BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING

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PLEASE TAKE NOTICE that on December 10, 2008, there was filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois a copy of the **Petitioner's Reply Brief on Remand.**

Respectfully submitted

____/s/____________________________

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REPLY BRIEF OF PETITIONER AMERICAN BOTTOM CONSERVANCY ON REMAND

I. INTRODUCTION

Thousands of words later, neither the Illinois Environmental Protection Agency (IEPA or Agency) nor the United States Steel Corporation (US Steel) can refute the central fact of this case: while the governing regulation required IEPA to base its decision whether to hold a public hearing solely on "significant public interest in the permit," 35 Ill. Adm. Code § 309.115(a)(1), IEPA did not base its decision to deny the public hearing requests on considerations of the public interest. The Agency paid no heed to the commenters' demonstration of the public interest in the draft U.S. Steel permit. IEPA offered no contemporaneous explanation of its decision to deny the public hearing requests, and in this appeal belatedly offers several irrelevant reasons for that decision. By ignoring the governing public interest test, IEPA made an arbitrary decision, without using conscientious judgment, and thereby abused its discretion. By acting as if it had unfettered discretion, IEPA ignored the law and abused its discretion under the governing regulation.

II. IEPA BASED ITS DECISION TO DENY THE PUBLIC HEARING REQUESTS ON FACTORS OTHER THAN THE PUBLIC INTEREST IN THE PERMIT. IEPA THEREBY ABUSED ITS DISCRETION.

One indication of an abuse of discretion is where an agency makes "an arbitrary decision, without using conscientious judgment." *United States Steel Corp. v. Illinois Pollution Control Board*, 384 Ill.App.3d 457, 465 (2008) ("*U.S. Steel*"). A decision is arbitrary when the agency "relies on factors that the legislature did not intend for the agency to consider." *Pollachek v. Department of Professional Regulation*, 367 Ill. App. 3d 331, 342 (2006); *Greer v. Illinois Housing Development Authority,* 122 Ill. 2d 462, 505 (1988).

In this case, the governing regulation, 35 Ill. Adm. Code § 309.115(a)(1), required IEPA to base its public hearing decision on a public interest determination. As the Appellate Court stated with respect to the identically-worded predecessor to that regulation:

> It is apparent from the language of this Rule that the decision as to whether to hold a public hearing is to be made by the Agency, **based upon its determination** as to the existence of a **significant degree of public interest in the permit** or group of permits.

Borg-Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 867 (1981) (emphasis supplied). In this case, IEPA made no such determination. Instead, IEPA based its decision on factors other than the degree of public interest in the permit.

A. The Record Contains No Indication That IEPA Considered the Degree of Public Interest in the Permit in Denying the Public Hearing Requests.

In its response to the commenters who requested a public hearing, IEPA offered no explanation of its denial of their requests. (AR 645-647 (Response to Comments of Health and Environmental Justice) and 648-650 (Response to Comments of American

Bottom Conservancy et al.[1])) In fact, commenters had to assume that their public hearing requests were denied by virtue of the fact that IEPA issued the US Steel permit without holding a public hearing.

Looking beyond IEPA's response to comments to the administrative record of its decisionmaking regarding the U.S. Steel permit, one searches in vain for references to "public interest" except where the language of the regulation is quoted or paraphrased. In its brief, IEPA argues that three documents reflect the Agency's evaluation of the public hearing request. (IEPA 11) The first, the one-page Frevert memo (addressed in detail in Petitioner's opening brief on remand), considers summarily the substance of the comments from the Agency's perspective but contains absolutely no discussion of the sole factor relevant to the public hearing regulation – whether there was significant public interest in the permit. (C. 286). The second, a memorandum by permit writer Beth Burkard, notes the public hearing requests, acknowledges the commenters' concerns that the permit would authorize increased discharges of lead and ammonia, and indicates as a recommended "action" item: "possible public meeting or hearing." Beyond that, there is no discussion of whether the comments reflected public interest in the permit. (AR 549-552; see also AR 545-546) The third is the IEPA's response to comments which, as noted above, does not even acknowledge the public hearing requests, let alone explain why they were being denied. Nor does it contain any discussion of the extent of public interest in

