

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SEP 17 2004

STATE OF ILLINOIS  
Pollution Control Board

VILLAGE OF LAKE BARRINGTON, )  
CUBA TOWNSHIP, PRAIRIE RIVERS )  
NETWORK, SIERRA CLUB, BETH )  
WENTZEL and CYNTHIA SKRUKRUD, )

Petitioners, )

VS. )

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY AND )  
VILLAGE OF WAUCONDA, )

Respondents. )

PCB 04-05-55

(APPEAL FROM IEPA DECISION  
GRANTING NPDES PERMIT)

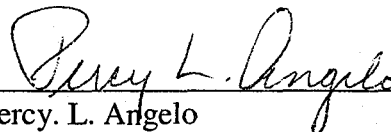
NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on September 17, 2004, I filed with the Illinois Pollution Control Board an original and nine copies of this Notice of Filing, Appearances and Petition for Review of a Decision by the Illinois Environmental Protection Agency, copies of which are attached and hereby served upon you.

Dated: September 17, 2004

Percy L. Angelo  
Russell R. Eggert  
Kevin G. Desharnais  
Mayer, Brown, Rowe & Maw LLP  
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Chicago, Illinois 60603  
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Percy L. Angelo  
One of the attorneys for the Village of  
Lake Barrington and Cuba Township

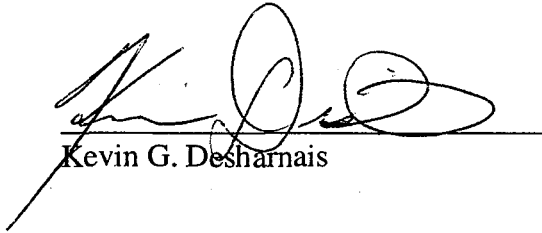
Albert Ettinger  
Environmental Law and Policy Center  
35 East Wacker Drive, Suite 1300  
Chicago, Illinois 60601  
312-795-3707

**CERTIFICATE OF SERVICE**

Kevin G. Desharnais, an attorney, hereby certifies that a copy of the foregoing Notice of Filing, Appearances and Petition for Review of a Decision by the Illinois Environmental Protection Agency was served on the persons listed below by First Class U. S. Mail, proper postage prepaid, on September 17, 2004.

Village of Wauconda  
101 North Main Street  
Post Office Box 785  
Wauconda, IL 60084

Division of Legal Counsel  
Illinois Environmental Protection Agency  
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P.O. Box 19276  
Springfield, Illinois 62794-9276



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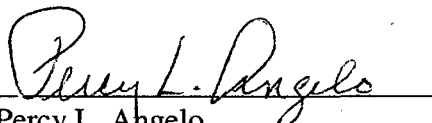
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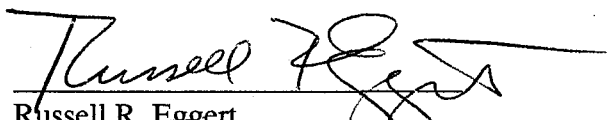
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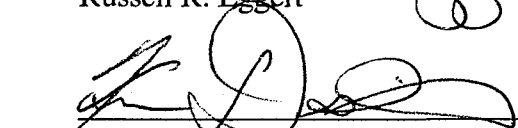
APPEARANCES

We, the undersigned attorneys, hereby enter our appearances as counsel on behalf of Petitioners Village of Lake Barrington and Cuba Township in this matter.

Respectfully submitted,

  
Percy L. Angelo

  
Russell R. Eggert

  
Kevin G. Desharnais

Dated: September 17, 2004

Percy L. Angelo  
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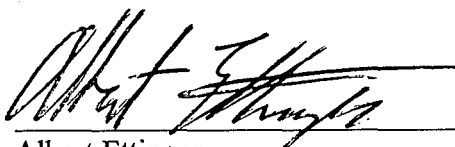
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PCB 04-05-55  
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APPEARANCE

I, the undersigned attorney, hereby enter my appearance as counsel in this matter on behalf of Petitioners Prairie Rivers Network, Sierra Club, Beth Wentzel and Cynthia Skrukud.

