

ILLINOIS POLLUTION CONTROL BOARD  
April 1, 2004

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 )  
PROTECTION AGENCY and VILLAGE OF )  
NEW LENOX, )  
 )  
 )  
Respondents. )

**HEARING OFFICER ORDER**

On March 25, 2004, all parties participated in a telephonic status conference with the hearing officer. The parties' respective proposed discovery schedules were discussed. The petitioners argue that there should be little if any discovery allowed and that the matter should be set for hearing. The respondents, however, request a protracted discovery schedule.

It was agreed by the parties that before a final and complete discovery schedule is set, that the parties should submit briefs on the issue of what the Board is to base its decision on and what constitutes the "record before the Agency" in this case. The parties were directed to file simultaneous opening briefs on or before April 21, 2004. Replies, if any, must be filed on or before April 30, 2004.

**Additional Briefing Instructions**

To more tightly focus their submissions, the hearing officer directs the parties attention to the following areas of concern. Each party's brief should provide justification for the length of the discovery schedule proposed by that party. All parties, but particularly those arguing for a protracted discovery schedule, are directed to elaborate on what information they believe is arguably relevant, discoverable, and admissible in this proceeding that was not before the Agency at the time the permit was issued.

In addressing these issues, the parties are reminded to focus both on the purposes of discovery and the nature of this action. 35 Ill. Adm. Code 101/616(a) provides that "[a]ll relevant information and information calculated to lead to relevant information is discoverable." Section 39(a) provides that "it is the duty of the Agency to issue . . . a permit upon proof by the applicant that the facility . . . will not cause a violation of [the] Act or regulations." In a third party appeal under Section 40(a)(3) such as this of a permit issued under Section 39, the third party petitioner has the burden of proving that the permit, as issued, would violate the Act or the

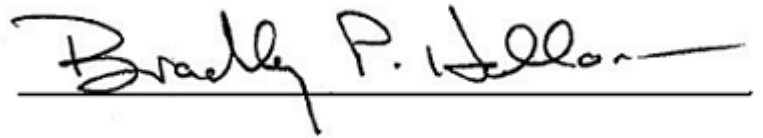
Board's regulations. Prairie Rivers Network v. PCB et al., 335 Ill. App.3d 391, 781 N.E.2d 372, 379 (4th Dist. 2002), *aff'g.* Prairie Rivers Network v. IEPA, et al., PCB 01-112 (Aug. 9, 2001) (correctness of Agency permit issuance *aff'd*).

But, case law is also clear that the relevant evidence in a Section 40(a)(3) action is not unlimited in scope. Section 40(a)(3)(ii) provides that the Board shall hear the petition for review "exclusively on the basis of the record before the Agency." (See Prairie Rivers Network v. IEPA, et al., PCB 01-112, slip op. at 10 (Aug. 9, 2001).)

### **Next Status Conference**

The parties or their legal representatives are directed to participate in a telephonic status conference with the hearing officer on May 6, 2004, at 11:15 a.m. The telephonic status conference must be initiated by the petitioner, but each party is nonetheless responsible for its own appearance. At the status conference, the parties must be prepared to discuss the status of the above-captioned matter and their readiness for hearing.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

Bradley P. Halloran  
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