ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
DIVISION OF LEGAL COUNSEL
1021 NORTH GRAND AVENUE EAST, POST OFFICE BOX 19276
SPRINGFIELD, ILLINOIS 62794-9276
TELEPHONE (217)782-5544-FACSIMILE (217)782-9807

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DES PLAINES RIVER WATERSHED ALLIANCE, LIVABLE COMMUNITIES ALLIANCE, PRAIRIE RIVERS NETWORK, and SIERRA CLUB,	)	
Petitioners,	)	
v.	)	PCB 04-88 (NPDES Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF NEW LENOX,	)	
Respondents.	)	

NOTICE OF FILING

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601

Albert F. Ettinger
Senior Staff Attorney
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1300
Chicago, IL 60601

Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601

Roy M. Harsch
Sheila H. Deely
Gardner Carton & Douglas LLP
191 N. Wacker Drive- Suite 3700
Chicago, Illinois 60606-1698

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board, a **BRIEF** 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: April 26, 2004
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62794-9276
(217) 782-5544

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DES PLAINES RIVER WATERSHED ALLIANCE, LIVABLE COMMUNITIES ALLIANCE, PRAIRIE RIVERS NETWORK, and SIERRA CLUB,	)	
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BRIEF IN SUPPORT OF AGENCY'S POSITION

NOW COMES the Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") by and through its attorney, Sanjay K. Sofat, Assistant Counsel and Special Assistant Attorney General, pursuant to the Hearing Officer's order, dated April 1, 2004, the Illinois Environmental Protection Agency ("Illinois EPA") hereby submits this brief to the Illinois Pollution Control Board ("Illinois PCB" or "Board") in support of its position that Section 40(e) of the Illinois Environmental Protection Act ("Act") does not address discovery in a third party permit appeal. The Illinois EPA respectfully requests that the Board **GRANT** the Agency's request for prehearing discovery. In support of its position, the Illinois EPA states as follows:

I. BACKGROUND

On December 2, 2003, Petitioners, Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and Sierra Club, filed a third party permit appeal

with the Board pursuant to 415 ILCS 5/40(e)(1) and 35 Ill. Adm. Code 105.204(b). Petitioners appeal the issuance of an National Pollutant Discharge Elimination System ("NPDES") permit to the Village of New Lenox on October 31, 2003, for its STP #1 in New Lenox, Illinois. The Board accepted the petition on the grounds that it meets the requirements of Section 105.210. The Agency was instructed to file its record with the Board pursuant to 35 Ill. Adm. Code 105.116. The Board assigned a hearing officer to conduct the Board hearing in accordance with the rules set forth in 35 Ill. Adm. Code 101.Subpart F. On December 31, 2003, the Agency filed its original record of approximately 659 pages in December 2003. The Agency's original record contained two volumes. The Volume 1 contained documents from the NPDES permit hearing, whereas, the Volume 2 contained permit file documents. As more documents were discovered later, the Agency amended its record in January and February 2004.

On April 1, 2004, the Hearing Officer issued an order directing the parties to file a brief addressing the following issues: 1) What the Board is to base its decision on, and 2) What constitutes the "record before the Agency" in this case. Hearing Officer Order ("HO") at p.1. The HO outlines the areas of concern that the parties are asked to address. Specifically, the HO instructs the Agency to 1) provide justification for the length of the discovery schedule proposed by the Agency, and 2) elaborate on the information the Agency believes is relevant, discoverable, and admissible in this proceeding that was not before the Agency at the time the permit was issued. To respond to the issues above, the HO directs the Agency to focus on Section 101.616(a) of the Board regulations, Sections 39(a) and 40(e)(3) of the Act, and the Board's opinion in *Prairie Rivers Network v. IEPA, et al.*, PCB 01-112, and the Fourth District court's opinion in *Prairie Rivers Network v. PCB et al.*, 335 Ill.App.3d 391, 781 N.E.2d 372, 379 (4th Dist. 2002), *aff'g. Prairie Rivers Network v. IEPA*, et al., PCB 01-112 (Aug. 9, 2001). The Agency responds to the HO as follows:

II. ARGUMENTS

Fundamentally at issue is whether discovery is allowed under Section 40(e)(3) of the Act.