Respectfully submitted,

  
Albert Ettinger

Dated: September 17, 2004

Albert Ettinger  
Environmental Law and Policy Center  
35 East Wacker Drive, Suite 1300  
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312-795-3707

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Petitioners )

VS. )

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PCB 04-08-55

(APPEAL FROM IEPA DECISION  
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**PETITION FOR REVIEW OF A DECISION BY THE  
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**

Pursuant to 415 ILCS 5/40(e)(1) and 35 Ill. Admin. Code Section 105, the Village of Lake Barrington ("Lake Barrington"), Cuba Township, Prairie Rivers Network ("Prairie Rivers"), the Sierra Club, Beth Wentzel and Cynthia Skrukrud (collectively "Petitioners") hereby petition for review of the August 23, 2004 decision of the Illinois Environmental Protection Agency ("IEPA") to issue a modified National Pollutant Discharge Elimination System ("NPDES") permit (Permit IL 0020109) to the Village of Wauconda ("Wauconda") to increase its discharge of pollutants into Fiddle Creek tributary to the Fox River from its Wastewater Treatment Plant ("WWTP"). Ex. A. In support of their petition, Petitioners state as follows:

1. The Village of Lake Barrington is a municipal corporation existing under the laws of the State of Illinois and located in Lake County. It borders Fiddle Creek on the north and is immediately downstream of the Wauconda discharge. Lake Barrington and its residents are

directly impacted by the Wauconda WWTP discharge and its residents use and enjoy Fiddle Creek and its wetlands, the Fox River and the Illinois River for recreational and other activities.

2. Cuba Township is a township existing under the laws of the State of Illinois and located in Lake County. Fiddle Creek runs through Cuba Township downstream of the Wauconda discharge. Cuba Township and its residents are directly impacted by the Wauconda WWTP discharge and its residents use and enjoy Fiddle Creek and its wetlands, the Fox River and the Illinois River for recreational and other activities.

3. Prairie Rivers Network is an Illinois not-for-profit corporation concerned with river conservation and water quality issues in Illinois. It works with concerned citizens throughout the state to address those issues that impact Illinois streams. Prairie Rivers members live in the Fiddle Creek and Fox River Watersheds and are concerned with pollution that would affect their ability to enjoy recreation activities dependent on the ecological health of Fiddle Creek and its associated wetlands and on the Fox River and the Illinois River, including fishing, boating, canoeing, nature study and hiking.

4. The Sierra Club is a California not-for-profit corporation, which has among its purposes to protect and restore the quality of the natural and human environment. The Sierra Club has over 20,000 members residing in the State of Illinois and has members who are adversely affected by offensive conditions in Fiddle Creek, the Fox River and the Illinois River and by any degradation of Fiddle Creek, the Fox River and the Illinois River that could affect the uses of those waters. Sierra Club members live in the Fiddle Creek and Fox River watersheds and many Sierra Club members are concerned with pollution that would affect their ability to enjoy recreation activities dependent on the ecological health of Fiddle Creek and the Fox River including fishing, boating, canoeing, nature study and hiking. Sierra Club members are

adversely affected by offensive conditions that occur as the result of nutrients and biochemical oxygen demanding pollution discharged into Fiddle Creek, the Fox River and other downstream waters.

5. Beth Wentzel is a member of and a watershed scientist with the Prairie Rivers Network and submitted comments on the proposed permit.

6. Cynthia Skrukrud is a member of the Sierra Club and a clean water advocate for that organization. She presented testimony at the public hearing in this matter and submitted comments on the proposed permit.

7. Members of the Petitioners, including Albert Ettinger, Cynthia Skrukrud, Beth Wentzel and Evan Craig, and representatives and elected officials of Lake Barrington and Cuba Township on behalf of Lake Barrington and Cuba Township and their residents, including Lake Barrington Trustee Kevin C. Richardson, and their attorneys and consultant James E. Huff, P.E. of Huff & Huff, Inc., participated in the hearing held in this proceeding on September 9, 2003, and submitted comments in opposition to the permit during the public comment period. See e.g. Exs. B, C, D and E; Tr. 57-76, 97-102, 140-146, 150-154.<sup>1</sup> They and other members of Petitioners, and residents of Lake Barrington and Cuba Township are so situated as to be affected by the permit and by offensive conditions or other violations of water quality standards and of the Environmental Protection Act in Fiddle Creek and its associated wetlands, the Fox River and the Illinois River.<sup>2</sup>

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<sup>1</sup> References to Tr. \_\_\_\_, are to the public hearing transcript of September 9, 2003.

