

SEP 27 2004

STATE OF ILLINOIS
Pollution Control Board

SLOCUM LAKE DRAINAGE DISTRICT OF)
LAKE COUNTY, ILLINOIS)

Petitioner)

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

Respondents.)

PCB 0558
(Third Party)

(Appeal from IEPA Decision)
Granting NPDES Permit
Permit No. IL0020109

**PETITION FOR HEARING TO REVIEW THE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
DECISION ON ISSUANCE OF NPDES PERMIT TO
VILLAGE OF WAUCONDA'S**

NOW COMES, SLOCUM LAKE DRAINAGE DISTRICT OF LAKE COUNTY,
ILLINOIS ("District"; "Petitioner"), pursuant to Section 40(e) of the Environmental
Protection Act ("Act") (415 ILCS 5/40(e) and 35 Ill. Admin. Code Section 105, and requests
a hearing before the Illinois Pollution Control Board ("Board") to review the August 23,
2004 decision of the Illinois Environmental Protection Agency ("IPEA") to issue a modified
National Pollutant Discharge Elimination System Permit ("NPDES Permit")(See Exhibit A
attached hereto and made a part hereof) to the Village of Wauconda ("Wauconda"),
County of Lake, Illinois, which allows Wauconda to increase its discharge of pollutants into
Fiddle Creek tributary to the Fox River from its Wastewater Sewage Treatment Plant
("WSTP") through the District's ditch system, and in support of the District's petition,
states as follows:

1. ESTABLISHMENT OF SLOCUM LAKE DRAINAGE DISTRICT

The District is an Illinois drainage district established pursuant to the Illinois Drainage Code, 70 ILCS 605/1-1 et. seq., with the full power to contract, sue and be sued. 70 ILCS 605/3-24. The District is a special purpose, non-profit entity that was originally established by the Circuit Court of Lake County in 1915, for which, at that time, its purpose was to provide drainage of agricultural land. At present, the District is responsible for maintenance of approximately 17,900 linear feet of ditch line ("Ditch") See Exhibit B, Slocum Drainage District Boundary Map attached hereto and made a part hereof. Over the years, the Ditch has not been maintained despite the increased usage it receives. Furthermore, in addition to natural drainage, the Ditch has been impacted by the increasing use by Wauconda WSTP.

2. BACKGROUND ON SLOCUM LAKE AND FIDDLE CREEK

Originally, Wauconda WSTP discharged to Bangs Lake Drain Creek which flows into Slocum Lake and exits through the Slocum Lake Drain and joins the Fox River. In 1983, when the Wauconda WSTP discharge was causing high levels of eutrophication in Slocum Lake, this Board required the discharge to be moved from Slocum Lake to its current Ditch discharge point which is Fiddle Creek. (See Exhibit C, Baxter & Woodman, Inc. letter dated March 23, 1983) Fiddle Creek ultimately unloads into the Fox River. (September 9, 2003 Public Hearing Transcript designated hereinafter as ("Tr.") Tr. 15-16.

Currently, the Wauconda WSTP discharges through District's Ditch system under Anderson Road into Fiddle Creek. Current Wauconda WSTP discharge rates

average over one million gallons per day. If residential development in the Wauconda area is allowed to expand resulting in the state agencies allowing Wauconda WSTP to increase the discharge per day into the Ditch, the downstream potential for increased flooding and degradation of the surrounding area (Fiddle Creek watershed and Slocum Basin watershed, i.e., 11 square miles) will escalate and deteriorate at an alarming rate. The current District Ditch system is inadequate for surface water drainage, let alone an increase in discharge by the Wauconda WSTP. Future residential and industrial development within the watershed will further impact this outdated system. In addition, the elevation of the drainage Ditch invert has a limited two foot pitch from the spillway to the Fox River into which it ultimately empties. Silt build-up and culvert problems along the secondary ditch from the spillway to the confluence also pose restrictions to the outflow volume of Wauconda WSTP effluent and stormwater runoff, not to mention an increase of possibly tens of millions of gallons per day from the Wauconda WSTP if the modified permit is allowed to stand.

