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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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
(3rd Party NPDES Permit Appeal)

SLOCUM LAKE DRAINAGE DISTRICT OF LAKE COUNTY, ILLINOIS,

Petitioner,

v.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,

Respondents.

PCB 05-58
(3rd Party NPDES Permit Appeal)

THIS FILING PRINTED ON RECYCLED PAPER

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 ASSOCIATION, DONALD KREBS, DON BERKSHIRE, JUDY BRUMME, TWIN POND FARMS HOMEOWNERS ASSOCIATION, JULIA TUDOR and CHRISTINE DEVINEY,

Petitioners,

v.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,

Respondents.

PCB 05-59
(3rd Party NPDES Permit Appeal)
(Consolidated)

NOTICE OF FILING

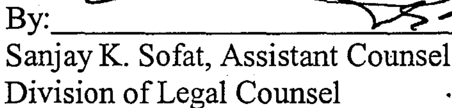
Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601

Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601

SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board an original and four (4) copies the **POST-HEARING BRIEF** of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY



By:____________________
Sanjay K. Sofat, Assistant Counsel
Division of Legal Counsel

Dated: February 25, 2004
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62794-9276
(217) 782-5544

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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 (3rd Party NPDES Permit Appeal)
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POST-HEARING BRIEF IN SUPPORT OF AGENCY'S RESPONSE TO PETITIONERS' THIRD-PARTY PERMIT APPEAL

NOW COMES, Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Sanjay K. Sofat, Assistant Counsel and Special Assistant Attorney General, and hereby submits this brief in support of the Agency's response to Petitioners' third party permit appeal.

I. BACKGROUND

The Village of Wauconda ("Village") proposes to expand its existing wastewater treatment plant's design average flow from 1.4 million gallons per day ("MGD") to 1.9 MGD, and design maximum flow from 4.0 MGD to 5.963 MGD, during Phase 1 of the expansion. During Phase 2 of the expansion, the Village plans to expand the plant's design average flow to 2.4 MGD and design maximum flow to 7.93 MGD. The treatment plant is located at 302 Slocum Lake Road and

discharges into Fiddle Creek, at North Anderson Road. The Fiddle Creek is classified as a general use stream, which ultimately discharges into the Fox River. (Agency Record hereinafter "Record" Book 4, p.2213)

The Wauconda wastewater treatment plant originally discharged to Bangs Lake Drain Creek, also known as Slocum Creek. The Bangs Creek or Slocum Creek flows into Slocum Lake, exits through the Slocum Lake Drain and finally merges into the Fox River. In the mid 1970s, it became apparent to the Agency that the discharge from the Village's wastewater treatment plant was causing high levels of phosphorus in Slocum Lake. In 1977, the Illinois Pollution Control Board ("Board") granted the Village of Wauconda a variance from the phosphorus effluent standard at 35 Ill. Adm. Code 304.123 of the Board regulations in order to give the Village some time to resolve the problem. As the high levels of phosphorus persisted in the Slocum Lake, the Board terminated the Village's variance in 1983. The Village then moved the discharge point to Fiddle Creek. At times, the receiving stream has been referred to as "an unnamed tributary to the Fox River" or "Wauconda Creek" in the Agency documents, however, the discharge point has been the same since 1983. (Record, Book 4, p. 2213)

The receiving stream, Fiddle Creek, is part of a complex combination of wetlands and man-made drainage ditches. The Fiddle Creek flows through a man-made silt trap and then joins into the wetland complex. The wetland complex has been channelized and the drainage ditch flows West for approximately 625 feet, South for approximately 1,500 feet, West for approximately 5,250 feet, South for approximately 1,250 feet, and West for approximately 1,125 feet where it joins Slocum Lake Drain before entering the Fox River just south of Fox River Valley Gardens. (Record, Book 1, p. 239). The Lake County Forest Preserve District ("LCGPD") owns a portion of the Fiddle Creek, approximately 2,600 linear feet, which constitutes the northern boarder of the 517-acre Fox River Preserve. The land use surrounding the Fiddle Creek over time has changed from farmland to

highly populated residential area. The Fiddle Creek passes through the Saddlewood, Lakewood, and Twin Farm subdivisions before discharging into the Fox River which is about 2.4 miles from the Village's outfall. According to the drainage district, the ditch was dug in about 1905 to drain the wetlands for agricultural development. Restoration work was done on the ditch in 1960 and 1997. The restoration work is done on the ditch if the drainage district has sufficient funds to perform the necessary activities. (Record, Book 4, p. 2213)

II. CHRONOLOGY OF EVENTS

On March 24, 2003, the Agency received an application for modification of National Pollutant Discharge Elimination System ("NPDES") Permit No. IL 0020109. (Record, Book 3, pp. 1608-1669). On April 9-10, 2003, the Agency conducted a general review of the Village's NPDES permit modification application. (Record, Book 3, pp. 1673-1676).

Beginning July 25, 2003, the Agency provided public notice of the Village's draft NPDES permit for public comments thrice (July 25, August 1 and 8) in the *Wauconda Leader*. (Record, Book 4, p. 2212). The Agency had to change the originally scheduled public hearing on August 26 to September 9, 2003, as the required public notice was not published in the local newspaper. On July 23, 2003, the Agency mailed the public hearing notice to local legislatures, county and municipal officials, environmental organizations, and interested citizens. The public hearing notice was mailed. *Prairie Rivers* Network helped to widely circulate the public hearing notice by sending it to their listserv. The local citizens near the Village's treatment plant also helped to widely circulate the public hearing notice through distribution of fliers, posting of signs, and on their website at www.savefiddlecreek.com. From August 1, 2003, through September 7, 2003, the Agency further notified the general public by publishing the public hearing notice in the *Wauconda Leader, Waukegan News Sun, Daily Herald, and Barrington Courier Review.* In order to educate

the general public regarding the Village's NPDES draft permit, the Agency mailed an issue information fact sheet on September 5, 2003, to all persons for whom the Agency had a mailing address. (Record, Book 4, p. 1121)

On September 9, 2003, the Agency conducted a public hearing at the Wauconda High School. Due to the large number of participants, the Agency had to move the hearing location from the Wauconda Township Hall, as notified in the public hearing notice, to the Wauconda High School. An Agency representative remained at the Township Hall until 8 p.m. to direct interested citizens to the new location. Approximately two hundred participants including persons representing municipalities, news media, local citizens, consultants, county officials, and environmental interests attended the public hearing. (Record, Book 4, p. 2212).

