BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DesPlaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and Sierra Club	)	
Petitioners	)	**PCB 04-88**
v.	)	(Third Party NPDES Permit Appeal Water)
Illinois Environmental Protection Agency and Village of New Lenox	)	
Respondents	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that the Environmental Law and Policy Center of the Midwest ("ELPC"), DesPlaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and Sierra Club today have electronically filed **Petitioners' Response to the Motions of the Illinois Environmental Protection Agency and the Village of New Lenox for Reconsideration.**

Respectfully submitted,

Albert F. Ettinger (Reg. No. 3125045)
Counsel for Environmental Law & Policy Center, Prairie Rivers Network and Sierra Club

DATED: June 12, 2007

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Petitioners	)	**PCB 04-88** (Third Party NPDES Permit Appeal- Water)
v.	)	
Illinois Environmental Protection Agency and Village of New Lenox	)	
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Petitioners' Response to the Motions of the Illinois Environmental Protection Agency and the Village of New Lenox for Reconsideration

As recently stated by the Board in denying a motion for reconsideration:

> In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (Mar. 11, 1993), we observed that the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992). The motion to reconsider presents no new evidence or a change in the law that would indicate that the Board's September 16, 2004 decision was in error. Therefore, the motion to reconsider is denied. *American Bottom Conservancy v. Illinois EPA*, PCB No(s). 06-171,2007 Ill. ENV LEXIS 183 (May 3, 2007).

Here, the motions for reconsideration brought by the Illinois Environmental Protection Agency ("IEPA") and the Village of New Lenox ("New Lenox") are notable chiefly in that neither movement attempts even half-heartedly to raise factors necessary for a proper motion for reconsideration. Certainly, IEPA and New Lenox do not cite any newly discovered evidence or

newly decided cases. Further, IEPA and New Lenox do not attempt to explain how the Board in its ruling in this case overlooked some critical fact or authority. Instead, IEPA and New Lenox repeat arguments that were fully discussed and properly rejected in the *Opinion and Order of the Board of April 19, 2007,* 2007 Ill. Env. LEXIS 149 (hereinafter "*April 19, 2007 Order*"). Plainly, the IEPA and New Lenox motions for reconsideration should be denied.

In particular, IEPA and New Lenox repeat two arguments that have been exhaustively briefed in the past. First, seemingly unable to believe that it is possible for a party to lose when the opposing party has the burden of proof, IEPA and New Lenox repeat the uncontroversial point that Petitioners had the burden of proof in this case and then discuss Board decisions in which the party with the burden of proof failed to sustain its burden. IEPA and New Lenox succeed only in proving that the Board reaches different results under different factual situations.

IEPA and New Lenox also attempt to argue that the Board's ruling on Petitioners' motion for summary judgment is somehow inconsistent with its final ruling in this case. The Board specifically dealt with this issue by pointing out the elementary principle that because of the strict standards applied to motions for summary judgment, a party can fail to win summary judgment on an issue yet later prevail on that issue when ordinary standards apply. *April 19, 2007 Order* at 17.

Finally, New Lenox makes a pseudo-constitutional argument that "due process rights" were denied by the fact that it was not allowed to take discovery in this proceeding. (New Lenox Motion at 2, New Lenox Memorandum at 15) This argument has been considered and rejected twice by the Board in this case. (*Order of the Board* November 17, 2005 at 39-40 and *April 19, 2007 Order* at 19.) Moreover, in making this argument, New Lenox relies on cases decided before the legislature enacted the statute regarding third-party appeals that governs this case.

According to 415 ILCS 5/40(e), the case is to be decided "exclusively on the basis of the record before the Agency."

Extensive argument is not needed in this Response because all of the arguments made by IEPA and New Lenox have been considered by the Board. Some response is made here, however, to the use and misuse of Board decisions and other precedents contained in the IEPA and New Lenox briefs.

I. The Board properly found that Petitioners carried their burden to show that issuance of the permit violated the Environmental Protection Act and Board rules governing issuance of NPDES permits.

There are three now well-established principles governing third-party appeals of NPDES permits that the Board carefully followed in its *April 19, 2007 Order* but that IEPA and New Lenox ignore and distort. These principles are:

- The agency decision must be supported by substantial evidence. See the many cases cited in Petitioners' Post-Hearing Memorandum, April 21, 2006 at 19.

- A third party appeal must be decided "exclusively on the basis of the record before the Agency." 415 ILCS 5/40(e).

- The burden of proof is on Petitioners to show that the permit as issued violated the Environmental Protection Act or the Board rules. *Prairie Rivers Network v. Illinois Pollution Control Board*, 335 Ill. App. 3d 391, 400, 781 N.E. 2d 372, 379 (4th Dist. 2002).

