

ORIGINAL
11/18/07

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

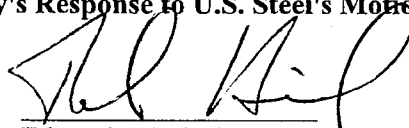
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| AMERICAN BOTTOM CONSERVANCY |) | |
| |) | |
| Petitioner, |) | PCB No. 2006-171 |
| |) | (NPDES Permit Appeal) |
| v. |) | |
| |) | |
| ILLINOIS ENVIRONMENTAL |) | |
| PROTECTION AGENCY, and UNITED |) | |
| STATES STEEL CORPORATION – |) | |
| GRANITE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

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PLEASE TAKE NOTICE that on June 18, 2007, there was filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of **American Bottom Conservancy's Response to U.S. Steel's Motion for Stay Pending Appeal.**



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**AMERICAN BOTTOM CONSERVANCY'S RESPONSE TO
U.S. STEEL'S MOTION FOR STAY PENDING APPEAL**

Petitioner, American Bottom Conservancy ("ABC"), respectfully asks the Illinois Pollution Control Board ("Board") to deny United States Steel Corporation's ("U.S. Steel") motion for a stay pending appeal.

I. INTRODUCTION

On January 26, 2007, the Board entered an Opinion and Order ("Board Order") holding that the Illinois Environmental Protection Agency's ("IEPA") failure to hold a public hearing prior to issuing a NPDES permit for U.S. Steel's Granite City Works violated the Board's regulations. The Board concluded that the record demonstrated significant public interest in the subject permit and that its regulations required that a public hearing be held. Therefore, the Board invalidated the permit.

On March 9, 2007, U.S. Steel requested that the Board reconsider its decision. The Board denied U.S. Steel's Motion to Reconsider on May 3, 2007. U.S. Steel subsequently petitioned for review of the Board's orders in the Appellate Court of the

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Fifth District. On May 30, 2007, U.S. Steel filed its motion to stay the Board's orders of January 26, 2007 and May 3, 2007, pending the outcome of its petition for review.

A stay is not warranted in this case because U.S. Steel has not shown a likelihood of success on the merits. U.S. Steel makes only one argument as to its likelihood of success: that the Board applied an incorrect standard of review when it decided ABC's appeal. This argument was previously rejected when the Board denied U.S. Steel's motion to reconsider. The Illinois Supreme Court has held that the Board is not constrained by the narrow, deferential standard of review suggested by U.S. Steel when reviewing decisions of the IEPA. *IEPA v. IPCB*, 503 N.E. 2d 343, 345 (Ill. 1986).

Granting a stay would also harm the interests of ABC because the new permit allows illegally high levels of various pollutants to be discharged to Horseshoe Lake. Maintaining this status quo might prejudice IEPA's decision when the permit is reconsidered after a public hearing. Finally, U.S. Steel has not provided concrete evidence of the harm it would suffer if a stay is not granted. The affidavit offered by the company does not tie specific actions or costs to the Board's invalidation of the new permit.

II. ARGUMENT

A. Motion for Stay Factors

Granting a stay is a discretionary act that involves the consideration of "numerous different factors." *Stacke v. Bates*, 562 N.E.2d 192, 196 (Ill. 1990). The factors that the Illinois Supreme Court considered in *Stacke* are 1) "whether a stay is necessary to secure the fruits of the appeal in the event the movant is successful," 2) "the movant's likelihood of success on the merits," and 3) "the likelihood that the respondent will suffer hardship."

Id. at 196-97. The movant must show that "the balance of the equitable factors weighs in favor of granting the stay." *Id.* at 198. Despite the "numerous different factors" that may be considered, the Court held that there is one factor which must be considered: "the movant . . . *must* . . . present a substantial case on the merits." *Id.* (emphasis added).

U.S. Steel has not shown a likelihood of success on the merits nor has it shown that the balance of equitable factors tilts in its favor. Accordingly, the Board should deny U.S. Steel's motion for a stay.

B. U.S. Steel Has Not Shown a Likelihood of Success on the Merits of Its Petition for Review.

A "substantial case on the merits" must be put forward to support the granting of a stay pending the outcome of an appeal. U.S. Steel argues that the Board applied an incorrect standard of review when it considered ABC's challenge to the company's NPDES permit. It asserts that the Board should have applied the narrow, deferential "abuse of discretion" standard of review. However, this contention has been rejected by Illinois' highest court and the Board already concluded that this argument lacks merit when it denied U.S. Steel's motion for reconsideration.