The Agency posted a transcript of the public hearing on its website on October 8, 2003. Due to the great interest expressed by the participants, the Agency extended the public hearing comment period from October 9, 2003, to October 31, 2003. The Agency published the extension of the public hearing comment period on its website and in the *Waukegan News Sun*. (Record, Book 4, p. 2212)

On August 23, 2004, the Agency issued the Village's NPDES permit IL 0020109, which expires on November 30, 2005. (Record, Book 4, p. 2251)

On September 17, 2004, Village of Lake Barrington, Cuba Township, Prairie Rivers Network, Sierra Club, Beth Wentzel, and Cynthia Skrukrud filed a third party permit appeal with the Board pursuant to 415 ILCS 5/40(e)(1) and 35 Ill. Adm. Code 105.204(b). On September 27, 2004, Slocum Lake Drainage District of Lake County ("Slocum District" or "SD"), Illinois filed a Section 40(e) petition with the Board. Also, on September 27, 2004, Al Phillips, Vern Meyer, Gayle Demarco, Gabrielle Meyer, Lisa O'Dell, Joan Leslie, Michael Davey, Nancy Dobner, Mike Politio, Williams Park Improvement Association, Mat Chlueter, Mylith Park Lot Owners Association, Julia

Tudor, and Christine Deviney ("Resident Group" or "RG") filed a Section 40(e) petition with the Board.

On January 11, 2005, Village of Lake Barrington, Cuba Township, Prairie Rivers Network, Sierra Club, Beth Wentzel, and Cynthia Skrukrud (referred to as "Settling Petitioners" in the settlement document) and the Village of Wauconda filed a stipulation with the Board. The Settling Petitioners, under Section IV of the stipulation, stated that, "In consideration of Wauconda's agreement to commitments contained in the IGA, upon the Pollution Control Board's acceptance and approval of the terms of this Stipulation ... the Settling Petitioners shall dismiss their petition in case number PCB05-55 with prejudice." Stipulation at 8. On February 3, 2005, the Board declined to accept the stipulation. As the Settling Petitioners and the Village of Wauconda have expressed their desire to be bound by the terms of the stipulation, this brief does not address the issues raised by the Settling Petitioners. The Slocum District ("SD") and the Resident Group ("RG") are collectively referred to as "Petitioners" in this post-hearing brief.

III. APPLICABLE STAUTORITY AND REGULAOTRY PROVISIONS

Statutory Authority

Petitioners bring the permit appeal pursuant to Section 40(e) of the Act. This section allows the third parties to appeal the Agency's decision of an NPDES permit to the Board. Section 40(e) of the Act provides:

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.
2. A petitioner shall include the following within a petition submitted under subdivision (1) of this subsection:

a. A demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held; and
b. A demonstration that the petitioner is so situated as to be affected by the permitted facility.

3. If the Board determines that the petition is not duplicitous 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. The burden of proof shall be on the petitioner. The Agency and permit applicant shall be named co-respondents. 415 ILCS 5/40(e) (2004) (*emphasis added*)

Section 39(a) of the Act sets forth the applicant's and the Agency's obligations prior to issuing an NPDES permit. Section 39 of the Act provides:

(a) When the Board has by regulation require a permit for the construction, installation, or operation of any type of facility, equipment, vehicle, vessel, or aircraft, the applicant shall apply to the Agency for such permit and is shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of the Act or of regulations hereunder. 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, direct, 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.... 415 ILCS 5/39(a) (2004) (*Emphasis added*)

Section 44 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 condition 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 the all State and local law-enforcement officers to enforce such Act

and regulations, and all such officers shall have the authority to issue citations for such violations. 415 ILCS 5/44(a) (2004) (*emphasis added*)

(h) Violations; False Statements.

(1) 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. 415 ILCS 5/44(h)(1)(2004) (*emphasis added*)

Applicable Board Regulations

The Board regulations at 35 Ill. Adm. Code 302.105 set forth in detail the requirements that apply to the Agency's antidegradation analysis. Section 302.105 provides:

The purpose of this Section is to protect existing uses of all waters of the State of Illinois, maintain the quality of waters with quality that is better than water quality standards, and prevent unnecessary deterioration of waters of the State.

a) Existing Uses
Uses actually attained in a surface water body or water body segment on or after November 28, 1975, whether or not they are included in the water quality standards, must be maintained and protected. Examples of degradation of existing uses of the waters of the State include:

1) an action that would result in the deterioration of the existing aquatic community, such as a shift from a community of predominantly pollutant-sensitive species to pollutant-tolerant species or a loss of species diversity;

2) an action that would result in a loss of a resident or indigenous species whose presence is necessary to sustain commercial or recreational activities; or

3) an action that would preclude continued use of a surface water body or water body segment for a public water supply or for recreational or commercial fishing, swimming, paddling or boating.

■■

c) High Quality Waters

1) Except as otherwise provided in subsection (d) of this Section, waters of the State whose existing quality is better than any of the established standards of this Part must be maintained in their present high quality, unless the lowering of water quality is necessary to accommodate important economic or social development.

2) The Agency must assess any proposed increase in pollutant loading that necessitates a new, renewed or modified NPDES permit or any activity requiring a CWA Section 401 certification to determine compliance with this Section. The assessment to determine compliance with this Section must be made on a case-by-case basis. In making this assessment, the Agency must:

A) Consider the fate and effect of any parameters proposed for an increased pollutant loading.

B) Assure the following:

i) The applicable numeric or narrative water quality standard will not be exceeded as a result of the proposed activity;

ii) All existing uses will be fully protected;

iii) All technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading have been incorporated into the proposed activity; and

iv) The activity that results in an increased pollutant loading will benefit the community at large.

C) Utilize the following information sources, when available:

i) Information, data or reports available to the Agency from its own sources;

ii) Information, data or reports supplied by the applicant;

iii) Agency experience with factually similar permitting scenarios; and

iv) Any other valid information available to the Agency.

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f) Antidegradation Assessments

In conducting an antidegradation assessment pursuant to this Section, the Agency must comply with the following procedures.

1) A permit application for any proposed increase in pollutant loading that necessitates the issuance of a new, renewed, or modified NPDES permit or a CWA Section 401 certification must include, to the extent necessary for the Agency to determine that the permit application meets the requirements of this Section, the following information:

A) Identification and characterization of the water body affected by the proposed load increase or proposed activity and the existing water body's uses. Characterization must address physical, biological and chemical conditions of the water body.

B) Identification and quantification of the proposed load increases for the applicable parameters and of the potential impacts of the proposed activity on the affected waters.

C) The purpose and anticipated benefits of the proposed activity. Such benefits may include:

   i) Providing a centralized wastewater collection and treatment system for a previously unsewered community;

   ii) Expansion to provide service for anticipated residential or industrial growth consistent with a community's long range urban planning;

   iii) Addition of a new product line or production increase or modification at an industrial facility; or

   iv) An increase or the retention of current employment levels at a facility.

