BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VILLAGE OF LAKE BARRINGTON, CUBA TOWNSHIP, PRAIRIE RIVERS NETWORK, SIERRA CLUB, BETH WENTZEL and CYNTHIA SKRUKRUD,	)	
Petitioners,	)	
v.	)	PCB 05-55 (Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

SLOCUM LAKE DRAINAGE DISTRICT OF LAKE COUNTY, ILLINOIS,	)	
Petitioner,	)	
v.	)	PCB 05-58 (Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

AL PHILLIPS, VERN MEYER, GAYLE DEMARCO, GABRIELLE MEYER, LISA O'DELL, JOAN LESLIE, MICHAEL DAVEY, NANCY DOBNER, MIKE POLITO, WILLIAMS PARK IMPROVEMENT ASSOCIATION, MAT SCHLUETER, MYLITH PARK LOT OWNERS ASSOC., DONALD KREBS, DON BERKSHIRE, JUDY BRUMME, TWIN POND FARMS HOMEOWNERS ASSOC., JULIA TUDOR, CHRISTINE DEVINEY,	)	
Petitioners,	)	
v.	)	PCB 05-59 (Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on January 7, 2005, I filed with the Illinois Pollution Control Board an original and nine copies of this Notice of Filing and attached Motion to Strike Joint Petitioners' Request to Admit, which are hereby served upon you.

Dated: January 7, 2005

William D. Seith
Total Environmental Solutions, P.C.
631 E. Butterfield Rd., Suite 315
Lombard, IL 60148
630-969-3300

Rudolph Magna
Magna & Johnson
495 N. Riverside Dr., Suite 201
Gurnee, IL 60031
847-623-5277

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VILLAGE OF LAKE BARRINGTON, CUBA TOWNSHIP, PRAIRIE RIVERS NETWORK, SIERRA CLUB, BETH WENTZEL and CYNTHIA SKRUKRUD,	)	
Petitioners,	)	
v.	)	PCB 05-55 (Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

SLOCUM LAKE DRAINAGE DISTRICT OF LAKE COUNTY, ILLINOIS,	)	
Petitioner,	)	
v.	)	PCB 05-58 (Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

AL PHILLIPS, VERN MEYER, GAYLE DEMARCO, GABRIELLE MEYER, LISA O'DELL, JOAN LESLIE, MICHAEL DAVEY, NANCY DOBNER, MIKE POLITO, WILLIAMS PARK IMPROVEMENT ASSOCIATION, MAT SCHLUETER, MYLITH PARK LOT OWNERS ASSOC., DONALD KREBS, DON BERKSHIRE, JUDY BRUMME, TWIN POND FARMS HOMEOWNERS ASSOC., JULIA TUDOR, CHRISTINE DEVINEY,	)	
Petitioners,	)	
v.	)	PCB 05-59 (Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

MOTION TO STRIKE JOINT PETITIONERS' REQUEST TO ADMIT

NOW COMES Respondent Village of Wauconda, by and through one of its attorneys, William D. Seith, and moves to strike the Joint Request to Admit to the Village of Wauconda filed by Petitioners Slocum Lake Drainage District of Lake County and The Resident Group ("Joint Petitioners"), and in support thereof, states as follows:

I. The Illinois Environmental Protection Act Does Not Permit Discovery in a Third Party Permit Appeal Proceeding

The Illinois Pollution Control Board ("Board") is a creature of statute.[1] As such, it only has such authority as is granted it by statute.[2] Section 5(d) of the Act, 415 ILCS 5/5(d) (2004), provides in relevant part as follows:

> (d) The Board shall have authority to conduct proceedings . . . upon petitions for review of the [Illinois Environmental Protection] Agency's final

[1] See Section 5 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/5 (2004).

[2] See Concerned Adjoining Owners v. Pollution Control Board, App. 5 Dist. 1997, 288 Ill.App.3d 565, 577. "The Board's authority is limited to the terms of its enabling statute . . . ."

determinations on permit applications in accordance with Title X of this Act.

Title X of the Act (Permits) includes Section 40(e) of the Act, 415 ILCS 5/40(e) (2004), which provides in relevant part:

(e)(1) If the Agency grants or denies a permit under subsection (b) of Section 39 of this Act, a third party, other than the permit applicant or Agency, may petition the Board within 35 days from the date of issuance of the Agency's decision, for a hearing to contest the decision of the Agency.