3. MAINTENANCE OF THE DISTRICT'S DITCH

Historically, maintenance of the Ditch has been at a minimum, since the District receives only \$14,000 annually in assessments from residents within the boundaries of the District. The cost for any improvements required as a result of the issuance of the NPDES Permit to the Village of Wauconda would far exceed the amount received in annual assessments from residents and a minimal annual fee paid by the Village of Wauconda.

Consequently, the Ditch managed by the District is inadequate to handle the outflow of effluent from Wauconda WSTP and stormwater runoff. The ability of the District to obtain additional funding to improve the capacity and maintenance of the Ditch is extremely limited. Furthermore, if the landowners in the communities downstream and the adjacent wetlands (Fiddle Creek, Slocum Lake, their tributaries, and associated wetlands in the Slocum Basin Watershed) have increased susceptibility to contamination from the effluent from WSTP to their property, the District may be required to defend potentially thousands of lawsuits alleging contamination and pollutants from Wauconda WSTP's increased discharge. Consequently, the District is and shall be so situated as to be detrimentally affected by the NPDES Permit if the modified NPDES Permit is affirmed by this Board.

4. ISSUES RAISED AT PUBLIC HEARING OR IN PUBLIC COMMENT

A decision to modify the NPDES permit to the Wauconda WSTP would allow WSTP 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 and to 7.93 MGD. (See Exhibit "A").

At the public hearing held on September 9, 2003, (as well as comments submitted in opposition to the NPDES Permit during the public comment period), many individuals, representatives and residents commented, testified, and submitted exhibits, prior to the District representative, Ed McGlade. Most importantly, at the outset of the hearing, the

Hearing Officer remarked, at page 7, line 22, of the September 9, 2003 public hearing transcript, as follows:

“...And lastly, I would like to avoid unnecessary repetition, if possible. So, if anyone before you has already presented testimony that is contained in your written or oral comments, please skip over those issues when you testify. And remember, all written comments whether or not you say them out loud tonight will become part of the official hearing record and will be considered.”

(See Exhibit D, attached hereto and made a part hereof.) In addition, the Hearing Officer defined the public hearing as strictly an informational hearing; advised that the hearing was not “a contested hearing.”; no sworn testimony was taken; prohibited speakers from arguing, cross-examining, or engaging in a prolonged dialogue with the panel; and the Hearing Officer also limited individuals to five minutes and representatives of groups to ten minutes.

The District maintains that any issues raised during and after Mr. McGlade’s testimony are issues that should be allowed by this Petition before the Board. (See Tr. 110 through 114). Moreover, for the purposes of this Petition, testimony by any witness at the public hearing held on September 9, 2003, is repetitive of those that would have been espoused by the District if the District’s representative would have been given the opportunity.

Finally, the Hearing Officer advised that the IEPA would issue a Responsiveness Summary which would attempt to answer all the relevant and significant questions raised

in the Hearing or submitted prior to the close of the comment period. (See Tr. 8-9). See Exhibit "E" attached hereto and made a part hereof.

Through comments and testimony as aforesaid, Petitioner raised and has raised legal and scientific issues regarding deficiencies in the draft permit and in IEPA's consideration of the draft permit including, but not limited to, the following:

A. FALSE PERMIT APPLICATION SUBMITTED BY THE VILLAGE OF WAUCONDA

The Village of Wauconda submitted a false application to the IEPA for a modified NPDES Permit, for which possible criminal violations may be charged.

(1.) Note, 415 ILCS 5/44, states:

Criminal acts; penalties (a) Except as otherwise provided in this Section, it shall be a Class A misdemeanor to violate this Act or regulations thereunder, or any permit or term or condition thereof, or knowingly to submit any false information under this Act or regulations adopted thereunder, or under any permit or term or conditions thereof. A court may, in addition to any other penalty herein imposed, order a person convicted of any violation of this Act to perform community service for not less than 100 hours and not more than 300 hours. If community service is available in the jurisdiction. It shall be the duty of all State and local law-enforcement officers to enforce such Act and regulations, and all such officers shall have authority to issue citations for such violations.