D) Assessments of alternatives to proposed increases in pollutant loading or activities subject to Agency certification pursuant to Section 401 of the CWA that result in less of a load increase, no load increase or minimal environmental degradation. Such alternatives may include:

   i) Additional treatment levels, including no discharge alternatives;

   ii) Discharge of waste to alternate locations, including publicly-owned treatment works and streams with greater assimilative capacity; or

   iii) Manufacturing practices that incorporate pollution prevention techniques.

E) Any additional information the Agency may request.

F) Proof that a copy of the application has been provided to the Illinois Department of Natural Resources.

IV. ARGUMENTS

A. Petitioner Failed To Meet The Requisite Burden Of Proof

Petitioners brought this third party NPDES permit appeal under Section 40(e) of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/40(e)(1) (2004). This Section allows a third party challenge to the Agency's decision on an NPDES permit within 35 days of such decision. Section 40(e)(3) provides that the burden of proof shall be on the petitioner. 415 ILCS 5/40(e)(3).

Petitioners argue that Section 39(a) of the Act requires that "the permits be issued only upon proof by the applicant that the permit will not cause a violation of this Act or the regulations hereunder." (RG ¶¶47, 47, 64). The Agency is aware of this requirement of the Act and has consistently applied this burden of proof requirement on the permit applicants. The Agency, like any other administrative agency, is bound by rule that "[a]dministrative agencies are required to apply their rules as written, without making *ad hoc* exceptions in adjudications of particular cases." *Panhandle Eastern Pipe Line v. Illinois EPA*, 314 Ill. App. 3d 296, 734 N.E. 2d 18, 24 (4th Dist., 2000). In this case, upon receiving information from the applicant, and the general public through the public hearing process, including Petitioners in this case, the Agency determined that the applicant has met the Section 39(a) burden of proof requirement and therefore, an NPDES permit must be issued to the Village.

In *Prairie Rivers Network v. Illinois EPA and Black Beauty Coal Company*, PCB 01-112 (August 9, 2001), the Board addressed the burden of proof issue in its first third party NPDES permit appeal. In addressing the issue, the Board concluded that, "Section 40(e)(3) of the Act unequivocally places the burden of proof on the petitioner, regardless of whether the petitioner is a permit applicant or a third-party." *Prairie Rivers Network* at 9. The Board held that, "[a]s petitioner, Prairie Rivers Network bears the burden of proving that the permit, as issued, would violate the Act or Board regulations." *Id.*

Since Petitioners challenged the Agency's final decision, pursuant to Section 40(e)(3) of the Act and the Board's ruling in *Prairie Rivers Network,* Petitioners must come forward with the evidence to show that the permit issued by the Agency would cause a violation of the Act or the regulations thereunder. This requirement is no more burdensome than what an applicant is required to meet.

Also, in *Prairie Rivers Network*, the Board addressed the issue of scope of Board's review of the Agency's decision. Section 40(e)(3) of the Act directs the Board to consider the petition "exclusively on the basis of the record before the Agency." 415 ILCS 5/40(e)(3) (2004). The Board has long held that in permit appeals, its review is limited to the record that was before the Agency at the time the permitting decision was made. See *Community Landfill Company v. IEPA*, PCB 01-48, PCB 01-49 (consolidated) (April 5, 2001); *Panhandle Eastern Pipe Line Company v. IEPA*, PCB 98-102 (January 21, 1999). In *Prairie Rivers Network*, the Board held that, "Section 40 of the Act (415 ILCS 5/40 (2000)) does not differentiate between the scope of the review in permit appeals brought by permit holders and those brought by third parties." *Prairie Rivers Network* at 10. Regarding the supplementing of the Agency record in NPDES permit appeals, the Board held that, "the Board's review is limited, pursuant to Section 40(e)(3) of the Act, to the record that was before IEPA during its permit review process." 415 ILCS 5/40(e)(3) (2004).

As long as there is substantial evidence in the record[1], the Agency's decision to issue the permit must be upheld. Consequently, Petitioners must identify the lack of substantial evidence in

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1 Though Petitioners have repeatedly accused the Agency of not filing a complete record, the Agency has made every effort to file a complete record. Initially, the Agency filed a record comprising of approximately 2262 pages. On December 10, 2004, the Agency amended its record to include the Agency's information hearing transcript. This was not an intentional act but rather an inadvertent mistake. In order to provide a complete transparency to the Agency's record compiling process, the Agency invited Petitioners to review additional documents in person. On December 17, 2004 Petitioners came to the Springfield Office to review these documents. On January 31, 2005, the Agency filed additional seven documents to ensure the completeness of the Agency record. A full explanation of the Agency's reasoning to file these seven documents is provided in the Agency's response to Petitioners' motion to compel the Agency to produce documents. Again, on February 8, 2005, the Agency filed additional documents per the Hearing Officers' directive. The Agency does not believe that the documents filed on February 8, 2005 are part of the Agency

the record to prove that the issued permit would violate the Act and/or the applicable regulations. The following cases illustrate the kind of substantial evidence that must be missing in the record. The court in *Ex Parte Fowl River Protective Association, Inc.*, 572, So.2d 446, 461 (Ala. 1990) found the following to be the substantial evidence that was missing from the record in that case: that Mobile Bay was determined to be too complex an environment to be simulated and the court found numerous factors that could affect water quality but cannot be analyzed. Also, in *Miners Advocay Council, Inc. v. Department of Environmental Conservation*, 778 P.2d 1126, 1139-40 (Alaska 1989), the substantial evidence that was missing from the record was that the mine in question may not have had the assumed level of dilution present for its discharge due to numerous mines discharging into the same waterbody.

In this case, Petitioners made no attempt to establish lack of substantial evidence in the record through their petition or through testimony at the Board hearing. In fact, Petitioners chose to waive their right to present its case-in-chief or cross-examine the Agency staff responsible for making the permitting decision. Also, at the Board hearing, Petitioners chose not to present any expert witness or scientific evidence to establish how the alleged shortcomings in the permit would cause violation of the Act or the applicable Board regulations.

Mere dislike of the Village's permit conditions or mere allegations of noncompliance with the law without any proof to support those allegations, or mere allegations that the permit could have been written in a different fashion, is not the kind of burden of proof required by Section 40(e)(3) of the Act.