Putting these fundamental principles together means that it was Petitioners' burden here to show from the agency record that in issuing the permit IEPA violated the Environmental Protection Act or the Board rules. Petitioners met that burden in this case by showing that IEPA in issuing the permit violated various Board rules including the basic rule that there must be substantial evidence in the record to support the agency decision.

IEPA and New Lenox both cite and rely on the Board's decisions in *Prairie Rivers Network v. IEPA* PCB 01-112 (Aug. 9, 2001) and *Village of Lake Barrington v. IEPA* PCB 05-55 (Apr. 21, 2005) but they did not read those decisions with sufficient care. This is shown most notably where New Lenox seeks to make much of the fact that the Board in its *April 19, 2007 Order* made various findings that the *record* did not support issuance of the permit New Lenox Brief at 2, (emphasis in original), and then argues that the Board erred because it should have instead focused on what Petitioners had proven rather than what was contained in the agency record. New Lenox brief at 8-9. New Lenox either missed or deliberately ignored the language in *Prairie Rivers Network* that states: "IEPA's decision to issue the permit must be supportable by substantial evidence." *Prairie Rivers Network* at 8." Contrary to New Lenox's argument, *Prairie Rivers Network* supports the Board looking to see if there is substantial evidence in the record to support IEPA's decision.

Indeed, in *Prairie Rivers Network* and *Village of Lake Barrington*, the Board considered each objection made by the petitioners in those cases and considered whether there were facts in the record that adequately addressed the objection. For example, in *Village of Lake Barrington*, the Board noted that objections had been made IEPA's failure to place phosphorus limits in the draft permit. The Board found, however, that IEPA met these objections by placing phosphorus limits in the final permit. *Village of Lake Barrington* at 9 and 11. Similarly, in *Prairie Rivers Network*, the Board affirmed the permit only after finding from the agency record that there were studies that had been performed by the agency or conditions placed in the permit that addressed each of the alleged flaws in the permit. *Prairie Rivers Network* at 18, 21, 24, and 26-27. The petitioners in *Prairie Rivers Network* and *Village of Lake Barrington* failed to meet their respective burdens because the Board found that there was substantial evidence in the record to

support the agency position as to every point at issue. The Board certainly did not suggest in either *Prairie Rivers Network* or *Village of Lake Barrington* that it would have affirmed the agency decision if it had not found substantial evidence in the record that supported IEPA's issuance of the permit.

In stark contrast, the Petitioners in this case have raised objections to the draft permit and showed that IEPA violated Board rules by issuing the permit without addressing those objections. Petitioners also pointed to the unanswered evidence in the record showing that the discharge allowed by the permit could adversely affect Hickory Creek and that the extent of the pollution allowed by the permit had not been shown to be necessary, as required by 35 Ill. Adm. Code 302.105(c). The Board found that there was not substantial evidence in the record to support IEPA's decision. Overturning a permit that is not supported by the agency record is completely consistent with prior Board rulings and the basic principles of administrative law. *See* Petitioner's Post Hearing Reply Memorandum July 21, 2006 at 7-9.

New Lenox also stresses that the April 19, 2007 Order states that IEPA "*failed to assure*" or "*did not assure*" certain environmental protections and argues again that this means that the Board shifted the burden. New Lenox Brief at 8, (emphasis in original). Use of this language, however, does not show that the Board shifted the burden of proof, but only that the Board properly read the Board rules applicable to permit issuance in finding that IEPA violated those rules.

Whether New Lenox likes it or not, the words "assure" and "ensure" appear in the Board rules 35 Ill. Adm. Code 302.105(c)(2)(B), 309.14. For example, one of the several ways in which petitioners carried their burden in this case was by showing from the agency record that IEPA failed to "assure" that increased loadings of phosphorus would not result in violations of water

quality standards. *April 19, 2007 Order* at 36. In arguing that the Board was wrong to insist that IEPA assure things that the Board rules require IEPA to "assure," New Lenox either has not reviewed the language of the applicable Board rules or it is arguing that a permit should be affirmed even if it has been shown that IEPA issued the permit in violation of Board rules.

II. There is no inconsistency between the Board's denial of Petitioners' motion for summary judgment and the April 19, 2007 Order

The Board made quite clear in its order denying Petitioners' motion for summary judgment that it was doing so because summary judgment was "drastic" and could only be done if Petitioners' right to relief was "clear and free from doubt." *Order of the Board*, November 17, 2005 at 7. Contrary to the argument implied by IEPA and New Lenox, the Board did not hint that Petitioners somehow had to put on witnesses at the hearing to prevail.[1]

In effect, the Board gave Petitioners an opportunity to put forward more evidence from the record, which they used, and gave IEPA and New Lenox another opportunity to try to find substantial evidence in the record to support issuance of the permit. However, because the agency record lacks substantial evidence to support a number of Agency decisions and in fact shows that IEPA violated numerous Board rules, IEPA and New Lenox were unable to make use of their second chance.