<sup>2</sup> Numerous residents of Lake Barrington and Cuba Township submitted comments and provided testimony as well.

### **Fiddle Creek**

8. Fiddle Creek flows through Lake County and comprises wetlands and channeled flow areas eventually joining Slocum Lake Drain and then entering the Fox River just south of Fox River Valley Gardens. The Wauconda WWTP discharges to Fiddle Creek at Anderson Road, approximately 2.4 miles from the Fox River. The Lake County Forest Preserve District ("LCFPD") Fox River Preserve is adjacent to Fiddle Creek on the south for some 2,600 feet downstream of the discharge. Lake Barrington is located immediately south of Fiddle Creek, from Anderson Road west, downstream of the WWTP discharge. There are no other permitted dischargers to Fiddle Creek.

9. The Wauconda WWTP originally discharged to Bangs Lake Drain Creek which flows into Slocum Lake, exits through the Slocum Lake Drain and joins the Fox River. Because the WWTP discharge was causing high levels of eutrophication in Slocum Lake, in 1983 the Pollution Control Board required that the discharge be moved from Slocum Lake. Wauconda moved the discharge to its present location in Fiddle Creek. Tr. 15-16. See Ex. G.

### **Statement of Issues Raised**

10. The IEPA issued notice that it had made a tentative decision to modify the NPDES permit for Wauconda to allow its WWTP to increase its design average flow from 1.4 million gallons per day ("MGD") to 1.9 MGD in Phase 1 and to 2.4 MGD in Phase 2, with increases in design maximum flow from 4.0 MGD to 5.963 MGD (Phase 1) and to 7.93 MGD (Phase 2). A public hearing was held September 9, 2003 at which Petitioners and many of their members, representatives and residents testified and submitted exhibits and comments. Additional comments were submitted by Petitioners and their members, representatives and residents before the close of the public comment period.



11. In their comments and testimony, Petitioners raised legal and scientific issues regarding flaws in the draft permit and in IEPA's consideration of the draft permit including the following (See references in paragraph 7, above):

(a) The permit allows discharges of phosphorus and nitrogen that cause, have reasonable potential to cause, or contribute to violations of the water quality standards regarding offensive conditions, 35 Ill. Adm. Code 302.203, in violation of 40 CFR 122.44(d) and 35 Ill. Adm. Code 309.141.

(b) The permit allows discharges that may cause, have a reasonable potential to cause, or contribute to violations of state water quality standards regarding dissolved oxygen ("DO"), 35 Ill. Adm. Code 302.206, in violation of 40 CFR 122.44(d) and 35 Ill. Adm. Code 309.141. For example, Huff & Huff, consultants for Lake Barrington and Cuba Township, monitored Fiddle Creek for DO at three locations: just below the Wauconda outfall, just before the merger with the Slocum Lake Outlet and at Roberts Road. DO violations occurred at Anderson Road and downstream on four out of five monitoring occasions. These are thus existing measured water quality violations to which Wauconda's effluent is clearly contributing, in violation of the applicable standards. Nitrates plus nitrites were found at levels above IEPA's criteria for use impairment. (E.g. 18 mg/L vs. 7.8 mg/L). See e.g. Tr. 57-76; Ex. B. See also Tr. 79 (Lake County Forest Preserve monitoring). Any increased discharge would exacerbate these existing violations and deleterious conditions.

(c) The permit and the assessments, and importantly, the lack of assessments, that led to the creation of the draft permit, did not comply with Illinois antidegradation rules protecting the existing uses of the receiving waters. 35 Ill. Adm. Code 302.105(a).