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record. However, the Agency filed the documents to allow the Board to review those documents and make its own decision as to whether or not those documents should be part of the Agency record. At the hearing on February 10, 2005, the Agency was directed to file the Village's preliminary design report. The Agency filed that report with the Board on February 14, 2005. The Agency would like to direct the Board's attention that this preliminary report was filed with the Agency on February 11, 2003, a month prior to the filing of the application for the modification of the permit. Because of that reason, this report was not part of the Agency files on the permit record.

The petitions and the failure of Petitioners to present any evidence presented at the Board hearing clearly demonstrate that it is the Petitioners' mere belief, not based on any scientific findings, that the water quality standards would not be met, that the limits in the permit are not stringent enough to protect the existing uses, and that the certain regulations would be violated.

There is no reasonable basis to argue that the discharge from the Village's treatment plant will violate any Illinois water quality standard, and there is no reasonable basis to conclude that the Agency in any way failed in its duty to ensure that the permit, as issued, does not violate any provisions of the Act or the regulations.

Here, Petitioners failed to meet the requisite burden of proof, that the permit, as issued by the Agency, would violate the Act or the applicable regulations.

THEREFORE, Petitioners' request for relief must be **DENIED.**

In the alternative, assuming the Board determines that the Petitioner has met the burden of proof outlined in Section 40(e)(3) of the Act, the Agency asserts that the permit, as issued, would not cause a violation of the Act or the applicable regulations: There is substantial evidence in the Agency record to support its decision to issue the Village's NPDES permit.

In the following subsections, the Agency will address the substantive issues raised by Petitioners.

B. Klaeren II Does Not Apply To The Agency's Informational Hearings

Asserting that *Klaeren II* applies to the case at bar, Petitioners argue that the Agency be ordered to draft new procedures for hearings and re-notice a public hearing to discuss the permit or any modification of the permit reasonable cross-examination of the Applicant and the Agency. (RG ¶¶32, 33, 34, 35, 36, 37, 38; SD §4).

In *People ex rel. Robert J. Klaeren II et al., v. Village of Lisle et al*, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426, 2002, *rehearing denied December 2, 2002*, the issue before the Illinois Supreme Court was to determine "whether a landowner whose property abuts a parcel subject to a proposed annexation, special use, and rezoning petition can be wholly denied the right to cross-examine witnesses at a public hearing regarding the petition. *Klaeren II*, 781 NE 2d 223, 224.

In *Klaeren II*, a public hearing pursuant to the Illinois Municipal Code was held. See 65 ILCS 5/1-1-1 et seq.. The defendants, in that case, argued that the applicable provisions of the Municipal Code granted the plaintiffs only notice and an opportunity to be heard at a public hearing concerning a special use in municipalities with a population of less than 500,000[2]. The plaintiffs, on the other hand argued, that the right to cross-examine is implied in the legislature's requirement of a public hearing in zoning matters because a public hearing is meaningless if the audience is not allowed to participate. *Klaeren II*, 781 NE 2d 223, 232. The appellate court agreed with the plaintiffs' reasoning. According to the Supreme Court, the resolution of the case depended on the "distinction between legislative hearings and administrative hearings before municipal bodies." *Klaeren II*, 781 NE 2d 223, 233. The Supreme Court held that "municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition." *Klaeren II*, 781 NE 2d 223, 234.

Due process is a flexible concept and requires only such procedural protections as fundamental principles of justice and the particular situation demand. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill.2d 76, 92, 180 Ill.Dec. 34, 606 N.E.2d 1111 (1992). (all aspects of due process protection need not be afforded at a fact-gathering hearing conducted

2 See 65 ILCS 5/11-13-7, 11-13-1.1 (West 1998). Section 7a of the Municipal Code applies to municipalities with a population of more than 500,000, and explicitly provides the property owners a right to "cross examine all witnesses." 65 ILCS 5/11-13-7a (West 1998).

before a plan commission). *Petersen v. Plan Comm'n*, 302 Ill.App.3d at 461, 468, 236 Ill.Dec. 305, 707 N.E.2d 150 (1998). Failure to permit cross-examination at a zoning board hearing violates due process. *E & E hauling*, 77 Ill.App.3d at 1022, 33 Ill.Dec. 536, 396 N.E.2d 1260.

To what extent the full panoply of due process rights commonly associated with quasi-judicial proceedings must be afforded interested parties depends upon the purpose of the hearings. *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct 1502, 4 L.Ed.2d 1307 (1960):

> Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, <u>when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used</u>. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which though the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain complexity of factors. The nature of the alleged right involved, the nature of the proceeding, are all considerations which must be taken into account. *Hannah*, 363 U.S. at 442, 80 S.Ct. at 1514-15, 4 L.Ed.2d at 1321. (*emphasis added*)

Petitioners' reliance on *Klaeren II* is misplaced and reflects the Petitioners' lack of understanding of the hearing process before the Agency and the Board. The Agency does not dispute the findings of *Klaeren II*, but asserts that *Klaeren II* is inapplicable here. *Klaeren II* involved a quasi-judicial proceeding in that a special use application was heard and interested parties were not afforded the right to cross-examine adverse witnesses. Here the Agency's decision to issue the permit is subject to the mandates set forth in Section 39(a) of the Act. The permit process under Sections 39(a) and 40(a)(1) of the Act differs from the process of local governmental approval of site locations under Sections 39.2 and 40.1. *Illinois in Environmental Protection Agency v. Pollution Control Board*, 115 Ill.2d 65, 503 N.E.2d 343, 345, 104 Ill.Dec. 786 (1986). In

Illinois EPA, the Supreme Court of Illinois addressed the issue of whether the Board is required to apply the manifest weight test to its review of the Agency's decision denying a permit. The Supreme Court held that the Board is not required to apply the manifest weight test. In reaching this holding, the Court stated:

> Unlike the procedures required under section 39.2 and 40.1, the permit process under section 39(a) and 40(a)(1) does not require the Agency to conduct any hearing. Consequently, no procedures, such as cross-examination, are available for the applicant to test the validity of the information the Agency relies upon in denying its application. As the appellate court noted, the procedure before the Agency has none of the characteristics of an adverse proceeding. The safeguards of a due process hearing are absent until the hearing before the Board. 503 N.E.2d 343, 345. (*emphasis added*)

The court in *Village of Sauget v. Pollution Control Board et al*, 207 Ill.App.3d 974, 566 N.E.2d 724, 152 Ill.Dec. 847 (5th Dist., 1990) further sheds some light on the nature of the hearings before the Agency and the Board. The *Sauget* court concluded that, "[w]hile the IEPA is bound to follow its own procedures and practices (quoting Harris-Hub Co. v. Pollution Control Board (1977), 50 Ill.App.3d 608, 613, 8 Ill.Dec. 685, 689, 365 N.E.2d 1071, 1075), the supreme court recognizes that the procedure before the IEPA has none of the characteristics of an adversary proceeding, and that the safeguards of a due process hearing are absent until the hearing before the Pollution Control Board."