[1] Citations to IEPA's record are designated "AR __"; citations to the transcript of the Board hearing that took place on November 20, 2006 are designated "Tr. __"; citations to the Board's administrative record are designated "C __"; citations to Respondent U.S. Steel's response brief on remand are "USS __"; citations to IEPA's response brief on remand are "IEPA __." The "C" documents include several that were filed with Petitioner's Second Motion to Supplement the Record (Nov. 6, 2006), and were therefore included in the record filed by the Board with the Appellate Court. They do not have "C" numbers on them, and have been hand-labeled to correspond to the designations given by the Board in its filing with the Appellate Court. Attached hereto, for the convenience of the Board, are two Appendices containing all record documents (one AR and the other C) cited in Petitioner's opening and reply briefs on remand.

the permit. (AR 645-650) In short, and as discussed more fully below, IEPA effectively concedes that it based its decision to deny the public hearing on factors other than the extent of public interest in the permit.

U.S. Steel offers the fully-circular reasoning that because IEPA denied the public hearing requests, it must have determined that significant public interest did not exist. (USS 28-29). This reasoning, devoid of a scintilla of support in the record, cannot stand. "[A]dministrative agencies should articulate the reasons for their decisions and … agency decisions should be based on the evidence contained in the record." *Castillo v. Human Rights Comm'n*, 159 Ill.App.3d 158, 163 (1987) (internal citations omitted).

U.S. Steel suggests that IEPA's failure to base its hearing denial decision on a public interest analysis can be cured by the hollow remedy of leaving the permit intact and remanding to enable IEPA to write a post-hoc explanation of its reasons for denying the public hearing. (USS 29, fn 8) That suggestion misses the heart of Petitioner's argument: IEPA violated the law by issuing the US Steel permit without holding a public hearing, as required in this case under 35 Ill. Adm. Code § 309.115(a)(1). A public hearing was required under that regulation because IEPA abused its discretion in denying public hearing requests that demonstrated significant public interest in the permit. The principal proof of IEPA's abuse of discretion is that it based its decision to deny the permit on factors other than significant public interest in the permit. See *Pollachek* and *Greer*, *supra* (decision is arbitrary when agency relies on factors different from those required by law).

B. IEPA and U.S. Steel Attempt to Justify the Hearing Denial Decision Based on Factors Other than the Degree of Public Interest in the Permit.

EPA and U.S. Steel justify the Agency's decision not to hold a public hearing by articulating tests that have no basis in 35 Ill. Adm. Code § 309.115(a)(1). IEPA and U.S. Steel argue variously that no public hearing was required because the comment letters requesting a public hearing did not: (1) provide additional information that the Agency would use in drafting the permit (IEPA 11-13); (2) warrant a public hearing because general concerns about impairment to Horseshoe Lake could be addressed in separate proceedings under Clean Water Act § 303(d) (IEPA 12); (3) show that the permit would have changed if a public hearing had been held (USS 5); (4) show that the permit should not have been issued (USS 17); and (5) list individuals who would appear at a public hearing (USS 20).

Neither IEPA nor U.S. Steel offers any legal support for these arguments. Instead, they attempt to belittle the significance of the concerns set forth in the public comment letters. However, the time and place to discuss the validity and significance of the public's concerns is not in litigation briefs but is at a public hearing, where the public can participate directly, ask questions, hear the Agency's responses, and follow up.

Moreover, IEPA's defense of its decision on the aforementioned grounds indicate that the Agency based its denial of the public hearing requests on the ground that it was not in the *Agency's* interest to hold the hearing – rather than on the degree of public interest in the permit. This is not an appropriate basis under the governing regulation, rendering the decision arbitrary and an abuse of discretion.

In addition, IEPA's defense of its decision utterly disregards the dictate in the governing regulation that "instances of doubt *shall be resolved in favor of holding the*

hearing." 35 Ill. Adm. Code § 309.115 (emphasis added). IEPA's failure to heed this directive underscores the Agency's abuse of discretion.

III. THE COMMENT LETTERS DEMONSTRATED SIGNIFICANT PUBLIC INTEREST IN THE PERMIT.

A. The Public Comment Letters Raised Significant Concerns Regarding the Permit and the Impact on Horseshoe Lake of the Discharge Authorized Thereby.