A. Section 40(e)(3) of The Act Does Not Prohibit Discovery In A Third Party Permit Appeal

Section 40(e)(3) of the Act governs a third party NPDES permit appeal. 415 ILCS 5/40(e)(3) (2002). Under this section, a third party has the right to appeal the Agency's decision to grant or deny a permit under Section 39 of the Act. *Id.* Pursuant to this section, third party has the burden of proof. This section provides that, "the Board shall hear the petition ... exclusively on the basis of the record before the Agency." *Id.* However, this section is silent as to whether discovery is allowed in a third party permit appeal.

Though Section 105.214(a) of the Board's procedural rules provides that the hearing before the Board "will be based exclusively on the record before the Agency at the time the permit or decision was issued," 35 Ill. Adm. Code 105.214(a), discovery is allowed under Section 101.616(a) of the Board procedural rules1. Specifically, Section 101.616(a) provides that, "[a]ll relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to Statute, Supreme Court Rules or common law, and materials protected from disclosure under 35 Ill. Adm. Code 130." 35 Ill. Adm. Code 101.616(a) (*emphasis added*).

Petitioners argue that "there should be no discovery in this case because discovery cannot yield admissible evidence in this proceeding." Petitioner's Submission Regarding Discovery, March

1 Part 105 of the Board's procedural rules apply to appeals of final decision of the Agency. 35 Ill. Adm. Code 105.100. Section 105.110, Hearing Process, provides that, "[u]nless this Part provides otherwise, proceedings held pursuant to

11, 2004, p.1. The Agency disagrees. Petitioners' argument is in contradiction with Section 101.616(a) of the Board's procedural rules and the fundamental right of a party to obtain a fair hearing.

It is clear from Section 101.616(a) of the Board's procedural rules that information is discoverable as long as it is relevant information or is information that will lead to relevant information. Contrary to Petitioners' position, this rule does not mandate that discovery is permissible only in those circumstances where it yields admissible evidence. Pretrial discovery presupposes a range of relevancy and materiality much broader than that of admissibility of evidence at trial. *Maxwell v. Hubart Corp.*, 216 Ill.App.3d 108, 576 N.E.2d 268, 159 Ill.Dec. 599 (1st Dist. 1991). Therefore, the Board should apply the relevancy test provided in Section 101.616(a) in granting the prehearing discovery in this case. At this juncture, it is wholly irrelevant as to what information, if any, obtained through discovery would be admissible at the hearing.

Generally, discovery "is intended to be a mechanism for the ascertainment of truth, for the purpose of promoting either a fair settlement or a fair trial. It is not a tactical game to be used to obstruct or harass the opposing litigant." *Ostendorf v. International Harvester Co.*, 89 Ill.2d 273, 433 N.E.2d 253, 257, 60 Ill.Dec. 456 (1982). The objectives of pretrial discovery are to enhance the truth-seeking process, to enable attorneys to better prepare and evaluate causes, to eliminate surprises, and to ensure that judgments rest on the merits and not on the skillful maneuvering of counsel. *Mistler v. Mancini*, 111 Ill.App.3d 228, 443 N.E.2d 1125, 1128, 67 Ill.Dec. 1 (2nd Dist. 1982); *Hilgenberg v. Kazan*, 305 Ill.App.3d 197, 711 N.E.2d 1160, 238 Ill.Dec. 499 (1st Dist. 1999). Illinois Supreme Court Justice Underwood stated that, "[d]iscovery procedures ... facilitate settlements by enabling the parties to more accurately estimate the strengths and weaknesses of their

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this Part will be in accordance with the rules set forth in 35 Ill. Adm. Code 101.Subpart F. 35 Ill. Adm. Code 105.110. Subpart F of Part 101 contains the Board's procedural rules applicable to hearings, evidence, and discovery.

positions. Should such case still proceed to trial, the additional knowledge afforded by pretrial discovery should expedite the trial." Illinois Supreme Court Justice Underwood, 112 Chi.D.L.Bull., 209 (Oct. 26, 1966). Another purpose behind allowing discovery is "to permit exploration and to avoid surprise." *Payne v. Coates-Miller, Inc.*, 68 Ill.App.3d 601, 386 N.E.2d 398, 402, 25 Ill.Dec. 127 (1st Dist. 1979).