The due process clause requires that the opportunity to be heard occur "'at a meaningful time and in meaningful manner.'" *Midwest Generation EME, LLC v. Illinois Environmental Protection Agency*, 2004 WL 2578734 (PCB 04-185, November 4, 2004) [citing Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 902 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed. 2d 62, 66, 85 S.Ct. 1187, 1191 (1965)]. *Lyon*, 209 Ill.2d at 272, 277, 807 N.E.2d at 430-31, 433. In

Midwest Generation, the Board noted[3] that providing due process is not necessarily synonymous with compliance with state regulations. Nevertheless, state requirements "are a useful reference because they represent standards that the General Assembly and the [agency] concluded were sufficient." *Lyon*, 209 Ill.2d at 274, 807 N.E.2d at 432. "Generally, the State must act reasonably before depriving a person of an interest protected by due process clause." *Rosewell v. Chicago Title & Trust Co.*, 99 Ill.2d at 407, 412, 459 N.E.2d 966 (1984).

The Supreme Court of Illinois' holding and reasoning in *Illinois EPA* applies to the case at bar. Under the *Illinois EPA* Court's reasoning, the Petitioners' due process rights did not include a right to an evidentiary adversarial hearing until the hearing before the Board. At the Board hearing, Petitioners had the right to present their own case-in-chief and cross-examine the Agency and the applicant. However, Petitioners waived their right to cross-examine the Agency and the applicant. Further, Petitioners were afforded reasonable opportunity to comment at the Agency's information hearing. The NPDES permitting regulations provide many opportunities for input from the public as well as the permit applicant, through issuance of draft permits followed by comment periods and potential hearings, all before a final permit issues. *See Village of Sauget*, 207 Ill.App.3d at 979-83, 566 N.E.2d at 727-30.

The Agency's informational hearing was held pursuant to Part 309 of the Board regulations and Part 164 of the Agency rules. The Board regulations set specific requirements that the Agency must follow in providing public participation prior to issuing an NPDES permit. See 35 Ill. Adm. Code 309.108, 309.109, 309.115, and 309.119. The Agency fully complied with these requirements. The Agency also met the requirements set forth in Part 164 of the Agency rules. As the Agency complied with all regulatory "public participation" requirements in issuing the permit,

3 The United States Supreme Court has made clear that due process is a matter of federal constitutional law, so compliance or noncompliance with state procedural requirements is not a determinative of whether minimum procedural

Petitioners' due process rights were not violated.

C. The Agency's Antidegradation Analysis Is Complete And Protective Of Existing Uses

Petitioners contend that the Agency's antidegradation analysis did not satisfy the requirements of 35 Ill. Adm. Code 302.105. More specifically, Petitioners argue that "the Agency has implemented policies which are incompatible with the language of both 302.105 and 302.105(a) and which contravenes both the antidegradation mandate and the November 28, 1975 benchmark." RG ¶63; SD §4C. Petitioners further argue that, "[a] fair reading of the antidegradation provisions requires the Agency to do an assessment of the Slocum wetlands, as it existed, prior to November 28, 1975." RG ¶63; SD §4C. Petitioners' reading of Section 302.105 is erroneous.

The purpose of the Board's antidegradation regulations is to "protect existing uses of all waters of the State of Illinois, maintain the quality of waters with quality that is better the water quality standards and prevent unnecessary deterioration of waters of the State." See 35 Ill. Adm. Code 302.105 (*emphasis added*). The Board's antidegradation regulations are equivalent of the federal regulations at 40 CFR 131.12(a)(1). The federal regulations classify the waterbodies into three-tier system. Tier I in the federal scheme is based on achieving and maintaining existing stream uses. Tier I sets the minimum level of protection and is intended to be the absolute floor of water quality protection for all waters of the United States. *In The Matter Of: Revisions To Antidegradation Rules*, 35 Ill. Adm. Code 302.105, 303.205, 303.206, AND 102.800-102.830, 2001 WL 34084035, R01-13, June 21, 2001, pages 2-3. Tier II of the federal program addresses waters whose quality exceeds the levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water. Water quality cannot be lowered below the level necessary to

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due process standards have been met. Lyon, 209 Ill.2d at 274, 807 N.E.2d at 432, citing Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492 (1985).

protect the "fishable/swimmable" uses and other existing uses. However, maintaining a level of water quality above the "fishable/swimmable" level is not always required and water quality may be lowered if necessary to accomplish important economic or social development in the area in which the waters are located. *Id.* at page 3 (*emphasis added*). Both the Board regulations and the federal regulations prohibit the loss of existing uses and require that the existing uses actually attained in the waterbody must be maintained and protected. This mandate appears in the 302.105(a) language. It provides, "[u]ses actually attained in a surface water body or water segment on or after November 28, 1975, whether or not they included in the water quality standards, must be maintained and protected." 35 Ill. Adm. Code 302.105(a) (*emphasis added*).

The Agency, like any other administrative agency, is bound by rule that "[a]dministrative agencies are required to apply their rules as written, without making *ad hoc* exceptions in adjudications of particular cases." *Panhandle Eastern Pipe Line v. Illinois EPA*, 314 Ill. App. 3d 296, 734 N.E. 2d 18, 24 (4th Dist., 2000). The directive by Section 302.105 of the Board regulations is to protect the existing uses of the Fiddle Creek, the receiving water, that existed on or after November 28, 1975. Unlike Petitioners' assertion, the Board regulations do not require the Agency to compare the physical, chemical, or biological data that existed on or after November 28, 1975, but mandate that the uses actually attained on or after November 28, 1975 be maintained and protected.

Petitioners must prove that the permitted discharge from the Village's wastewater treatment plant would impair the existing uses of the Fiddle Creek. Petitioners assert that KOT report (Record, Book 1, pp.470-478) attached as Exhibit L to the Resident Group's petition shows that Slocum wetlands have experienced a loss of 180 acres of open water since 1993. RG ¶66; SD §4C. Neither the KOT report nor Petitioners list any of the assumptions or calculations for making these conclusions. Both the KOT report and

Petitioners fail to mention the fact that the Drainage District performed "restoration" in 1960 and 1997. In 1997, the restoration was performed not to restore the wetlands, but to restore the drainage canal so that wetlands can be drained better. It would be irresponsible to adopt the conclusions of the KOT report without fully cross-examining the assumptions used in the models. The Agency believes that loss of 180 acres of open water is most likely due to the "restoration" of the drainage channel and to the sources of non-point pollution generated by the urban development in the area adjoining the wetlands. Consequently, Petitioners provide no evidence in support of its' gross assumption that 180 acres of open water was lost due to the Village's discharge.