(2.) In addition, 415 ILCS 5/44(h)(1) Violations; False Statements, states:

Any person who knowingly makes a false material statement in an application for a permit or license required by this Act to treat, transport, store, or dispose of hazardous waste commits the offense of perjury and shall be subject to the penalties set forth in Section 32-2 of the Criminal Code of 1961 (720 ILCS 5/32-2)

(3). The Village of Wauconda submitted its NPDES application by answering questions falsely. In particular, Question F-12 of that application states....."Does the treatment works currently or has it been notified that it will receive waste from remedial activities?" The Village of Wauconda answered "N/A", meaning "not applicable." On page 10 of the Wauconda WSTP NPDES application, "vinyl chloride" is listed with an asterick (*), which indicates "not believed to be present."

(4). The Conestoga-Rovers report on the Wauconda Sand & Gravel Superfund site states to the contrary. The IEPA failed to consider that the WSTP filed a false answer on its Application, since the Wauconda WSTP currently receives waste from a remedial activity, i.e., Wauconda Sand & Gravel Superfund Site; and that vinyl chloride is present at the facility outflow.

(5). On information and belief, the IEPA has failed to consider these facts and has not reported the Village of Wauconda as having included false and misleading statements in its Application for the modified NPDES permit, pursuant to Section 44 (h)(1). The District maintains that filing a false application should have consequences and at the very least, the Agency's consideration of the fact itself that such conduct was exhibited to a governmental agency from which relief is being sought.

B. NON-COMPLIANCE WITH THE ACT

The IEPA failed to consider Wauconda WSTP's acts of non-compliance with the Act and adjudications therefor. Because of past violations, the WSTP was forced into compliance with the Act upon a lawsuit having been filed in 1999 in Lake County, Illinois,

at the request of the IEPA by the Attorney General's Office. A consent decree was not entered in the matter until December 13, 2000. Furthermore, on September 24 and October 1, 2003, an industrial user of WSTP sent contaminated water to WSTP and sludge was released into Bangs Lake Drain. (See Exhibit ___, a copy of which is attached hereto and made a part hereof).

Section 39 of the Act, (415 ILCS 5/39) sets forth the requirements for issuance of a permit and states :

"...the Agency shall adopt such procedures as are necessary to carry out its duties under this Section. In making its determinations on permit applications under this Section, the Agency may consider prior adjudications of noncompliance with this Act by the applicant that involved a release of a contaminant into the environment. In granting permits, the Agency may impose reasonable conditions specifically related to the applicant's past compliance history with this Act as necessary to correct, detect, or prevent noncompliance. The Agency may impose such other conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder...."

At the September 9 and 10, 2003 informational hearing, Ms. Moreno, the IEPA Attorney, stated as follows:

"...Now, yes, it is true that through the '90's it (WSTP) had a lot of problems. No question about that. But it (WSTP) doesn't have those same problems anymore. What happened basically is that in 2000, 1999 and 2000, we had the Attorney General's office file suit against the Village to force them to take care of some of these problems. And there was a consent decree entered into here in Lake County in Chancery Court. And for those of you who might be interested, it's No. 99 CH 720. It was entered on December 13, 2000...."

Tr. 18-19.

Therefore, the IEPA failed to consider the credibility of the applicant when reviewing the contents of the WSTP application, and that the IEPA failed to consider the

past non-compliance of the WSTP with the Act. The District would contend that past conduct and non-compliance with the Rules should indicate the likelihood of non-compliance by the Village of Wauconda in the future. However, apparently these issues were not considered seriously by Agency and this Board should direct the Agency to do so.