Assessments were not properly conducted to determine the potential effect of the draft permit on existing uses, including impacts causing a deterioration to the aquatic community as it existed on November 28, 1975. Among other flaws, the only water quality data referenced in the 2003 antidegradation assessment prepared by IEPA, Ex. F, is a September 15, 1993, facility stream survey by the Illinois EPA. This survey found “fair environmental conditions in Wauconda Creek with minor impact from the Wauconda STP (sewage treatment plant) discharge.” This survey identified elevated levels of conductivity, nitrate plus nitrite, phosphorus, sodium, potassium, boron, strontium, and oil downstream of the Wauconda outfall. Despite the IEPA findings, not one of these contaminants was evaluated under the antidegradation assessment. No discussion was included of conditions as of November 28, 1975, the relevant date for antidegradation analysis. See e.g. Ex. G. In addition, surveys have shown that the Fiddle Creek wetland has pollutant sensitive species (lake sedge, jewelweed, blue verain), Tr. 57-76, as well as an endangered fish, the starhead top minnow, Ex. H, yet the impact of increased pollutant loading on these species has not been considered. Testimony showed that nutrient enrichments have a detrimental effect on plant communities, including rapidly growing, invasive and weedy species, with negative impacts on DO. There was no consideration of the impact from the increased permitted loadings on existing uses or water quality, or assurance that technically and economically reasonable measures have been taken to avoid or minimize impacts, and no assurances that the activity causing the increased loading will benefit the community at large. 302.105(c). Alternatives, such as additional treatment levels or discharge to alternative locations, such as locations other than the impacted areas of Fiddle Creek were not considered. 302.105(f). Moreover, the

antidegradation assessment made the entirely unsupported assertion, on which the IEPA evidently relied, that the proposed project “will result in improved effluent quality.” Ex. F. In fact, all of the evidence available, including the IEPA 1993 stream survey, the Huff & Huff monitoring, the evidence of unnatural algal and other growth, and the evidence of endangered and pollutant sensitive species, is to the contrary.

(d) The IEPA assessment further fails to include the analysis of alternatives required by 302.105(f). Such analysis should have included consideration of increased levels of treatment, e.g. for phosphorus and nitrogen, capping of loading levels for TSS and BOD, partial land application and alternative discharge points which could have avoided the Fiddle Creek impacts. Those alternatives were not properly considered.

(e) Besides being substantively insufficient, the IEPA’s three page 2003 antidegradation assessment was insufficient under 302.105(f) by failing to consider impacts to biological communities, increased loadings, or alternatives or by providing a showing of benefits which fully justify the project. Ex. F. Rather than requiring data from the applicant, as required by 302.105(f), the assessment was performed despite the lack of any water quality samples over the previous ten years. The IEPA’s assessment determines ammonia and DO standards will not be exceeded without any basis for such statement. With regard to phosphorus and total nitrogen, it “defers” such analysis until state standards are adopted. There is no provision in 302.105 allowing deferral of decision-making or decision-making without information. Indeed a major point of 302.105 is to require analysis of issues which might not be fully developed through regulation or which would lead to degradation if not addressed now. As noted above, despite a total lack of supporting data, the assessment concludes without support that the

discharge “will result in improved effluent quality.” Such an analysis does not meet the requirements of 302.105.

(f) The IEPA’s permit analysis, including its 2003 antidegradation assessment, also fails to address the impact of the discharge on the Fox River, an impaired waterway. DT22, the Fox River segment into which Fiddle Creek discharges is designated impaired due to nutrients, inorganic – N (nitrates), siltation, pathogens and suspended solids. See Ex. B, Att. D.

(g) As demonstrated by the monitoring by Huff & Huff, Fiddle Creek should also be considered an impaired waterway for nutrients, phosphorus and total nitrogen, and low DO and should be subject to federal requirements for such waters. Ex. B. The permit does not properly consider its effect on such impaired waters.

(h) In light of the existing problems with Fiddle Creek and its wetlands and the Fox River, the pounds per day of TSS, BOD5, ammonia, and total nitrogen discharged by the WWTP should not be permitted to exceed the levels in the prior Wauconda permit, e.g. no net increase.

(i) In light of the wetland impacts already experienced, Wauconda should be required to develop, with the concurrence of its wetland neighbors, a wetland management plan to maintain and restore the Fiddle Creek wetlands.

(j) Plant and algal growth along Fiddle Creek, stimulated by excessive nutrients, has impeded the capacity of the creek during high flow conditions, causing flooding. Wauconda should be required to limit discharges, both loading and hydraulic, to reduce such impacts and should be required to contribute to the maintenance of such waterway.