The Illinois Supreme Court rejected an argument nearly identical to that U.S. Steel asserts here twenty-one years ago in *IEPA v. IPCB*, 503 N.E.2d 343 (Ill. 1986). The Supreme Court held that when the Board acts in its quasi-judicial role in relation to permits issued by IEPA it is not constrained by a narrow standard of review. *Id.* at 345. Only in situations where the underlying agency decision was made as part of a rigorous adversarial proceeding might the Board owe deference to the decisionmaker. *Id.*¹

¹ At the time *IEPA v. IPCB* was decided, only permit applicants were authorized by the Act to appeal IEPA's permitting decisions. The Supreme Court's reasoning applies equally to the subsequently authorized third-party appeals of NPDES permits.

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Like the situation in *IEPA v. IPCB*, IEPA's decision not to hold a public hearing for the U.S. Steel NPDES permit was made without the formalities of an adversarial proceeding below. In fact, IEPA never even provided ABC or other commentators with an explanation of why it decided not to hold a hearing. The unexplained decision by IEPA to not hold a public hearing on the U.S. Steel permit should not be accorded a deferential standard of review.

U.S. Steel relies on the Third District's decision in *Borg-Warner v. Mauzy*, 427 N.E.2d 415 (3rd Dist. 1981), to argue that the Board must apply an abuse of discretion standard of review. That case is clearly distinguishable in that it did not involve an appeal to the Board. Instead, the plaintiff company filed suit directly in circuit court, arguing that it was entitled under the Illinois Administrative Procedure Act to an "adjudicatory hearing" before IEPA made a decision on its permit application. *Id.* at 417. The Third District's commentary about the Board's public hearing regulation was thus made in the context of *judicial* review and the court did not hold that the *Board* must defer to IEPA's decision on whether or not a public hearing is required. *Id.* at 417. In fact, the court noted that the Board applies *de novo* review in permit appeals. *Id.* at 420. As acknowledged by the Supreme Court in *IEPA v. IPCB*, courts and the Board apply different standards of review. *IEPA v. IPCB*, 503 N.E.2d at 345-46.

The Board's regulation requiring public hearings when there is significant interest in a permit cannot be brushed aside as urged by U.S. Steel. The Board has broad authority under the Act to adopt regulations to "implement" the environmental standards of Illinois. 415 ILCS § 5/5(b). It is also within the Board's authority to ensure that these regulations are complied with through its quasi-judicial powers. *Id.* § 5/40. These

statutory provisions do not require the Board to defer to IEPA's determination not to hold a public hearing. The Board's expertise in the environmental field and its responsibilities under the Act support its use of the *de novo* standard of review.

C. A Stay will Harm the Interests of ABC and Members of the Public Who Use Horseshoe Lake.

Allowing the new permit to remain in effect harms the interests of ABC because it allows illegally high levels of various pollutants—including zinc, lead, cyanide and ammonia—to be discharged into Horseshoe Lake.

The new permit allows the discharge of illegally high levels of heavy metals into the Lake. Under the new permit, U.S. Steel may discharge up to 4,380 pounds of zinc per year and up to 2,044 pounds of lead each year.² (AR 652). The Lake's sediment already contains high levels of zinc as indicated by its presence on the state's impaired waters list in recent years, including 2006.³ Furthermore, a study performed by Professor Richard Brugam of Southern Illinois University-Edwardsville discovered high levels of heavy metals—including zinc and lead—in the bottom sediment of the Lake. (AR 604-05). Although Illinois has no numeric criteria for heavy metals in sediment, the narrative criteria prohibit "bottom deposits" that are of "other than natural origin." 35 Ill. Admin. Code § 302.203 (2005). IEPA did not impose limits in U.S. Steel's permit to prevent additional contamination of the Lake's sediments with heavy metals.

The permit also impermissibly allows U.S. Steel to use so-called "background credits" for zinc. The use of "background credits" allows U.S. Steel to subtract the

² These figures are calculated using the permit's 30-day average for the daily load limit. (AR 652). For zinc, 12 pounds per day X 365 days = 4,380 pounds per year. For lead, 5.6 pounds per day X 365 days = 2,044 pounds per year.

³ See, 2006 list of 303(d) Listed Waters, available at <http://www.epa.state.il.us/water/tmdl/303-appendix/appendix-a.pdf> (identifying zinc from "industrial point source discharge" as a source of impairment).

amount of zinc in its intake water from the Mississippi River when determining whether it is meeting the limits in its permit. (AR 521, 654 (Special Condition 6)). Federal and state regulations prohibit use of background credits where pollution is drawn from one body of water and put into another, such as the situation at the U.S. Steel plant where water is drawn from the Mississippi River and dumped into Horseshoe Lake. *See* 40 C.F.R. § 122.45(g)(4) (2005); 35 Ill. Admin. Code § 304.103 (2005). The use of these credits allows U.S. Steel to discharge zinc in amounts greater than the already high loads allowed by the permit.