In Illinois, the scope of discovery is broad and the permissible discovery methods include depositions upon oral examination or written questions, written interrogatories to parties, discovery of documents, objects or tangible things, inspection of real estate, request to admit, and physical and mental examination of persons. *Hayes v. Burlington Northern & Santa Fe Ry.*, 323 Ill.App.3d 474, 752 N.E.2d 470, 256 Ill.Dec. 590 (1st Dist. 2001); *Winfry v. Chicago Park District*, 274 Ill.App.3d 939, 654 N.E.2d 508, 211 Ill.Dec. 46 (1st Dist. 1995). Accordingly, the method of discovery, whether written or oral, should be immaterial, provided that the scope of discovery is limited to "all relevant information and information calculated to lead to relevant information."

In this case, discovery is essential for the Agency to assess the basis of the Petitioners' conclusion that unnatural conditions exist in the stream. Discovery of the basis of the Petitioners' expert's opinion on economics and other basis is also needed to assess Petitioners' conclusions and arguments. Also, fundamental fairness mandates that the Agency be allowed to do prehearing discovery to better prepare and evaluate basis of this appeal, and to eliminate any surprises. Though Section 40(e)(3) places burden on Petitioner to prove that the permit, as issued, would violate the Act or Board regulations, the Agency had no prior opportunity to determine the strength of weaknesses of Petitioners' case. The informational hearing that was held in this case pursuant to Subpart A of Part 166 of the Agency rules was only an informational hearing, and therefore, the Agency had no opportunity under these regulations to determine the basis of Petitioners' expert's opinion. This is supported by the fact that informational NPDES permit hearings are not

adjudicatory hearings. Commentors are neither required to testify under oath nor are subject to a cross-examination. The sole purpose of these hearings is to inform public of a proposed Agency action or to gather information or comments from the public prior to making a final decision on a matter. 35 Ill. Adm. Code 166.120.

Reading Section 40(e)(3) of the Act and Section 101.616(a) of the Board's procedural rules together, the Agency argues that discovery of relevant information is permissible in a third party appeal. The data and information contained in the Agency record determine the scope of relevant information in this permit appeal. Under Section 101.616(a) of the Board procedural rules, new information is not discoverable. Any fact or issue not contained in the Agency record constitutes new information, and thus, is not relevant information, and thus, not discoverable pursuant to Section 101.616(a).

B. Relevant Information Is Admissible If It Is Demonstrative And Cumulative To Other Information In The Record

The Board's opinion in *Community Landfill Company v. IEPA* (April 5, 2001), PCB 01-48, 01-49 governs the admissibility of relevant information.

It is well settled that in permit appeals the Board's review is limited to the record that was before IEPA at the time the permitting decision was made. *Prairie Rivers Network v. IEPA, et al.*, PCB 01-112. Typically, evidence that was not before the Agency at the time of its decision is not admitted at hearing or considered by the Board. *Community Landfill Company v. IEPA* (April 2, 2001), PCB 01-48, PCB 01-49 (consolidated); *Panhandle Eastern Pipe Line Company v. IEPA* (January 21, 1999), PCB 98-102; and *West Suburban Recycling and Energy Center, L.P. v. IEPA* (October 17, 1996), PCB 95-199, PCB 95-125 (consolidated); *Alton Packing Corp. v. PCB*, 162 Ill.App.3d 731, 516 N.E.2d 275 (5th Dist. 1987). However, it is the hearing before the Board that