* * *

(3) If the Board determines that the petition is not duplicative or frivolous and contains a satisfactory demonstration under subdivision (2) of this subsection, the Board shall hear the petition (i) in accordance with the terms of subsection (a) of this Section and its procedural rules governing permit denial appeals and (ii) exclusively on the basis of the record before the Agency. .

(Emphasis added.)

In filing their Request to Admit, Joint Petitioners purport to rely upon Board General Rule 101.202, 35 Ill. Adm. Code 101.202. General Rule 101.202, however, is a list of definitions and does not purport to provide any authority to propound requests to admit. Assuming, for the sake of discussion, that Joint Petitioners intended to rely upon General Rule 101.618, 35 Ill. Adm. Code 101.618, this General Rule is still of no help to them.[3] General Rule 101.618 no doubt applies in any number of cases before the Board where discovery is allowed[4]. In third party permit appeals of all types, however,

[3] It is worth noting that General Rule 101.618 requires, *inter alia*, that, "Any party serving a request to admit in accordance with subsection (d) or (e) must include the following language in the first paragraph of the request. 'Failure to respond to the following requests to admit within 28 days may have severe consequences. Failure to respond to the following requests will result in all the facts requested being deemed admitted as true for this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding or an attorney.'" Nowhere in Joint Petitioners' Request to Admit is this language contained.

"the Board shall hear the petition . . . exclusively on the basis of the record before the Agency."[5]

Since Section 40(e) of the Act, 415 ILCS 5/40(e) (2004), clearly limits the Board's authority in this third party permit appeal to a review based solely on the record before the Agency, the Joint Petitioners' Request to Admit serves no meaningful purpose in this proceeding, and therefore must be stricken.[6]

II. Joint Petitioners' Request to Admit Violates Supreme Court Rule 216

Illinois Supreme Court Rule 216(a) states as follows:

> A party may serve on any other party a written request, for the admission by the latter of the truth of any specified relevant fact set forth in the request.

(Emphasis added.) In a number of statements set forth in Joint Petitioners' Request to Admit, the Joint Petitioners seek to have Wauconda affirm conclusions drawn by Joint Petitioners rather than facts. In several of the paragraphs, Joint Petitioners ask Wauconda to agree with Joint Petitioners' conclusion that statements made on various documents submitted to Illinois EPA are false.[7] Joint Petitioners also ask Wauconda to

---

[4] For example, enforcement cases pursuant to Section 31, 415 ILCS 5/31 (2004), of the Act, variance petitions pursuant to Section 35, 415 ILCS 5/35 (2004) of the Act, and permit denial appeals by the applicant pursuant to Section 40(a) of the Act, 415 ILCS 5/40(a).

[5] See Sections 40(b), 40(c) and 40(e) of the Act, 415 ILCS 5/40(b), (c) and (e) (2004). See also Section 40(d) of the Act, 415 ILCS 5/40(d) (2004), regarding the appeals of Agency permit decisions under the Clean Air Act.

[6] See Opinion and Order of the Board of August 9, 2001 in Prairie Rivers Network v. IEPA and Black Beauty Coal Company (PCB 01-112), p. 10, "In addressing the scope of review for this permit appeal, the Board is bound by the clear directives of Section 40(e)(3) of the Act (415 ILCS 5/40(e)(3) (2000). Accordingly, for purposes of this appeal, the only information the Board may properly consider is that information that was before the IEPA below. The Board has consistently held that in permit appeals, its review is limited to the record that was before IEPA at the time the permitting decision was made." See also *Id.*, p. 25, where the Board notes that certain exhibits presented at the hearing were "based on data collected after issuance of the NPDES permit . . . Accordingly, the Board strikes these exhibits . . . ." (Emphasis added.)

[7] See Request to Admit, paragraphs 13, 14, 17, 18 and 22.

agree with Joint Petitioners' conclusion that Wauconda or its representatives had actual knowledge of certain matters.[8] Wauconda vehemently denies that it or its representatives knowingly misrepresented any material fact on any documents filed with Illinois EPA. Nevertheless, Joint Petitioners' requests in paragraphs 13, 14, 17, 18, 21, 22 are conclusions, and not facts. Accordingly, the requests in these paragraphs violate Supreme Court Rule 216 and should therefore be stricken.