Petitioners then argue that "the September 15, 1993, Facility Related Survey was the statutory benchmark." Pursuant to 35 Ill. Adm. Code 302.105(c)(2)(C) and 105(f) of the Board regulations, the Agency considered as much date as were available in-house, provided by applicant or by the public. At no point the Agency stated that the September 15, 1993 facility related survey was the statutory benchmark.

Petitioners also argue that the "survey found 'fair environmental condition and identified elevated levels of conductivity, nitrate, plus nitrite, phosphorus, sodium, potassium, boron, strontium, and oil downstream of the WSTP outfall.'" RG ¶¶63, 65; SD §4C. Under Section 40(e)(3) of the Act, Petitioners burden of proof is to show that the above-mentioned parameters violated the applicable water quality standards and thus the permit as issued is in violation of the Act and the Board regulations. Petitioners provide no such evidence.

In its responsiveness summary, the Agency responded to the similar comments. (Record, Book 4, p. 2222). The Agency indicated that the above-mentioned parameters were found to be elevated in relation to concentrations upstream of the Village's discharge. The

Agency also found that the concentrations of the above mentioned parameters coming out of the Village's discharge were typical of domestic wastewater plants throughout the state. Most importantly, the above-mentioned parameters do not violate the applicable water quality standards, and also the permitted discharge will not increase the concentrations of the above-mentioned parameters above the water quality standards.

Petitioners also fail to provide any evidence in support of their assertion that "the potential effect on existing uses including aquatic community, including endangered fish, pollutant sensitive plant species has not been considered." RG ¶65. The Board's water quality standards are considered protective of the existing uses. There is no evidence that endangered fish are present where the Village's wastewater treatment plant is discharging into the Fiddle Creek.

Petitioners contend that "[t]he KOT report Ex L coupled with the testimony of Huff & Huff Tr 61-83 evidence a degradation of the Slocum Wetlands from current discharges from WSTP." RG ¶67, ¶70; SD §4C. Petitioners are alluding to violations of dissolved oxygen water quality standard in the receiving stream. The Agency reviewed the data and information provided by Huff & Huff[4], V3, and Bonestroo and Devery (Record, Book 1, pp.249-310, 311-345, Book 3, pp. 1574-1579), concluded that the low dissolved oxygen levels in the receiving stream were caused by algae. The Agency found that low dissolved oxygen was present in the morning and supersaturation occurred in the afternoon. This is a common phenomenon in many streams that pass through wetlands or exhibit physical and habitat characteristics typical of a wetland environment. To reduce the growth of algae from

4 All of the stream samples were taken in the downstream continuum of the discharge. There were no samples taken upstream or on tributary streams, which are not impacted by the effluent. This does not allow the Agency to draw any conclusions on the results of the samples taken. The dissolved oxygen samples were taken in the early morning hours. This is the time when dissolved oxygen is expected to be at its lowest levels, if the algae are present. There were not any

point sources, the Agency continues to regulate $CBOD_5$, and ammonia. In addition, the Agency requires the Village to meet phosphorus effluent limit of 1 milligram per liter and to meet the dissolved oxygen water quality standard at the end of pipe. The Agency also added a special permit condition to the permit to study the dissolved oxygen profile of the Fiddle Creek and the possible effects, if any, of nutrients downstream from the outfall. (Record, Book 4, p. 2211). Petitioners fail to show how the Village's discharge has a potential to cause or contribute to the violations of the dissolved oxygen water quality standard when the Agency determined that the low dissolved oxygen conditions are caused by algae in the receiving stream and that the permit requires the Village to meet the water quality based effluent limits for dissolved oxygen at the end of the pipe. See RG ¶70.

Unlike Petitioners' assertion, the Agency's analysis did consider the loading of nutrients and radium. (Record, Book 4, pp. 2224-2225, 2244-2245). To address the nutrient problem in the receiving stream, the Agency included a phosphorus limit of 1 mg/L as a monthly average in the Village's NPDES permit. After the installation of phosphorus removal equipments, the receiving stream would experience a net reduction of phosphorus loading from the Village's discharge. Regarding radium, pursuant to 35 Ill. Adm. Code 391.420(f) the Village is required to test its sludge for radium prior to land applying. Further, the Village is required to report the results of the testing on a semi-annual basis. (Record, Book 4, pp. 2244-2245). Also, the Agency incorporated a monitoring condition in the state construction permit, 2003-HB-4649, regarding radium 226. Under this condition, the permittee is required to take three 8-hour composite samples of influent and effluent. (Record, Book 4, p. 2244).

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samples taken from adjacent streams or wetlands to indicate whether the dissolved oxygen was depressed due to the Village's discharge or because of the background conditions.

Petitioners assert that the Agency provides no support to conclude that ammonia and dissolved oxygen water quality standards will not be exceeded. SD §4E. The Agency's conclusion is supported by the fact that the Village's permit contains water quality standard based effluent limits for ammonia and dissolved oxygen. Therefore, the permit, as issued, does not violate water quality standard for ammonia or dissolved oxygen. As the permit includes a limit for phosphorus, the loading of phosphorus will decrease when the expanded facility is complete. The dissolved oxygen levels in the receiving stream are impacted by the presence of algae and presence of wetlands. However, the Agency believes that permit conditions related to ammonia, phosphorus, and dissolved oxygen in the Village's permit will help to improve the dissolved oxygen conditions in the receiving stream.

Petitioners assert that the "Agency's decision is flawed by the fact that no consideration was given to any discharge alternatives." SD §4D. Petitioners contend that the Agency be instructed to review alternatives including alternative sites. RG at p.27. The Agency disagrees with the Petitioners' assertion.

Pursuant to Section 302.105(f)(1)(D)of the Board regulations, the Agency conducted its assessment of alternatives to the Village's proposed increase in pollutant loading. (Record, Book 3, pp. 1599-1602; Book 4, pp. 2234-2235). The Agency in its Responsiveness Summary discusses in detail the various alternatives considered in this case. The supplement information provided by Bonestroo Devery & Associates on June 3, 2004 (Record, Book 4, pp. 2054-2099) evaluated the purchase of and application to land, application to a near-by golf course, and other discharge locations, but found none of those sites to be the feasible alternatives. The supplement information also considered discharging into alternative waterbodies including Mutton Creek/Island Lake, Bangs Lake, Gangs Lake Drain/Slocum Lake, and the Fox River. Discharging into lakes were not considered as

feasible alternatives as such discharges have the potential to cause greater long-term water quality impacts. The Fox River was not considered a feasible alternative as it is currently on the State's impaired water list. Clearly, the Agency did consider the feasible alternatives as mandated by Section 302.105(f)(1)(D) of the Board regulations.

