

ILLINOIS POLLUTION CONTROL BOARD

July 12, 2007

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

ORDER OF THE BOARD (by G.T. Girard):

On May 30, 2007, the Illinois Environmental Protection Agency (IEPA) filed a motion, and a memorandum of law in support (Memo1), asking the Board to reconsider an April 19, 2007 opinion and order. On June 1, 2007, the Village of New Lenox (New Lenox) filed a motion, and a memorandum of law in support (Memo2), also asking the Board to reconsider the April 19, 2007 opinion and order. On June 12, 2007, petitioners filed a response in opposition to both motions.

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).

Among other arguments, the motions to reconsider raise an argument that the Board applied the wrong standard of review and shifted the burden of proof. *See* Memo1 at 8-9; Memo2 at 2. The Board will address only these arguments for clarity purposes. As to the remaining arguments, the IEPA and New Lenox have provided no new evidence or a change in the law that would indicate that the Board's April 19, 2007 decision was in error. Therefore, the Board will not address those arguments.

Both the IEPA and New Lenox argue that the Board shifted the burden of proof from the petitioners to the IEPA. This is not the case. The Board correctly stated both the standard of review and who bears the burden of proof in the opinion and order. *See* Des Plaines Rivers

Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and Sierra Club v. IEPA and New Lenox, PCB 04-88, slip op. 11 (Apr. 19, 2007). The Board's standard of review is whether the record establishes that the issuance of the permit will not violate the Environmental Protection Act (Act) (415 ILCS 5 (2006)) or Board rules. *Id.*, citing Prairie Rivers Network v. PCB et al., 335 Ill. App. 3d 391, 401; 781 N.E.2d 372, 380 (4th Dist. 2002) and Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987). The petitioner bears the burden of proving the record does not support the issuance of the permit. *Id.*

In this case, petitioners pointed the Board to inadequacies in the record that demonstrate that the IEPA did not meet the requirements of the Board's regulations and the Act. For example, the Board's rules require the IEPA to "assure" that the waters of the State will not be degraded unnecessarily in issuing an National Pollutant Discharge Elimination System (NPDES) permit. *See New Lenox*, slip op. 20, citing 34 Ill. Adm. Code 302.105(c)(2)(B). As pointed out by petitioners, the record does not support the issuance of the permit, because the record establishes that IEPA did not make these assurances. *See New Lenox*, PCB 04-88 slip op. 34-36. Thus, the Board did not shift the burden of proof in this case, but rather found inadequacies in the record as pointed out by the petitioner.

Also, in the IEPA's motion the IEPA "respectfully requests the Board to apply the well settled standard of review". Memo1 at 3. The Board did in fact apply the well-settled standard of review. As stated above, the Board's standard of review is whether the record establishes that the issuance of the permit will not violate the Act or Board rules. The IEPA asserts that Board did not apply this standard and the burden of proof shifted because the Board "reviewed the entire record" in rendering the Board's decision. Memo1 at 3. To support this position, the IEPA relies on the Board's citation to Section 33(a) of the Act (415 ILCS 5/33(a) (2006)). Memo1 at 3. However, the Board made that ruling in response to an argument from respondents that because the Board declined to grant summary judgment, the respondents were entitled to judgment on the merits. *See, New Lenox*, PCB 04-88, slip op. 16-17. The Board merely stated the statutory requirement as support for the Board's finding that a denial of a motion for summary judgment does not automatically entitle the individual who prevailed on the motion for summary judgment to judgment on the merits. The Board reliance on Section 33(a) was merely support for the Board finding that the Board must make findings of fact (*see* 415 ILCS 5/33(a) (2006)).

In conclusion, the Board has reviewed the arguments by the parties regarding the standard of review and burden of proof. The Board has also reviewed the Board's decision of April 19, 2007. The Board finds the arguments unpersuasive and inaccurate. Therefore, the Board denies the motions to reconsider and affirms the April 19, 2007 decision.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/31(a) (2006)); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois

Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 12, 2007, by a vote of 4-0.

A handwritten signature in black ink, reading "John T. Therriault". The signature is fluid and cursive, with a long horizontal stroke at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board