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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

STATE OF ILLINOIS  
Pollution Control Board

DES PLAINES RIVER WATERSHED  
ALLIANCE, LIVABLE COMMUNITIES  
ALLIANCE, PRAIRIE RIVERS  
NETWORK, and SIERRA CLUB

Petitioners

v.

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY and VILLAGE OF NEW LENOX

Respondents.

**PCB 04-88**  
**(APPEAL FROM IEPA**  
**(DECISION GRANTING**  
**NPDES PERMIT)**

**NOTICE OF FILING**

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James R. Thompson Center  
100 West Randolph Street - Suite 11-500  
Chicago, IL 60601

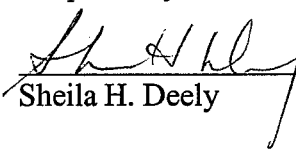
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Illinois Environmental Protection Agency  
1021 North Grand Ave. East  
P.O. Box 19276  
Springfield, IL 62794-9276

**PLEASE TAKE NOTICE** that on March 1, 2005, 2005, we filed the attached  
**MOTION FOR STAY OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT**  
with the Clerk of the Pollution Control Board, a copy of which is herewith served upon you.

Respectfully Submitted,

  
Sheila H. Deely

Roy M. Harsch  
Sheila H. Deely  
GARDNER CARTON & DOUGLAS LLP  
191 N. Wacker Drive - Suite 3700  
Chicago, Illinois 60606  
(312) 569-1000

**THIS FILING IS BEING SUBMITTED ON RECYCLED PAPER**

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**MOTION FOR STAY OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

The Village of New Lenox ("the Village"), by its attorneys Gardner Carton & Douglas LLP, moves the Illinois Pollution Control Board to stay Petitioner's Motion for Summary Judgment and briefing on that motion in order to allow the Board to issue a decision on proposed discovery in this case and, if so ordered by the Board, to allow the Village to take discovery. The Village has also conferred with counsel for Illinois EPA, who represented to the Village that Illinois EPA joins in this motion and authorized the Village to so represent to the Board.

1. The parties in this matter are awaiting decision from the Board on the issue of whether the Illinois Environmental Protection Act's provisions governing third party NPDES permit appeals allow discovery. The Village will not rehash the arguments in those documents, but in sum, Petitioners have contended that the current and long-standing procedure allowing discovery in permit appeals is not permissible under the Illinois Environmental Protection Act, while the Illinois EPA and the Village both contend that discovery is not only proper but

required, and Petitioners' interpretation of the Illinois Environmental Protection Act is unsupported and to the exclusion of the rest of the Act.

2. Though the Parties are still awaiting the Board's ruling, Petitioners plunged forward and filed a motion for summary judgment on February 7, 2005, claiming the case presents no issue of material fact and they are entitled to judgment as a matter of law. Shortly after, on February 7, 2005, the Hearing Officer issued an order setting a briefing schedule. The Village informed the Hearing Officer and the other parties that it intended to file a motion addressing the need for discovery prior to responding to Petitioners' motion.

3. Petitioners' motion is flawed and its timing premature. A summary judgment filing at this time is an improper use of the summary judgment procedure, and a waste of the time and resources of the Board, Illinois EPA, and Village.

4. Petitioners' motion underscores the need for discovery. The claimed "material facts" are nothing more than Petitioners' unverified and unsworn comments submitted at the informational hearing before Illinois EPA. These claims have not been subject to discovery and are unproven. In their "Statement of Relevant Facts from the Agency Record," Petitioners include numerous unverified statements and conclusions that were made by parties submitting comments at the hearing and cite to treatises as if they were already verified and admissible. Petitioners variously cite to unsworn statements by Phillip Smith and Dr. David Bardack (who did not submit written comments in this matter); unverified claims concerning algal blooms by purported nearby residents; unverified and unsworn claims by various parties of uncertain credentials concerning the plant and its effect on Hickory Creek; unsworn "published treatises" placed in the record; conclusions as to pH; conclusions as to IEPA's work; purported

conclusions derived from internal agency deliberations; alleged confusion by IEPA; and numerous other conclusory statements from the informational hearing.

5. Petitioners claim that the statements of parties at the hearing are testimony. These are not testimony but instead were simply comments made at the informational hearing held by Illinois EPA. The persons making comments were not sworn or cross examined. And the various written exhibits put in the record by Petitioners may or may not constitute reliable evidence in the future, but they are not reliable now as they have no foundation. Petitioners' unverified claims and their motion underline the need for discovery.

6. It is premature to require the Village or Illinois EPA to respond substantively to Petitioner's motion without resolution of the pending discovery dispute between Petitioners on the one hand and the Village and Illinois EPA on the other. Illinois caselaw is clear that summary judgment is a drastic remedy, and all inferences must be made in favor of the non-movant. Further, where discovery is necessary, Supreme Court Rule 191(b) allows a party to so advise the court by affidavit. The proper procedure is then for requested discovery to be allowed so the non-movant can properly respond. In addition to evidence the Village or Illinois EPA may submit to the Board, the Village and Illinois EPA have the right to explore Petitioners' claims in discovery and to cross examine those witnesses put forth by Petitioner.

7. This motion is not intended to nor does it address the administrative record or its contents. It addresses only the extent to which Illinois EPA or a permittee may further inquire into the claims of a commenter at the public hearing that are as yet unsworn and not subject to cross examination. To rule otherwise would encourage third parties to place voluminous unverified and unsworn evidence in the record at the Informational Hearing and require Illinois EPA and a permittee to exhaustively respond to any claims at that time as a precaution against a

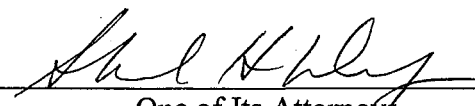
challenge before the Board. The statute does not require such an approach. The Illinois Environmental Protection Act and Illinois rules of civil procedure require the Board to allow Village and Illinois EPA to conduct discovery into Petitioners' claims. To the extent there are material facts in dispute, a hearing must be held in accordance with Section 40(a) of the Act governed by Sections 32 of the Act.

8. As required by Supreme Court Rule 191(b), an affidavit concerning the need for discovery is attached to this motion. The Village urges the Board to stay Petitioners' motion pending completion of that discovery necessary to respond to it.

WHEREFORE, the Village, joined by Illinois EPA, moves the Board to stay Petitioners' Motion for Summary Judgment and the briefing schedule set by the Hearing Officer pending the Board's order on discovery and, if ordered by the Board, to allow the Village and Illinois EPA the opportunity to take discovery in this case.

Respectfully submitted,

**The Village of New Lenox**

By:   
One of Its Attorneys

Roy M. Harsch  
Sheila H. Deely  
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**AFFIDAVIT OF SHEILA DEELY IN SUPPORT OF MOTION  
FOR STAY OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT**

I, Sheila Deely, declare and state as follows:

1. I am a partner in the law firm of Gardner Carton & Douglas LLP, counsel for Respondent Village of New Lenox ("the Village").
2. This affidavit is submitted in support of the Village's Motion for Stay of Petitioners' Motion for Summary Judgment.
3. The Village's request for discovery in this matter is currently pending before the Board. The parties are in disagreement over whether the Illinois Environmental Protection Act's provisions governing third party NPDES permit appeals allow discovery and, accordingly, whether the Illinois EPA and the Village are entitled to discovery in this matter.
4. Petitioners have now moved the Board for entry of summary judgment in this matter, claiming there is no issue of material fact and they are entitled to judgment as a matter of law.