The two alternatives suggested by the Resident Group are not feasible alternatives. RG 78. With the Phase 1 and 2 extension, the Village's wastewater treatment plant would be much more sophisticated than Northern Moraine Wastewater Reclamation District ("Northern Moraine WRD") facility. For example, Northern Moraine WRD is only required to treat BOD and TSS to the limits of 20 mg/L and 25 mg/L respectively.. Also, Northern Moraine WRD is not subject to phosphorus removal conditions in its permit. Petitioners suggest running a pipe on the bottom of the SLDD channel directly to the Fox River. RG 78. As mentioned earlier, the discharge to the Fox River was not considered feasible as it is listed on the Section 303(d) list. Further, the Agency would have serious reservations with putting a pipe through the wetland, when an alternative path would be available. Unlike the Petitioners' argument, all feasible and reasonable alternatives were considered in writing this permit.

Unlike as suggested by Petitioners, Section 302.105 does not require that every time a discharge is proposed, a biological study must be performed on the receiving stream. A known discharge into a well-known receiving waterbody is definitely not a situation in which the Agency would require the applicant to perform a biological study. A permittee may be required to perform biological study if the information about the receiving stream is not otherwise available from various resources at the Agency's disposal. This position is consistent with the mandates of Sections 302.105(c) and 302.105(f) of the Board regulations.

The Agency contends that as the discharge from the Village's wastewater treatment

plant is required to meet the general use water quality standards, thus protecting the existing uses, the Village's NPDES permit as issued meets the burden of proof requirements of Section 302.105. The Agency further contends that the record shows that the Agency's antidegradation analysis fully complies with the mandates of Section 302.105 of the Board regulations.

D. The Village's NPDES Permit Conditions Ensure That The Illinois' General Use Water Quality Standards Are Met

Petitioners contend that the Village should be required to sample and monitor, at a minimum, every contaminant found in Wauconda Sand & Gravel Superfund site. RG 54. In support of its position, the Resident Group attaches Exhibit I to indicate that the four volatile compounds were found in the Village's wastewater effluent above the reporting limits.

The Petitioners' contention fails for many reasons. First, the Resident Group did not provide the results of the analysis to the Agency during the comment period or any other period prior to the issuance of the permit. On August 20, 2004, the Resident Group tested the Village's effluent by taking a single grab sample. The laboratory analysis report was prepared on September 20, 2004. The Agency issued the permit on August 23, 2004. For the fact that the laboratory results were not submitted to the Agency during permitting decision, this information should not be considered by the Board to review the Agency's decision. As Board has long held that its review is limited to the record that was before the Agency at the time of the permitting decision was made. [citation omitted]

Despite Petitioners claim, the data does not show that the permit as issued would cause violation of the Act or Board regulations. Of the four volatile organic compounds detected, none exceeded the acute water quality criteria. Only bromodichloromethane exceeded the chronic water

quality criteria. This is not a violation of applicable water quality standard because for a single grab sample violation of acute standard is required.

The Agency's decision to not regulate volatile organic compounds or all other contaminants found in Wauconda Sand & Gravel's effluent was based on its analysis of reasonable potential to exceed water quality standards. On July 31, 2000, the Agency analyzed the date submitted by the Village that included, arsenic, barium, cadmium, chromium (hexavalent), chromium (total), copper, cyanide (WAD), cyanide (total), fluoride, iron (total), iron (dissolved), lead, manganese, mercury, nickel, oil, phenols, selenium, silver, and zinc. (Record, Book 4, pp. 2216-2217). As similar concerns were raised at the public hearing, the Agency collected four additional samples for some of the above parameters and also sampled, magnesium, potassium, beryllium, cobalt, strontium, calcium, sodium, aluminum, boron, and vanadium. These parameters were selected based on potential for these contaminants to pass through the treatment process and be discharged in the effluent. As a result of these analyses, the Agency determined that the copper has the reasonable potential to exceed water quality standard, and therefore, a copper limit was included in the final permit. All of the other parameters were found not to have a reasonable potential to exceed water quality standards, and therefore, no monitoring was required for these parameters in the Village's permit. It should be noted that the Village's permit requires routine monitoring of metals twice prior to the expiration of the permit. *Id.*

On September 18, 2003, the Village sampled their influent and effluent for organics (Record, Book 3, pp. 1774-1779). Most organic parameters in the influent, including vinyl chloride were not detected. Similarly, all organic parameters in the effluent, including vinyl chloride and benzene, were not detected. As similar concerns were raised at the public hearing the Agency also sampled effluent on June 21, 2004, and only one organic compound was detected, Bis (2-ethylhexl) phthalate. However, the concentrations were well within the acceptable human health and aquatic

life criteria. (Record, Book 4, pp. 2219). Also, Huff & Huff report includes the results of a sample for organic compounds taken in the receiving stream on August 26, 2003. (Record, Book1, pp. 289-299). The samples did not detect any volatile organic compounds in the receiving stream. Consequently, Petitioners have failed to show that the permit, as issued, would cause the violation of any applicable water quality standards.

E. The Agency Did Not Violate Section 44 Of The Act

Petitioners argue that the Agency had an obligation under Section 44(h)(1) of the Act to report the false answer submitted by the Village in its NPDES permit application. RG ¶¶39, 40, 41, 42, 43, 49; SD §4A. The Agency could not disagree more. There is no such requirement under Section 44 or 44(h)(1) of the Act. Also, the Agency has no reason to believe that the Village lied on its NPDES permit application. A inadvertent mistake in filling an NPDES permit application does not amount to providing false information. Petitioners have provided no evidence to show that the applicant intentionally lied on its application. In this case, the Agency became aware of the facts regarding the Wauconda Sand & Gravel site discharge at the hearing, and therefore any information that was not part of the application became available for the Agency's review prior to the issuance of the final permit. Unlike Petitioners suggest, the Board regulations do not require the applicant or the Agency to correct the original application every time additional information becomes available. The real test is whether or not all pertinent information was considered by the Agency in making its final decision. Further, there is nothing in the Section 44(h)(1) language to suggest that the Agency had any obligation. Clearly under the Section 44 language, State's Attorney of the county in which the violation occurred and the Attorney General have authority to file actions both before the Board and the circuit courts. Thus, Petitioners yet again fail to meet the requisite burden under Section 40(e)(3) of the Act.