IEPA and U.S. Steel dismiss the concerns raised in the public comment letters by suggesting that the concerns raised were not helpful to the Agency and/or were not related to the permit because they focused on the water quality of Horseshoe Lake. (IEPA 11-14, 24; USS 11-14). As noted above, whether the comments were helpful to the Agency is not the test of whether a public hearing must be held; the test is whether the comments demonstrate a significant degree of public interest in the permit. Inasmuch as IEPA and U.S. Steel suggest that the comments are misplaced because they focus on Horseshoe Lake rather than on the permit, they are flat wrong.

The comments express concerns about the following pollutants, all of which the permit authorized U.S. Steel to discharge into Horseshoe Lake: toxic heavy metals (which would include lead, expressly mentioned, as well as zinc); ammonia, cadmium, and cyanide. (AR 532-536) As U.S. Steel concedes, the permit included higher discharge limits, allowing for more pollution to be discharged into Horseshoe Lake, for three of those pollutants – ammonia, lead, and zinc – than in the previous permit. (USS 19, n 4) In addition, although U.S. Steel tries to create the impression that these limits are somehow automatic, and not relevant to U.S. Steel's operations, the Agency's record indicates otherwise. In fact, U.S. Steel benefits from a 1992-era exemption regarding its ammonia limit (AR 371-373), as well as another exemption regarding its zinc limit. (AR

135) Moreover, while U.S. Steel and IEPA suggest that there was nothing to discuss with the public with respect to these permit limits, they found plenty to discuss between themselves. The record contains numerous documents reflecting ongoing disagreements regarding permit limits and associated monitoring requirements regarding cyanide, ammonia, and zinc. (AR 371-375, 432, 489-491, 507-509).

In addition, both IEPA and U.S. Steel try to create an artificial distinction between the pollution discharged under the authority of the U.S. Steel NPDES permit and the water quality in Horseshoe Lake. U.S. Steel discharges massive amounts of pollutants – up to 25 million gallons per day – into Horseshoe Lake, and is the sole industrial discharger into this state park lake. In addition, Horseshoe Lake is listed as "impaired" because it is not meeting water quality standards for, among other pollutants, ammonia and zinc[2] – two of the three pollutants whose discharge limits increased in the permit. Petitioner's comment letter stated a related concern that U.S. Steel had a history of excess ammonia discharges, and that U.S. Steel was contributing to excess concentrations of ammonia in the Lake. IEPA and U.S. Steel are free to agree or disagree with these concerns; that is irrelevant. The fact is that they indicate significant, bona fide concerns of the public regarding the permit. Moreover, although the IEPPA public notice (AR 517-523) and the IEPA brief (IEPA 13) suggest that U.S. Steel plays no role in the water quality degradation of Horseshoe Lake, the commenters expressed the contrary concern and, moreover, IEPA's § 303(d) listings specifically include "industrial point source" dischargers (i.e., U.S. Steel in this case) as a possible cause of the degraded water quality. See footnote 2.

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[2] See 2004 303(d) list, at http://www.epa.state.il.us/water/watershed/reports/303d-report/2004/appendices.pdf (page A-4; the legend for the codes is in the unnumbered preliminary pages). See also 2006 303(d) list at http://www.epa.state.il.us/water/tmdl/303-appendix/appendix-a.pdf.

IEPA attempts to belittle the commenters' concerns by stating that if it has to hold a public hearing in this case, "purely based on circumstantial facts regarding the public use of a water body and a request from a group with a large number of members," it may have to hold some 300 such hearings each year. (IEPA 17) This bogeyman argument is entirely out of line. First, the facts on this case are far more compelling than IEPA's statement acknowledges. This case involves an enormous industrial discharge, the sole industrial discharge, into a lake that is the centerpiece of a heavily-used urban state park. The permit authorizes increased pollution discharges of three harmful pollutants – lead, zinc, and ammonia – two of which (zinc and ammonia) are already present in concentrations violating the state's water quality standards. Recreational uses of the lake and the surrounding park include subsistence fishing, hunting, and outdoor recreation. As previously found by the Board, the four organizations that jointly submitted the comment letter of January 18, 2005 (AR 533-536) represent some 27,000 members. *ABC v. IEPA and U.S. Steel*, PCB 06-171 (2007). This is undoubtedly at the far extreme of the "public use of a water body" situations where an NPDES permit is of significant interest to the public. Second, there is no support in the record for IEPA's guesstimate of 300 hearings, and the Board should disregard it. This appeal is about this case, and only this case. It is frankly inconceivable that facts comparable to these are present in 300 discharge permits issued by IEPA each year.[3]

[3] IEPA's citation of *In Re City of Fort Worth*, 6 E.A.D. 392 (April 5, 1996) (IEPA 17) is unavailing. In that case, the City of Arlington was not entitled to public hearing based solely upon the fact that eighty thousand people reside in the city. Residential citizenship in a municipal unit whose political government brings a lawsuit is not in any way similar to voluntary membership in non-profit organizations that expressly articulate and advertise their environmental watchdog role.

