

ILLINOIS POLLUTION CONTROL BOARD
February 3, 2005

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

Petitioners,)

v.)

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

Respondents.)

PCB 05-55
(Third-Party NPDES Permit Appeal -
Water)

SLOCUM DRAINAGE DISTRICT OF LAKE)
COUNTY, ILLINOIS,)

Petitioner,)

v.)

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

Respondents.)

PCB 05-58
(Third-Party NPDES Permit Appeal -
Water)

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

HEARING OFFICER ORDER

On December 22, 2004, petitioners Slocum Drainage District of Lake County, Illinois, (Drainage District) and Al Phillips, Vern Meyer, Gayle Demarco, Gabrielle Meyer, Lisa O'Dell, Joan Leslie, Michael Davey, Nancy Dobner, Mike Politio, Williams Park Improvement Association, Mat Schlueter, Mylith Parl Lot Owners Association, Donald Krebs, Don Berkshire, Judy Brumme, Twin Pond Farms Homeowners Association, Julia Tudor and Christine Deviney (Association) (collectively, petitioners), filed two motions. One was entitled motion for sanctions and to compel the Illinois Environmental Protection Agency (Agency) to produce certain unspecified documents. Petitioners' second motion was entitled motion to compel the Agency to produce the violation and litigation record. On January 7, 2005, the Agency filed a response to the motion to compel the Agency to produce the violation and litigation record. On January 10, 2005, the Agency filed a response to the motion for sanctions and to compel. On December 22, 2005, the petitioners filed a joint request to admit and served both the Agency and respondent, Village of Wauconda (Wauconda). On January 7, 2005, the Agency filed its response to the petitioners' joint request to admit. On January 10, 2005, Wauconda filed a motion to strike petitioners' joint request to admit. The parties were directed to file any responses or replies to the above pleadings on or before January 26, 2005. To date, no responses or replies have been filed.

Motion To Compel

In the petitioners prayer for relief contained in the motion for sanctions and compel, they request that: (a) an order be entered prohibiting the Agency from altering and/or destroying documents relating to the Wauconda Wastewater Treatment Plant; (b) order the Agency to file and to produce documents contained in the folders that the petitioners reviewed in the Agency's office on December 17, 2004: and (c) require the Agency to provide and certify that the record filed with the Board is complete. In the petitioners motion to compel the Agency to produce the violation and litigation record, they request an order to compel the Agency to produce the violation and litigation record for the Village of Wauconda's Wastewater Treatment Plant from 1980 to the present.

The Agency's response to the motion for sanctions and to compel states, among other things, that the petitioners demand to produce documents contained in all folders reviewed on December 17, 2004, is outside the mandates of both the Environmental Protection Act (Act) and the Board regulations. The Agency's response to the motion to compel the Agency to produce the violation and litigation record states, among other things, that demanding the introduction of documents that were not considered by the Agency during the permitting decision process would not only be inconsistent with the requirements of the Act but also a waste of the Board's valuable time.

Discussion

It is well-settled that the Board's review of permit appeals is limited to information before the Agency at the time the Agency issued its determination and information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E. 2d 275, 280 (5th Dist. 1987); *Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom.* 331 Ill. App. 1056, 772 N.E.2d 231 (3d Dist. 2002).

Addressing first the petitioners' motion for sanctions and to compel, the hearing officer denies petitioners prayer to enter an order prohibiting the Agency from altering and/or destroying documents relating to the Wauconda Wastewater Treatment Plant. Petitioners fail to offer any evidence that the Agency is altering and/or destroying said documents, and it is assumed the Agency will not do so. Further, the hearing officer denies the petitioners prayer to enter an order directing the Agency to file and to produce documents contained in the folders reviewed in Springfield, Illinois, on December 17, 2004. The Board's procedural provisions require that all motions must contain a concise statement of the position or the relief sought. *See Board's Procedural Rules*: 35 Ill. Adm. Code 101.504. The hearing officer is unable to discern specifically what documents the petitioners' request or whether they were in the record before the Agency at the time the Agency issued its determination. The Agency's response, although somewhat more clear as to what the petitioners are requesting, states in paragraph 20 states that the documents requested fall outside the mandates of both the Act and the Board regulations. There is little indication whether the requested documents were in the record or was other information not in the record at the time the Agency made its decision. Finally, the hearing officer denies the petitioners' request to require the Agency to certify that the record before the Board is complete. The record filed December 1, 2004 bears the attorney's signature

