transport the leachate with vehicles to the treatment system, as occurred under the prior permit. SR. I and II, R. 302. If IEPA then issues a new permit with the internal monitoring point back in place, U. S. Steel will have to re-construct the piping. All of these activities would have to be done at a safety risk to U. S. Steel contractors who would be doing the deconstruction and re-construction in a confined space and at a cost to the company. Further, the change in how the leachate arrives at the treatment plant does not affect the quality of U. S. Steel's discharges to Horseshoe Lake. The treatment system has been accepting the landfill leachate for years. *See* R. 302.



on a decision is reviewable, subject to an abuse of discretion standard, but the availability of review over the determination does not alter the essentially discretionary nature of the determination.

*Id.*; *Marathon Oil Co. v. IEPA*, PCB No. 92-166, 1994 Ill. ENV. LEXIS 488, \*18-19 (IPCB, March 31, 1994) (“Whether an Agency hearing is to be held in an NPDES permit review is discretionary with the Agency, as has been declared by the [*Borg-Warner*] court.”)<sup>9</sup> Accordingly, IEPA’s decision to not grant ABC’s request for a public hearing should have been reviewed by the Board for an abuse of discretion.

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.”)

Applying the proper abuse of discretion standard as set forth by the Appellate Courts, the Board should find that IEPA did not abuse its discretion in finding that there was not a significant degree of public interest in the Proposed Permit, and, thus, IEPA properly decided not to hold a public hearing on the Proposed Permit. Further, the language in the

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<sup>9</sup> The *Borg-Warner* Court interpreted former Water Rule 909(a), the language of which was identical to 35 Ill. Adm. Code 309.115(a). Accordingly, the Court was aware of the word “shall” in the regulation, upon which ABC heavily relies in arguing for a nondiscretionary standard of review. Despite the “shall” in the regulation, the Court still ruled that IEPA’s decision to hold a public hearing is reviewed for an abuse of discretion. *Borg-Warner*, 100 Ill. App. 3d at 867, 427 N.E.2d at 419. Not surprisingly, ABC wholly ignores the *Borg-Warner* case.

Section 309.115(a)(1) upon which ABC appears to rely is the parenthetical phrase “instances of doubt shall be resolved in favor of holding the hearing.” Yet, ABC failed to point to any information in the record that indicates any doubt on the Agency’s part regarding whether a hearing should be held. Rather, the record supports the fact that the Agency considered ABC’s timely filed comments and concluded that, because those comments did not raised issues that would lead to changes in the draft permit, no changes were needed in the Proposed Permit. SR. X. Accordingly, the Agency correctly determined that a hearing on the Proposed Permit was not necessary because no information would be gained that would result in a change in the permit. “The comments do not provide any additional information the Agency would use for inclusion in the reissued permit.” *Id.* IEPA also determined that “the issues raised by the 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.” *Id.* Thus, the Final Permit should be issued without holding a public hearing. *Id.*

Further, the record supports the fact that the Agency planned to meet with ABC and that ABC cancelled the meeting at the last minute. *See* SR. XII, XIII, XV, and XXII. Offering to meeting with ABC satisfied ABC’s request for a meeting if the hearing request was denied. *See* R. 535. Because ABC’s comment letter gave the alternative of a meeting if no hearing was held, the Agency did not abuse its discretion by deciding to not hold a hearing.

**IV. ABC did not prove that there was a significant degree of public interest in the Proposed Permit.**

Applying either the abuse of discretion standard or the standard used in the Board Order, ABC did not satisfy its burden of showing that there was a significant degree of public interest in the Proposed Permit, such that IEPA should have held 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.) Section 309.115(a)(2) provides that: “Any such request for a public hearing shall be filed within the 30-day public comment period and shall indicate the interest of the party filing such a request and the reasons why a hearing is warranted.” In other words, IEPA’s determination of whether a request for public hearing is warranted is limited to the information contained any public hearing requests the Agency receives during the public comment period. As the Board correctly noted, on page 5 of its Order, “review of permit appeals is limited to information before the Agency during the Agency’s statutory review period.” Order p. 5. Accordingly, ABC was required to demonstrate during the public comment period 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 Proposed Permit. Information submitted after the close of the public comment period should not be considered in IEPA discretionary determination of whether a public hearing is warranted and under Section 40(e)(2) of the Act, is not properly before the Board in its review of IEPA’s decision.

**A. The evidence presented by ABC did not demonstrate a significant degree of public interest specific to the Proposed Permit.**

In the January 17, 2005 and January 18, 2005 comments at issue, there is no evidence that the issuance of a NPDES permit to U. S. Steel would be improper or in violation of the Act or any applicable regulatory standards. Instead, the comments discuss issues unrelated to the Proposed Permit. As mentioned above, the January 17, 2005 and January 18, 2005 letters *comment on permitted discharges of lead from Granite City Works*. Neither letter stated that the 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 and as discussed elsewhere, U. S. Steel does not use lead in its processes. R. 601. Neither comment letter provided evidence to support their contentions about lead discharges to the Lake and neither identified any such evidence that could reasonably be expected if a public hearing were held.

Similarly, the January 18, 2005 letter from ABC states that Horseshoe Lake is impaired for various pollutants. That issue, however, is properly addressed through the 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. It should be noted that ABC was aware of and did participate in the public hearings that were held on this issue. Trans. 84-86. 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.")

In addition and as mentioned above, the January 18, 2005 letter commented 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 because there was no evidence that the comment regarding fish with melanoma was connected to Granite City Works discharges under its NPDES permit. No expert or scientific testimony was submitted by ABC during the public comment period that would make such a connection. ABC failed to submit any evidence that could reasonably be expected to be presented if a public hearing were held that (1) fish in Horseshoe Lake have a higher incidence of melanoma than other fish or (2) there is any connection between the alleged melanoma in fish and U. S. Steel's effluent. ABC's unsubstantiated comments and failure to connect those comments to Granite City Works proposed permit were not sufficient to demonstrate that IEPA should have held a public hearing on the Proposed Permit.

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. Because U.S. Steel is not a source of cadmium, the Agency properly 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 properly declined to hold a public hearing on the Proposed Permit. Simply put, the timely filed comments did not raise issues related to the Proposed Permit. Accordingly, the Board should reconsider its Order.

**B. ABC did not demonstrate a significant degree of public interest.**

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 . . ."

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.<sup>10</sup> 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 preparing the letter. Moreover, only ABC deemed IEPA's denial of the public hearing request sufficiently important

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<sup>10</sup> 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 their comments or testimony can be used to support ABC's claim that a public hearing should have been held.

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.

In the end, ABC did not present sufficient evidence to demonstrate that IEPA abused its discretion or violated the Act or its regulations in denying ABC's public hearing request, and, thus, the Board should reconsider its Order.

**CONCLUSION**

For the foregoing reasons, U. S. Steel requests that the Board reconsider its January 26, 2007 Order and grant all relief it deems fair and just.

Dated: March 9, 2007

Respectfully submitted,

**U. S. Steel Corporation - Granite City Works**

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