With the facts of this case, and the language in 35 Ill. Adm. Code § 309.115 directing IEPA to hold a public hearing when it determines there is significant public interest in the permit, and further to resolve instances of doubt in favor of holding a public hearing, Petitioner has well satisfied its burden of proving that IEPA abused its discretion by rejecting the hearing requests on the strong facts of this case and without considering the public interest in the permit.

B. IEPA and U.S. Steel Improperly Discount the Informational Value of Public Hearings to the Public.

IEPA repeatedly seeks to justify the denial of the public hearing requests on the ground that a hearing would not have helped the Agency in finalizing the draft permit. While acknowledging as a general matter that hearings "provide opportunity for the public to understand and comment on proposed actions of the …Agency," (IEPA 30, quoting 35 Ill. Adm. Code § 164.101(a)), IEPA fails to perceive the applicability of that purpose to this case. Given the complexity of the facility, the numerous exemptions, permit increases, and water quality exceedances at issue, there was significant public interest in a public forum at which the public's concerns could have been aired. IEPA might have alleviated some of those concerns, and might have provided additional information to members of the public such as subsistence fishermen potentially at risk but unaware of the U.S. Steel discharge in Horseshoe Lake. In addition, although IEPA did not expect this to happen, it is always possible that the give and take of the public hearing would have given the public an opportunity to convince IEPA of the merits of its concern. U.S. Steel had numerous opportunities throughout the process to share its concerns with IEPA in a give-and-take setting, and this would have been the one opportunity for the public to do so as well.

U.S. Steel, on the other hand, erroneously contends that providing information to the public is not a valid reason to hold a public hearing on an NPDES permit. U.S. Steel claims that 35 Ill. Adm. Code § 166.101(b) ("§ 166.101"),[4] cited in Petitioner's opening brief, applies only to hazardous waste permits and not to NPDES permits. The language of the rule indicates otherwise. The subpart containing § 166.101 applies to "hearings which concern applications for permits," 35 Ill. Adm. Code § 166.110, specifically defined to include permits issued under the NPDES program, 35 Ill. Adm. Code § 166.120. In short, 35 Ill. Adm. Code § 309.115(a)(1) describes the circumstances under which IEPA should hold public hearings on NPDES permits, and both that regulation and the generic regulations at 35 Ill. Adm. Code Part 166, Subpart A, govern NPDES hearings that are, in fact, held.

C. The Environmental Appeals Board and Administrator Decisions Cited by IEPA Are Not Applicable or Factually Analogous.

IEPA cites federal Environmental Appeals Board ("EAB") and EPA Administrator decisions in an attempt to bolster its argument that the comment letters did not demonstrate a significant level of public interest in the permit. (IEPA 27-29). Differences between the federal and Illinois regulations, and factual differences between this case and those cited by IEPA, make for an unpersuasive comparison.

i. The Illinois Regulations are Materially Different from the Federal Regulations.

The federal administrative decisions cited by IEPA are of limited applicability here because the federal regulation governing NPDES hearings does not so heavily weight the scales in favor of public hearings as does the Illinois regulation. Federal rules

[4] As U.S. Steel correctly points out, ABC made a typographical error in attempting to cite § 166.101 in its opening brief. (USS 27-28).

require that the "Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s)." 40 CFR § 124.12 (2008). Illinois copied this federal language in § 309.115, but notably added a stated preference for hearings – "*instances of doubt shall be resolved in favor of holding the hearing*." 35 Ill. Adm. Code § 309.115(a)(1) (2006). Neither IEPA nor U.S. Steel acknowledges this key provision in the governing Illinois regulation.

ii. The Cases IEPA Cites are not Factually Analogous.