Another flaw in the permit is that it allows unlawfully high discharges of cyanide. The permit writer identified 0.0052 mg/L as the correct 30-day average limit for cyanide in order to protect water quality. (AR 475-76). However, the final permit sets the 30-day concentration limit for cyanide at 0.01mg/L—a figure almost double what the permit writer identified was necessary to protect water quality. (AR 652). Rounding up the figure from 0.0052 to 0.01 mg/L is unlawful and will have detrimental effects on water quality.

Finally, the new permit set unlawfully high effluent limits for ammonia. The new permit allowed a more lenient limit for the month of March, when young aquatic life is particularly susceptible to such pollution. (AR 638). This limit was added only after U.S. Steel indicated that it could not meet a tighter limit proposed in an earlier draft of the permit. (AR 507).

The issues identified above are only some of those that ABC intends to raise when a public hearing is finally held on the U.S. Steel NPDES permit. These flaws contradict U.S. Steel's statement that "even if a public hearing is held on [the] permit, the new

permit would contain the same conditions as the permit that the Board invalidated." *U.S. Steel Memo in Support*, p.2. The flaws also show the harm that would accrue to ABC if the new permit is left in place through a stay.

D. U.S. Steel Has Not Proven that It Will Suffer Substantial Hardship if a Stay is Granted.

The central argument in U.S. Steel's motion seems to be that it might have to deconstruct some pipes that it built after issuance of the new permit in March 2006. However, the evidence offered by U.S. Steel in support of this contention is unclear at best and does not justify the issuance of a stay.

U.S. Steel submitted an affidavit from its environmental manager, Carl Cannon, to support its allegation that hardship will result if a stay is not granted. In his affidavit, Cannon states that U.S. Steel "modified" piping after issuance of the new permit to "facilitate" transport of leachate from the landfill to the company's wastewater treatment lagoon.⁴ *Cannon Aff.*, ¶ 3. However, the affidavit is so general in nature that it is unclear what if any work will have to be performed if a stay is not granted, or which costs were directly related to the changes made in reliance on the new permit. The affidavit does not state precisely what items of work would be required for the company to return to operating under the previous permit. Instead, it catalogues projected costs of various activities without tying those activities to the absence of a stay.

U.S. Steel also asserts that no harm to the environment will result if the landfill leachate is transported by pipes to the company's wastewater lagoon because it was previously disposed of at the lagoon. *U.S. Steel Memo in Support*, pp.4-5. The record

⁴ The landfill was previously part of the steelmaking facility, but U.S. Steel decided not to purchase the landfill when it acquired the larger facility from National Steel in 2003. (AR 292). Its reluctance to purchase the landfill was apparently related to the possible presence of hazardous waste. *Id.*

contradicts U.S. Steel's motion, however, as to where this leachate has gone in the past. A memo prepared by U.S. Steel that is included in the record indicates that the leachate was trucked to an "off-site" disposal facility after concerns were raised about the presence of hazardous waste in the landfill. (AR 292). Oddly – in light of the potential hazardous waste – the "internal outfall" to measure the landfill leachate that was added in the most recent permit does not require monitoring for any pollutants, only the reporting of flow data. (AR 653).

III. CONCLUSION

U.S. Steel has not met the test for the granting of a stay pending the outcome of its petition for review. It has not demonstrated a likelihood of success on the merits nor has it shown that the balance of equitable factors weighs in favor of granting a stay. To the contrary, the company has not brought forward any new legal arguments and has not offered specific information as to how it will be harmed if a stay is not granted. For the foregoing reasons, ABC requests that the Board deny U.S. Steel's motion.

Respectfully submitted,



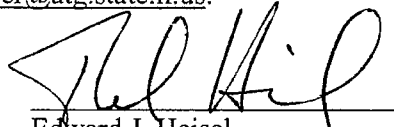
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Certificate of Service

I, Edward J. Heisel, certify that on June 18, 2007, I filed the above **AMERICAN BOTTOM CONSERVANCY'S RESPONSE TO U.S. STEEL'S MOTION FOR STAY PENDING APPEAL** electronically with the Clerk of the Pollution Control Board and with Carol Webb, Hearing Officer, at webbc@ipcb.state.il.us. In addition, I served copies of the foregoing electronically upon Sanjay K. Sofat, counsel for respondent Illinois Environmental Protection Agency, at Sanjay.Sofat@epa.state.il.us, and Carolyn Hesse, counsel for respondent United States Steel Corporation – Granite City Works, at Carolyn.hesse@btlaw.com. A copy was also sent electronically to Rachel Hoover of the Illinois Attorney General's Office at rhoover@atg.state.il.us.



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