(k) The IEPA permit fails to require Wauconda to implement a pretreatment program for its industrial dischargers despite industrial discharges which have resulted in WWTP upsets and unpermitted offensive discharges to the waters of the state. The WWTP also accepts industrial discharges from the Wauconda Sand and Gravel Superfund Site. Exs. I and J; Tr. 21. Wauconda should be required to implement a formal pretreatment program under the NPDES permit program.<sup>3</sup>

12. Petitioners asked that all technically and economically reasonable measures to avoid or minimize the impact of the proposed discharge and increase in loadings be incorporated into the permit, (see Exs. B, C, D and E for Petitioners' requests for relief), including:

(a) It provide for economically feasible controls on the discharge of nutrients including both phosphorus and nitrogen. There was no limit placed on total nitrogen.

(b) The limits in the permit be tightened to prevent discharges which could cause or contribute to violations of water quality standards regarding offensive conditions and dissolved oxygen. It was requested that pounds per day of TSS, BOD5 and ammonia be limited to the levels in the former Wauconda permit, e.g. no net increase, consistent with the antidegradation regulations.

(c) That proper biological studies and other work be conducted to assure that the discharge would not adversely affect existing uses of the stream.

(d) That IEPA properly consider whether the increased discharge was actually necessary in light of potential alternatives, such as additional treatment and alternative

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<sup>3</sup> IEPA has cited an August 3, 2001 USEPA letter to the effect that no industrial pretreatment program was required as of that date. USEPA, however, noted that no program was required because there were then no industrial users. Since then the existence of industrial users, and indeed violations caused by those users, have been documented by IEPA, rendering the USEPA determination obsolete. See e.g. Exs. I and J, Tr. 21.

discharge points, e.g. via pipeline, and whether it, in fact, benefits the community at large, including those in the Fiddle Creek watershed and the Fox River.

(e) That IEPA properly consider alternatives to allowing the loading of pollutants to the streams and wetlands that would be allowed by the draft permit.

(f) That Wauconda be required to implement a pretreatment program.

(g) That regular monitoring of the Wauconda discharge be required for organics and heavy metals.

13. On August 23, 2004 the IEPA issued the modified permit that is the subject of the instant petition. The modified permit failed to comply with legal and scientific requirements in at least the following respects.

(a) While the problem of nutrient discharges was recognized and phosphorus limits were imposed, no limits were imposed on total nitrogen discharges.

(b) No limitations were imposed to address the existing DO violations and offensive condition violations other than a minimum DO in the effluent. Rather the IEPA proposed to simply study the DO problem.

(c) No pretreatment program was required. Rather the IEPA simply asked for an annual updated industrial user survey.

(d) No proper antidegradation assessment was prepared.

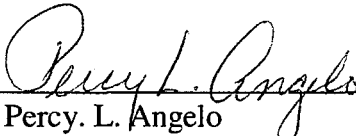
14. Petitioners and their members and residents will be adversely affected when pollution discharged under the permit causes or contributes to the creation of low oxygen and offensive conditions in Fiddle Creek and its associated wetlands, the Fox River and the Illinois River, and otherwise injures the ecology of Fiddle Creek and its wetlands and downstream

waters as a result of IEPA's failure to require appropriate effluent limits, monitoring, industrial pretreatment programs and a proper antidegradation analysis.

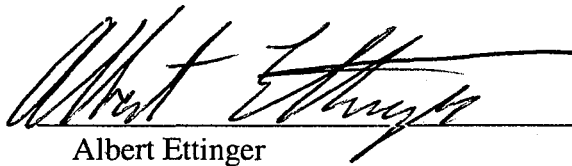
WHEREFORE, Lake Barrington, Cuba Township, the Prairie Rivers Network, Sierra Club, Beth Wentzel and Cynthia Skrukrud ask that the Pollution Control Board set aside NPDES permit IL0020109 issued to the Village of Wauconda on August 23, 2004 as not in accordance with law and direct the IEPA to reconsider the permit in order to establish conditions and limits necessary to protect Illinois waters, comply with Illinois water quality standards and comply with the Illinois Environmental Protection Act, 415 ILCS 5/1 et seq., Illinois regulations and the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq.

September 17, 2004

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