F. USEPA, NOT The Agency, Is The Proper Authority To Approve Pre-Treatment Program

Petitioners argue that the Agency failed to require the Village to implement a pretreatment program. RG ¶57; SD §4F. Petitioners' contention lacks support of law. The Agency is not delegated by the USEPA to operate the pre-treatment program outlined in Part 310 of the Board regulations. As the Agency is not the control authority, pursuant to 35 Ill. Adm. Code 310.400, the Agency has no authority to issue pretreatment permits. Instead, USEPA is the proper authority to review and approve the pretreatment programs.

Here in this case, the Village, pursuant to Special Condition 8 of its NPDES permit, was required to submit industrial user survey with the Agency. The Agency forwarded the information to USEPA for its review and determination. In its August 3, 2003 letter, USEPA determined that, "the Village is not required to develop a pre-treatment program at this time." (Record, Book 3, pp. 1559-1572). As US EPA is the agency with proper jurisdiction, the Illinois EPA has no authority to direct the Village to implement a formal pre-treatment program. However, the Agency in response to the public concern at the hearing has required the Village to submit industrial user survey annually with the Agency. The purpose behind this permit modification is to allow the USEPA to review and reconsider its decision to approve or disapprove the Village's pretreatment program based on the additional information gathered during each annual cycle. Thus, Petitioners again fail to prove that the permit as issued violates the Act or Board regulations.

G. The Discharge From The Village's Treatment Plant Is Not The Cause Of Contamination In The Private Wells

The Resident Group attaches Exhibit N5 to its petition that the private well was contaminated from the Village's discharge. RG ¶¶75, 76. The Resident Group's claim fails for many reasons. First, the Resident Group did not provide the results of the analysis to the Agency during the comment period or at any other time prior to the issuance of the permit. The private well was tested on September 1, 2004, nine days after the final permit was issued. As the laboratory results were not submitted to the Agency prior to the permit issuance, this information should not be considered by the Board to review the Agency's decision. As Board has long held that its review is limited to the record that was before the Agency at the time of the permitting decision was made. [*citation omitted*]

Further, Petitioners fail to prove that any contamination found is the private well is as a result of the discharge from the Village's treatment plant. After receiving similar concerns at the NPDES permit information hearing, the Agency investigated this issue. After thorough review of the data on private wells including the geological information regarding the aquifer feeding the private wells, the Agency concluded that contamination from the Village's discharge is unlikely. (Record, Book 4, pp. 2216-2217). The Agency's conclusion is based on the hydrological information for the Fiddle Creek around the Village's treatment plant discharge area. The Agency found that the eastern portion is a low geologic susceptibility area. Well logs show this area to have a low permeability layer. Though the western area shows high geological susceptibility to surfacial contamination, well logs within this area show that the area contains less permeable material near the surface at most well locations. (Record, Book 4, p. 2216). The Agency further concluded that "it is more likely that groundwater in the vicinity of the Fiddle Creek would tend to be discharging to the creek." *Id.* This allows the Agency to conclude that there is a limited nature of

5 The sample tested positive for Total Coliform and negative for E.Coli. The recommendation was to chlorinate the well, and not drink or test the water. Also, Total Coliform contamination could be caused due to close proximity to the septic field.

communication between the Creek and shallow groundwater. This is further confirmed by the fact that the LCHD records show no fecal coliform contamination in private wells within 1000 feet of Fiddle Creek over the past years. The Agency also suspects that improper well construction, damage to or flooding of well casings could be causing the contamination of wells. (Record, Book 4, p. 2217). Clearly, Petitioners have failed to show that the permit, as issued, would cause violation of the Act or the regulations.

H. The Agency Complied With The Requirements Of Section 39(a) Of The Act

Petitioners argue that the Agency failed to consider the Village's treatment plant's acts of non-compliance. In support of its argument, Petitioners cite to the language of Section 39(a) of the Act. RG ¶¶58, 61, 62, 63, 65, 66, 67, 71, 72, 77, 78, 79; SD §4B. Petitioners' argument fails for two reasons.

First, the Section the Section 39(a) language does not impose a mandatory duty on the Agency. It specifically states that, "[i]n making its determination on permit applications under this Section, the Agency may consider prior adjudications of noncompliance with this Act by the applicant." 415 ILCS 5/39(a) (2004) (*emphasis added*). The Act requires the Agency to consider prior adjudications of noncompliance such that, where necessary, the Agency may impose reasonable conditions in the applicant's NPDES permit to specifically address the reasons of noncompliance. *See* 415 ILCS 5/39(a) (2004).

Second, the Agency did consider the Village's prior adjudication of noncompliance. The Agency found one prior adjudication of noncompliance in the form of a consent decree entered on December 13, 2000, with the Act. Based on the review of the consent decree, the Agency determined that the Village's request to expand its treatment would directly address the problems that led to the violations of the Act covered by the December 13, 2000 consent decree. Additional

capacity to treat wastewater would reduce the burden on the existing treatment plant and thus would reduce the incidents of overflow. Once again, Petitioners fail to prove that the Agency's decision to issue the Village's permit would lead to violations of the Act or the Board regulations.

V. CONCLUSION

For the reasons and arguments provided herein, the Agency respectfully requests that the Board the Petitioners' requested relief.

Respectfully Submitted,

ILLINOIS ENVIRONMENTALPROTECTION AGENCY

By:

Sanjay K. Sofat
Assistant Counsel
Division of Legal Counsel

DATED: February 25, 2005

Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

THIS FILING PRINTED ON RECYCLED PAPER

SERVICE LIST

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

THIS FILING PRINTED ON RECYCLED PAPER

STATE OF ILLINOIS	)	
	)	**SS**
COUNTY OF SANGAMON	)	

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached **POST HEARING BRIEF** upon the person to whom it is directed, by placing a copy in an envelope addressed to:

Dorothy Gunn, Clerk
Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

(OVERNIGHT MAIL)

Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

(OVERNIGHT MAIL)

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

(OVERNIGHT MAIL)

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

(OVERNIGHT MAIL)

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

(OVERNIGHT MAIL)

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

(OVERNIGHT MAIL)

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

(OVERNIGHT MAIL)

and mailing it from Springfield, Illinois on February 25, 2005, with sufficient postage affixed as indicated above.

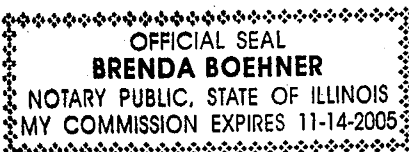
Meredith Kelley

SUBSCRIBED AND SWORN TO BEFORE ME

this day of February 25, 2005.

Brenda Boehner

Notary Public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