representing the Agency. The attorney's signature is sufficient. Moreover, the Agency continues to supplement the record.

In the petitioners' motion to compel the Agency to produce the violation and litigation record, the petitioners specifically request that the Agency be ordered to produce the violation and litigation records for the Village of Wauconda's Wastewater Treatment Plant from 1980 to present. The Agency response states that Section 39(a) of the Act provides that, at the Agency's discretion, the Agency may consider prior adjudications of noncompliance. The Agency states that only one prior adjudication of noncompliance in the form of a consent decree was considered during the permitting decision process. The consent decree is attached to the Agency's response. The Agency requests that the consent decree, 99 CH 720, entered by the Nineteenth Circuit Court on December 13, 2000, be made part of the record. The Agency's request is granted. In any event, case law requires that if the requested information was in the record before the Agency at the time the Agency made its determination, it is required to be in the record on review. Therefore, the petitioners' motion to compel the Agency to produce the violations and litigation records is granted to the extent that if the documents requested were in the record before the Agency at the time the Agency made its determination, they must be included in the record on review. The requested documents, however, are subject to any attorney-client privilege.

Request to Admit

On December 22, 2004, the petitioners filed a joint request to admit and served the Village of Wauconda. On January 10, 2005, Wauconda filed a motion to strike petitioner's joint request to admit. The petitioners have not filed a response. Section 101.500 of the Board's procedural provisions state that if no response to a motion is filed, the party will be deemed to have waived objection to the granting of the motion. Moreover, Section 101.618 of the Board's procedural provisions require in pertinent part that any party serving a request to admit must include the language that "[f]ailure 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" The petitioners omitted this required language from its pleading. Finally, and as noted earlier, the Board's review of the permit determination is limited to the record before the Agency at the time the Agency issued its determination, not the entity seeking the permit. For all of these reasons, the hearing officer grants Wauconda's motion to strike.

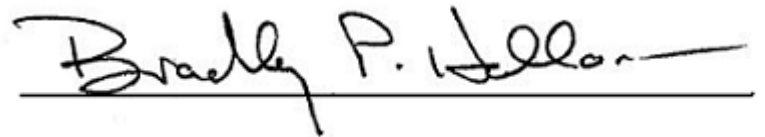
On December 22, 2004, the petitioners filed a joint request to admit and served the Agency. The petitioners have not filed a reply or a response to the Agency's numerous objections stated in the Agency's response. The petitioners also failed to include the required language found in Section 101.618 of the Board's procedural provisions. In any event, the Board is limited in its review to the record before the Agency at the time the Agency made its determination. Additionally, the Board's hearing affords the petitioners the opportunity to challenge the Agency's reasons for its decision regarding the permit.

The Agency is directed to file as part of the record on review, any violation and litigation documents that were in the record before the Agency at the time it made its permit determination in this matter, whether they were considered or not, on or before February 8, 2005. The

documents are subject to any attorney-client privilege. The mailbox rule will not apply. Discussion will be entertained at the February 7, 2005, pre-hearing conference regarding facsimiles.

The parties or their legal representatives are directed to participate in a telephonic pre-hearing conference with the hearing officer on February 7, 2005, at 1:00 p.m. The telephonic conference dial-in number is 1-800-559-0863. The pass code is 7618099#. At the conference, the parties must be prepared to discuss the status of the above-captioned matters 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
Hearing Officer
Illinois Pollution Control Board
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