III. Joint Petitioners' Request to Admit Seeks to Introduce Irrelevant Facts and Conclusions Not Contained in the Record Before the Illinois EPA

As noted in Section I above, the Joint Petitioners are not entitled to rely upon any matters not put into the record before the Illinois EPA issued its permit decision. In paragraphs 23 through 30 of their Request to Admit, the Joint Petitioners seek to introduce a number of facts and conclusions that are irrelevant to the Illinois EPA's permit decision, are not matters in the record nor matters relied upon by Illinois EPA, and that contain no citation to any document or statement in the record before the Illinois EPA. For example, in paragraph 23, Joint Petitioners attempt to raise an issue about the location of Wauconda's outfall in 1975. The location of Wauconda's outfall in the past is irrelevant to the application that was before the Illinois EPA in 2004. The Agency's duty is to review the application before it and make an engineering determination as to whether the proposed discharge, regardless of its location, will comply with applicable state and federal requirements, including the standards duly adopted by the Board.[9] In paragraph 24, Joint Petitioners attempt to raise an issue

[8] See Request to Admit, paragraph 21.

[9] See generally, Section 39(b) of the Act, 415 ILCS 5/39(b) (2004), and 35 Ill. Adm. Code 309.103(a)(1).

about the relocation of Wauconda's outfall in the "19980's" (sic).[10] Again, this issue is irrelevant to the Illinois EPA's consideration of the application that was before it in 2004. In paragraphs 25 through 28, Joint Petitioners seek to have Wauconda agree with conclusions that are irrelevant to the Agency's decision and are not based upon any document or testimony contained in the record. Finally, in paragraphs 29 and 30, Joint Petitioners seek to elicit new testimony from Wauconda that is in no way relevant to the Agency's decision on the application before it in 2004.

It is therefore incumbent upon the Board to strike paragraphs 23 through 30 of Joint Petitioners' Request to Admit.[11]

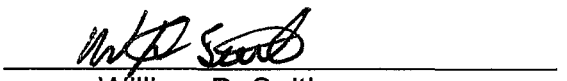
[10] Since the 19980's is a decade that will not begin for another 17, 975 years, Wauconda assumes for the sake of discussion that Joint Petitioners mean the 1980's.

[11] See Opinion and Order of the Board of August 9, 2001 in Prairie Rivers Network v. IEPA and Black Beauty Coal Company (PCB 01-112), p. 25.

IV. Conclusion

WHEREFORE, for all of the foregoing reasons, Respondent Village of Wauconda moves the Board to strike Joint Petitioners' Request to Admit in its entirety.

Respectfully Submitted,



William D. Seith
One of the attorneys for Respondent
Village of Wauconda

William D. Seith
Total Environmental Solutions, P.C.
631 E. Butterfield Rd., Suite 315
Lombard, IL 60148
630-969-3300

Rudolph Magna
Magna & Johnson
495 N. Riverside Dr., Suite 201
Gurnee, IL 60031
847-623-5277

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing Motion to Strike Joint Petitioners' Request to Admit were mailed, first class, on January 7, 2005 to each of the following persons:

Dorothy M. Gunn
Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Suite 11-500
Chicago, IL 60601

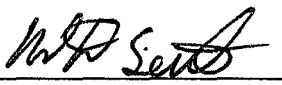
Sanjay Kumar Sofat
James Allen Day
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Ave. East
P.O. Box 19276
Springfield, IL 62794-9276

Percy L. Angelo
Russell R. Eggert
Kevin G. Desharnais
Mayer, Brown, Rowe & Maw, LLP
190 S. LaSalle St.
Chicago, IL 60603

Bonnie L. Macfarlane
Bonnie Macfarlane, P.C.
106 W. State Rd.
P.O. Box 268
Island Lake, IL 60042

Albert Ettinger
Environmental Law and Policy Center
35 E. Wacker Dr., Suite 1300
Chicago, IL 60601

Jay J. Glenn
Attorney at Law
2275 Half Day Road
Suite 350
Bannockburn, IL 60015



William D. Seith
Total Environmental Solutions, P.C.
631 E. Butterfield Rd., Suite 315
Lombard, IL 60148
630-969-3300

Rudolph Magna
Magna & Johnson
495 N. Riverside Dr., Suite 201
Gurnee, IL 60031
847-623-5277