In its brief, IEPA also offers a jumbled argument that suggests that the agency feels that it should always prevail if there are issues of material fact and that "simple logic dictates" that IEPA must prevail under 415 ILCS 5/40(e) if the Board finds that there was a material fact as to any issue. IEPA Brief at 12. This confuses the standard on summary judgment with the standard applied after the hearing. Moreover, the Board has made clear in many decisions that it will

[1] For the Board to have done this would have been rather strange given that the Board also reaffirmed in that order that the evidence was limited to the agency record. (at 39-40)

overturn an IEPA decision that is not supported by substantial evidence even if there is some evidence that supports it. See cases cited in Petitioners' Post Hearing Reply Memorandum, July 26, 2006 at 7-9.

III. New Lenox was accorded all the process to which it is entitled under law

New Lenox' complaint that it was wrongfully deprived of discovery is unmasked as a canard by the fact that New Lenox has never offered a coherent explanation of what it conceivably could have found through discovery that would make any difference in this case. The one time that New Lenox attempted any such explanation, it completely failed to justify discovery. *See Order of the Board* April 24, 2005 at 5-6.

New Lenox, of course, does not cite any authority showing that its constitutional rights were violated. The caselaw it cites regarding its supposed right to discovery under Illinois law is all completely inapposite because none of it applies to third party appeals. Whether the Board proceeding in a permit appeal is "adjudicatory" or not is beside the point. The Board can only adjudicate a case based on the evidence that is relevant to the proceeding which in this case was limited to the record before the Agency. 415 ILCS 5/40(e).[2]

One is never entitled to take discovery into matters that cannot lead to admissible evidence. *Cohn v. Bd. of Educ.*, 118 Ill. App. 2d, 453, 457, 254 N.E. 2d 803, 804-05 (2d Dist. 1970). Given that the Agency record is the only evidence that is relevant to a third party NPDES permit appeal, discovery would only be appropriate if the contents of the Agency record are in dispute, and they are not disputed here. *See Order of the Board*, November 17, 2005, at 39.

[2] New Lenox mentions *Prairie Rivers Network v IEPA and Black Beauty Coal Company* (PCB 01-112) as a case in which discovery was allowed. (New Lenox Brief p. 12) Actually, discovery was allowed because the petitioner's counsel failed to object. In the Board's ruling in the case, the Board refused to consider any evidence outside the agency record, (*Prairie River Network* August 9, 2001 pp. 9, 24) and it was apparent that the parties had wasted much time and effort in collecting evidence through discovery that was irrelevant to the Board's decision.

New Lenox attempts to twist the remark in the *April 19, 2007 Order* stating that New Lenox could have sought in the hearing to "clarify" the agency record (p.19) to support the illogical conclusion that New Lenox was entitled to offer evidence that was the result of discovery that went beyond the agency record. New Lenox Brief at 16. Of course, New Lenox could have attempted to clarify the agency record by combing the record for evidence supporting its position and presenting that evidence to the Board. As the Board noted, New Lenox could have attempted to do this through testimony at the hearing. It could also have made this attempt in its briefs. But unfortunately for New Lenox, there was nothing to clarify in the record that could save the permit. No amount of discovery could put something into the agency record that was not there.

Conclusion

The motions of IEPA and New Lenox for reconsideration should be denied.

Respectfully Submitted,

Albert Ettinger
Counsel for Petitioners
Environmental Law & Policy Center
35 E. Wacker Dr, Suite 1300
Chicago, IL 60601

CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that on June 12, 2007, I filed the attached **Petitioners' Response to the Motions of the Illinois Environmental Protection Agency and the Village of New Lenox for Reconsideration** upon the persons listed in the attached service list via U.S. Mail.

Respectfully submitted,

Albert F. Ettinger (Reg. No. 3125045)
Counsel for Environmental Law & Policy Center, Prairie Rivers Network and Sierra Club

DATED: June 12, 2007

PCB 04-88-Service List

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

Sanjay K. Sofat, Assistant Counsel
Illinois Environmental Protection Agency
P.O. Box 19276
Springfield, IL 62794-9276

Roy M. Harsch
Sheila H. Deely
Drinker Biddle Gardner Carton
191 N. Wacker Drive, Suite 3700
Chicago, IL 60606-1698