C. NO VALID ANTI-DEGRADATION ANALYSIS WAS CONDUCTED

Pursuant to 35 Ill. Adm. Code 302.105(a), apparently no valid assessments were accomplished prior to the draft Permit, which conduct by the Agency does not comply with Illinois anti-degradation rules, which protects the existing uses of the receiving waters. To conduct a proper anti-degradation assessment, the potential effect on the aquatic quality data as of November 28, 1975 would have to be used as a base, thereby comparing, assessing and/or determining the potential effect of the draft Permit on current existing uses and receiving waters. This was not accomplished prior to the creation of the draft Permit. The 2003 IEPA anti-degradation assessment referenced a IEPA 1993 facility stream survey. That 1993 survey specified elevated levels of nitrate plus nitrite, phosphorus, sodium, potassium, boron, strontium, and oil downstream of the Wauconda outfall. Notwithstanding these findings, the IEPA failed to assess any one of these contaminants under the 2003 anti-degradation assessment. In addition, the 2003 anti-degradation analysis failed to include any mention of the 1975 data, the base data for a anti-degradation analysis.

Likewise, the IEPA failed to consider the impact from the increased permitted loadings on existing uses in order to support the assertion that the proposed project “..will

result in improved effluent quality.” Ex. G. No evidence supported such a statement. All of the evidence is to the contrary, i.e., the IEPA 1993 facility stream survey, the lack of comparison between the relevant 1975 conditions versus current conditions as well as future impact conditions, and other evidence available to the IEPA.

A Final Report for the Preliminary Evaluation of the Fiddle Creek Watershed by KOT Environmental Consulting, Inc. dated October 8, 2003 (“Report”)(A copy of which is attached hereto as Exhibit H and made a part hereof) performed at the request of the Village of Lake Barrington, conducted a Surface evaluation on the water flow of the discharge from the WSTP which combines with Fiddle Creek watershed, on through a 360-acre wetland, enters the District’s drainage channels which flows westward to an intersection with the flow from Slocum Lake continuing southward through a small wet land area discharging into the Fox River. That Report compared the then current conditions with the 1993 conditions. In 1993, the residence time (i.e., the period of time that a wetland can hold water) in Fiddle Creek wetland was 38 days. At the time of the comparison (2003), the resident time was 11 days, which represented a 71% decrease. The Report states that “...under current wastewater loading conditions (1.4MGD), the wetland will be reduced to a channel taking the wastewater directly to the Fox River. This process can take place in 14 to 15 years. Increasing the wastewater discharge to 2.4 MGD will increase the aging process even more, resulting in the elimination of the wetland altogether.” Nothing more need to be stated to have this Board be convinced that to direct

the IEPA to conduct a proper anti-degradation analysis is reasonable, necessary, vital and essential.

Therefore, this Board should direct the IEPA to conduct a anti-degradation analysis based upon stream conditions on or about November 28, 1975 in accordance with 35 Ill.Adm. Code 302.105(a). Such an analysis must include nutrients and radium being contributed by not only the proposed Wauconda expansion, but also the existing treatment plant contribution (industrial users and Superfund Site).

D. DISCHARGE ALTERNATIVES NOT CONSIDERED

The Agency's decision is flawed by the fact that no consideration was given to any discharge alternatives. Such negligence could negatively impact the District's position in relationship to the increased loading and the subsequent impact on downstream receiving waters and landowners adjacent and surrounding properties to the Ditch, in light of the District's inability to maintain the Ditch (algae and plant growth stimulated by excessive nutrients throughout the Ditch as well as sediment build-up), but such issues were not considered by the IEPA in prior to issuing their decision. 35 Ill.Adm. Code 302.105(f).

Additional discharge points could avoid the impact to degrading wetlands, in light of silt and sediment accumulations into and along the Ditch, but were not considered by the IEPA prior to issuing their decision. An alternative discharge point into a subsurface pipe was also not considered by the IEPA. Therefore, the discharge alternatives were not considered properly or seriously in light of the significant impact on all aspects of the receiving waters and, as a result, the District's involvement.