An examination of every case cited reveals facts that distinguish them from the case at hand. In *In the matter of: Avery Lake Property Owners Association.*, for example, the petitioner merely wanted the permit reviewed; he did not even allege in his petition that there was a significant degree of public interest. *Avery Lake*, 1992 EPA App. LEXIS 70 (EPA App. 1992). In *In the matter of: Terra Energy LTD*, the petitioner speculates as to the effects of a new underground injection well. *Terra Energy LTD*, 1992 EPA App. LEXIS 69 (EPA App. 1992). By contrast, the comment letters in the case at hand detail a currently existing situation, where an impaired lake is being subjected to 25 million gallons per day of industrial discharge and the permit limits are being increased for ammonia and toxic heavy metals. (AR 532-36). *In the matter of Spokane Regional Waste-to-Energy Project*, the EAB holds that denial of petitioner's request for a public hear is not a clear error because the agency had "held two public hearings before issuing its December 13, 1988 permit determination." *Spokane Regional*, 1990 EPA App. LEXIS 91 (EPA App. 1990). This case seems incomparable, as IEPA appears to be determinedly striving to not hold even one public hearing, as opposed to holding two. *In the matter of Osage* details the plight of a sole petitioner who was the

only one who requested a public hearing and received a private meeting instead. *Osage*, 1992 EPA App. LEXIS 71 (EPA App. 1992). The parties requesting a public hearing in the instant case represent thousands of people.

D. The Evidence Elicited in this Board Appeal Elaborated Upon Issues Raised in the Comment Letters and is Relevant to the Board's Determination on Remand.

Respondents state that the evidence presented at the Board's hearing in this matter should be disregarded. (USS 10; IEPA 15). That is incorrect. Reliable information produced at the Board hearing is admissible for consideration in this case, so long as it is material and relevant. Information Produced at Hearing, 35 Ill. Adm. Code § 101.626(a). The testimony quoted in Petitioner's Brief on Remand simply elaborated on issues the comment letters raised with IEPA, which directly concerns the public interest. To hold such information inadmissible would make a mockery of the public's statutory right of appeal and right to an evidentiary hearing under Section 40(e) of the Illinois Environmental Protection Act. *See generally* 35 Ill. Adm. Code § 101.626(b); 415 ILCS 5/40(e).

D. PETITIONER DID NOT WAIVE ITS RIGHT TO A PUBLIC HEARING BY REQUESTING A MEETING IN THE EVENT OF THE DENIAL OF ITS HEARING REQUEST.

The joint comment letter stated: "If you deny this request for a public hearing, we ask for a meeting with you and your staff, followed by a 30-day extension of the public comment period." (AR 535). IEPA scheduled an "environmental justice" meeting on "issues regarding the Granite City Steel NPDES permit," to be held one week after the permit was issued. (C 291). IEPA informed ABC of the meeting, which was scheduled

to be held in Springfield instead of Granite City, the day before the Agency initially issued the U.S. Steel permit. (C 296). ABC consulted its members and then wrote IEPA:

> …we will be unable to come to Springfield for this meeting. Some of the people from the community were unable to attend on such short notice because of scheduling conflicts. Others felt the meeting should be held locally so that more people from the community could attend. They also thought the Agency should hold a public hearing on the Granite City Steel NPDES discharge permit into Horseshoe Lake and that this meeting could be viewed as an attempt to circumvent that. We are unsure as to the status of the NPDES and our repeated requests for a public hearing.

(C 296).

U.S. Steel somehow feels that this series of events means that ABC waived its right to a hearing or a meeting on the NPDES permit. (USS 24). This is the first time, in the two-plus years this litigation has been ongoing, that U.S. Steel has raised this spurious argument. There was no indication in the comment letter that commenters' potential interest in meeting with IEPA if the Agency denied their public hearing request was a waiver of their clearly-stated request for a public hearing. Second, IEPA did not offer the meeting until it was on the verge of issuing the permit. Third, a private meeting unknown and inaccessible to members of the public who, for example, fish at Horseshoe Lake, does not come close to fulfilling the purposes of a public hearing is held. 35 Ill. Adm. Code § 166.101. This is clearly a last-ditch effort to distract from the need for a public hearing on the U.S. Steel permit.

IV. CONCLUSION

For the reasons set forth in Petitioner's opening and reply briefs on remand, IEPA abused its discretion by denying the request for a public hearing on the U.S. permit. ABC

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respectfully requests that the Board vacate the U.S. Steel permit as issued and direct IEPA not to re-issue the permit without first holding a public hearing thereon.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 10th day of December 2008, one copy of the foregoing was sent via electronic communication to the following:

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