provides a mechanism for the petitioner to prove that operating under the permit as granted would not violate the Act or regulations. Further, the hearing affords the petitioner opportunity "to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the Board the opportunity to receive testimony which would 'test the validity of the information (relied upon by the Agency)'." *Alton Packing Corp. v. PCB*, 162 Ill.App.3d 731, 515 N.E.2d 275, 280. In similar reasoning, the Agency should be allowed an opportunity to fully engage in discovery to ensure no unfair surprises at the hearing and effectively defend the Agency decision. As Petitioners have a full access to the Agency record, there would be no surprises for them at the hearing even without the benefit of discovery. On the other hand, if the Agency were not permitted to engage in prehearing discovery, it would be greatly disadvantaged at the hearing. It wouldn't have an opportunity to find out the basis of opinions that Petitioners relied upon to conclude that the permit as issued is in violation of the Act and regulations.

The Board's opinion in *Community Landfill Company v. IEPA* (April 5, 2001), PCB 01-48, 01-49 regarding the admissibility of relevant information is applicable. In *Community Landfill Company*, petitioners appealed five of the hearing officer rulings that denied admission of certain documents as evidence. The petitioners in that case argued that the documents at the hearing should have been admitted to rebut the Agency's rationale in imposing certain conditions in the permit. *Id.* In reversing one of the hearing officer's rulings, the Board concluded that the exhibit should have been admitted as it is "demonstrative only, and cumulative to other information in the record." *Id.* at p.19. The Board further concluded that "the purpose of excluding evidence at hearing that was not before the Agency will not be violated with the admission of Exhibit D2." *Id.* at p.20.

In the same case, the Board affirmed the hearing officer's ruling that excluded the admission of another exhibit. In support of its conclusion, the Board stated that, "unlike Exhibit D2, Exhibit DD contains information that the Agency did not have in the record." *Id.* at p.20.

In light of the above, the Agency contends that the relevant information is admissible in permit appeals if it is demonstrative and cumulative to other information in the record.

C. Agency's Response To Specific Issues Raised By The Hearing Officer

The following are the Agency responses to the specific issues raised in the HO:

1. What Constitutes the Record Before the Agency

Section 105.212 of the Board's procedural rules specifies the minimum level of information that must be provided in the Agency's record. In this case, the record filed pursuant to Section 105.212 in December 2003 and later amended in January and February 2004 constitutes the complete record before the Agency for the purposes of Section 40(e)(3) of the Act.

2. What The Board Is To Base Its Decision On

Based on the discussion above, the Agency contends that, in this case, the Board's review of the petition should be based on: 1) the Agency's complete record, both original and amended record, filed with the Board, and 2) the Board hearing record that contains a statement of credibility of witnesses and the basis of opinions that Petitioners' allege.

3. Justification For The Length Of The Agency's Proposed Discovery Schedule

The discovery schedule proposed by the Agency is within the usual and customary practice in the legal profession and is not unduly burdensome to either party. The Agency provides that the proposed schedule is the Agency's estimation of time to complete the discovery process in this case. This estimation takes into consideration the complexity of issues presented in this case, number of deponents that may be deposed, availability of the deponents during the coming months, and the time needed to schedule desired depositions. Further, some of the time line is dictated by the Board's procedural rules.

Respectfully Submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: _____

Sanjay K. Sofat
Assistant Counsel
Division of Legal Counsel

DATED: April 26, 2004
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)
) ss
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached BRIEF upon the person to whom it is directed, by placing a copy in an envelope addressed to:

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

(FIRST CLASS MAIL)

Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

(FIRST CLASS MAIL)

Albert F. Ettinger
Senior Staff Attorney
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1300
Chicago, IL 60601

(FIRST CLASS MAIL)

Roy M. Harsch
Sheila Deely
Gardner Carton & Douglas LLP
191 N. Wacker Drive, Suite 3700
Chicago, Illinois 60606-1698

(FIRST CLASS MAIL)

and mailing it from Springfield, Illinois on April 26, 2004, with sufficient postage affixed as indicated above.

Nancy J. Lampert

SUBSCRIBED AND SWORN TO BEFORE ME

this day of April 26, 2004.

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CYNTHIA L. WOLFE
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 3-20-2007

Cynthia L. Wolfe
Notary Public

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