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E. NO QUALITY WATER SAMPLES OBTAINED PRIOR TO DECISION

The IEPA failed to obtain water quality samples from Wauconda WSTP as required by 35 Ill.Adm.Code 302.105(f), and the three-page anti-degradation assessment was compiled even though no water quality samples had been taken over the previous ten (10) years. The conclusion of the IEPA that "...ammonia and dissolved oxygen standards will not be exceeded.." is made without any basis or authority. Without taking water samples for analysis, how does the Agency make this unsupported conclusion? When the IEPA's assessment references phosphorus and total nitrogen, the assessment "defers" any analysis of these chemicals until state standards are adopted. Section 302.105 of the Illinois Administrative Code does not provide for a deferral or a conclusion to be reached without obtaining the required scientific data. In the end, the IEPA fails to produce any relevant data that would support the conclusion that the WSTP discharge "...will result in improved effluent quality."

Because of the serious negative impacts already experienced in Slocum Lake, Fiddle Creek and Fiddle Creek wetlands, at the hands of the Village of Wauconda WSTP, the Village of Wauconda should be required to cooperate with the District and other Lake County government entities towards implementation of a management plan to maintain and restore Slocum Lake, Fiddle Creek, and the Fiddle Creek wetlands, as well as the exploration of any alternative discharge carrier(s) and downstream receiving water(s) effected by the discharge from WSTP historically and futuristically.

F. NO PRE-TREATMENT PROGRAM IMPLEMENTED

The IEPA has failed to include in the Modified Permit a pre-treatment program for any current or unidentified industrial users, i.e., Wauconda Sand and Gravel Superfund Site, which wastewater is not treated prior to entry into the WSTP for processing. The IEPA referenced a August 3, 2001 letter from the U.S. EPA, that since there were no industrial users, a pre-treatment program was not required at that time. (See Exhibit I, attached hereto and made a part hereof). Since that time, the IEPA has not re-visited this issue, other than to require the Village of Wauconda to conduct surveys of the industrial users in the area which are sending their industrial wastewater to the WSTP. On information and belief, the Village of Wauconda does not diligently or actively monitor the potential industrial users of the WSTP on an ongoing basis. Clearly, the Village of Wauconda is negligent in their targeting of industrial waste users of the WSTP since violations have occurred in the past (See Exhibit E). The IEPA has failed to implement strict procedures upon the Village of Wauconda regarding the scientific monitoring of wastewater entering the WSTP from industrial users, i.e., Wauconda Sand and Gravel Superfund Site and other industrial users. The IEPA has failed to consider the impact of these wastewater contributions to the WSTP from industrial users and the loading from these users in conjunction with the loading from the requested expansion due to the residential development in and around Wauconda.

Upon review of the Record filed by the IEPA with this Board, the District respectfully reserves the right to amend its Petition after such review.

WHEREFORE, SLOCUM LAKE DRAINAGE DISTRICT, OF LAKE COUNTY,

ILLINOIS, Your Petitioner requests a hearing before this Board to review and set aside the IEPA's August 23, 2004, decision to issue the Modified NPDES Permit (IL0020109) to the Village of Wauconda, and respectfully requests that the Board set aside the IEPA Decision to Issue the Modified NPDES Permit, and the Petitioner additionally requests this Board to:

(A) Direct the Village of Wauconda to implement a formal pre-treatment program of water from remedial sites;

(B) Direct the IEPA to monitor the Village of Wauconda's discharge for organics and heavy metals as well as overflow of raw sewage from industrial users of the WSTP;

(C) Direct the IEPA to conduct a proper anti-degradation assessment, including taking of current water samples from the WSTP and in the downstream receiving waters;

(D) Direct the IEPA to consider alternative(s) for discharge other than Fiddle Creek and Fiddle Creek wetlands or Slocum Lake;

(E) Direct the Village of Wauconda to cooperate with Lake County governmental entities in order to restore and implement a wetland management plan for Slocum Lake, Fiddle Creek and the surrounding wetlands; and

(F) for such other relief as may be deemed appropriate and reasonable under the circumstances by this Board.

Respectfully submitted,
SLOCUM LAKE DRAINAGE DISTRICT

By: 

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