



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WESLEY BRAZAS, JR.,

Petitioner

v.

MR. JEFF MAGNUSSEN, PRESIDENT  
VILLAGE OF HAMPSHIRE  
and the  
ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondents

PCB 06-131

(Appeal from Illinois EPA  
decision granting modified  
NPDES permit)

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JUN 06 2006  
STATE OF ILLINOIS  
Pollution Control Board

**MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF  
IN SUPPORT OF PETITIONER**

Now comes Jane L. Collins, Attorney for *Amicus Curiae* and Counsel to Charles St. George, 17N635 Big Timber Road, Hampshire, Illinois 60140, and, pursuant to 35 Ill. Adm. Code 101.110, hereby requests permission from the Illinois Pollution Control Board to file the proposed *Amicus Curiae* Brief attached hereto.

**Interests of Proposed *Amicus***

Mr. St. George lives within the Village of Hampshire planning area and is surrounded by territory annexed to the village. He has demonstrated an abiding interest in the December 9, 2005 IEPA decision to issue the NPDES subject of this appeal, and attendant environmental issues it raises. Individually and as represented by counsel, evidence of his and other community residents' participation, along with Petitioner's, may be found throughout the public record of all proceedings preceding the December 9 decision, and in the Record submitted by the IEPA as part of this proceeding.

Because Petitioner's appeal has been reduced to one count, excluding all issues raised by Mr. St. George and others regarding this permit, Mr. St. George believes that an *Amicus* brief is an appropriate and reasonable means of trying to keep these issues before the Board. For these are issues that are capable of repeating themselves in other municipal and governmental settings. They are too important to dismiss as irrelevant or "novel," as characterized by the IEPA.

**Argument**

Mr. St. George believes in plain speaking. And the plain truth here is that citizens who have taken the time to inform themselves appear to be far more cognizant of what constitutes environmental protection than State agencies charged with that duty. They understand that discharging higher volumes of pollutants into a local stream will not make it swimmable, drinkable or suitable for fishing and that the exponential withdrawal of groundwater and its subsequent export downstream as treated effluent does not protect local resources. Instead, it degrades the stream, requires withdrawal of groundwater at unsustainable rates, yet fails to return any of that water to the local aquifers to maintain their recharge function.

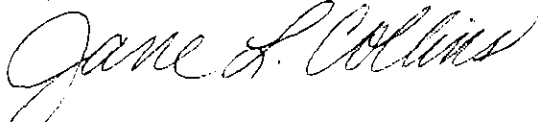
As Hearing Officer Halloran and IEPA Counsel Day noted in the May 15, 2006 hearing on this matter, the Board and Agency are creatures of statutes and rules. Unfortunately, these carefully calibrated environmental regulations do not always serve the public well.

Conclusion

For the foregoing reasons, I respectfully submit that the Board should grant leave and permit the filing of the proposed brief *amicus curiae*.

Dated: June 6, 2006

Respectfully submitted,



Jane L. Collins  
Attorney for *Amicus Curiae*  
Counsel to Mr. Charles St. George  
13610 Kishwaukee Vly. Rd.  
Woodstock, Illinois 60098  
(815) 338-8339  
ARDC #6242700


I, Jane L. Collins, hereby declare:

I am counsel for Mr. Charles St. George, 17N635 Big Timber Road, Hampshire, Illinois 60140.

I submit this Declaration to provide the Board with a copy of the attached brief I propose to file as *amicus curiae* on behalf of Mr. St. George in support of Petitioner, Wes Brazas.

Pursuant to 35 Ill. Adm. Code 101.504 and 735 ILCS 5/1-109, I certify under penalty of perjury that the foregoing is true and correct.

Executed on June 6, 2006

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Jane L. Collins

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER'S APPEAL

Jane L. Collins, Attorney for Amicus Curiae and Representing Mr. Charles St. George  
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- II. Board rules and IEPA permitting procedures failed to meet Board rules re backsliding and antidegradation.
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Conclusion

## TABLE OF AUTHORITIES

### Cases

*Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892)

### Federal Statutes

Federal Water Pollution Prevention & Control Act, 33 U.S.C. 1251 *et seq.*

### Other

35 Ill. Adm. Code, sections 101 and 302

## I. Statement of Identity and Interest of *Amicus Curiae*

By leave of the Board, with whom a Motion for Leave to File is attached, Attorney Jane L. Collins, counsel to Charles St. George, submits this brief *amicus curiae* in support of the Petitioner.

Charles St. George lives at 17N635 Big Timber Road, Hampshire, within the Village of Hampshire's planning area. His property adjoins and is adjacent to territory newly annexed to the village.

Mr. St. George and his wife, Francis, before her untimely death in 2005, worked with a group of concerned citizens calling itself Citizens After Responsible Expansion [CARE]. This group includes the Petitioner. CARE has been actively engaged in following and publicly commenting on the major environmental and land use issues affecting community residents.

The IEPA's Record shows participation in the modified permitting process by Mr. St. George, represented by counsel.

Although Mr. St. George chose not to appeal the modified permit in question, he believes that this matter is of substantial import to all Hampshire community residents. He supports Petitioner's appeal and wishes to bring arguments to the Board that he believes are germane to and of material significance in this proceeding.

## II. Introductory Statement and Summary of Argument

This proceeding involves a challenge to the IEPA's December 9, 2005 decision to issue a modified NPDES permit increasing the Village of Hampshire's STP/WWTF discharge of treated wastewater to Hampshire Creek.

The IEPA's refusal to hold a public hearing on the modification deprived interested residents from the opportunity to cross-examine the Applicant's experts and examine the evidence supporting the IEPA [Agency]'s decision.

Absent a record, the Board has relied on what the Agency has chosen to provide it, and has agreed to narrow Petitioner's appeal to one count, materially prejudicing all members of the public whose concerns -- while not being represented by Petitioner -- should be made available to him in his appeal, as they are all to be found in the public record.

The Agency pledged in its public notice of July 2005 that the modified permit would not increase the total pollutant load, a pledge flatly contradicted by the permit itself, as Petitioner has demonstrated in his appeal.

The permit allows backsliding from the Board's more strict antidegradation standards, and is not supported in the Record by Antidegradation evidence and analyses.

Further, by increasing the total pollutant load discharged into Hampshire Creek, the permit violates the Clean Water Act's spirit and intended goal of zero discharge. It also represents the State's abrogation of its public trust duty to protect the public's interest in the State's natural resources, protecting the integrity and health of streams, the biotic community they should support, and groundwater drawn from increasingly vulnerable aquifers.

Finally, the increased pollutant discharge violates what has come to be regarded as the

Board's most significant protection of stream water quality, its antidegradation rules designed to prevent further deterioration of the State's streams.

### III Argument

#### 1. The Board regulations governing this proceeding and the IEPA's actions leading to it have not provided the public adequate due process and meaningful public participation.

##### A. The Board's May 4, 2006 Order materially prejudiced the public interest in protecting local water resources.

The Order was issued in response to the IEPA's Motion to Dismiss for Lack of Jurisdiction, claiming that because Mr. Brazus had not raised all the issues in his appeal during a public comment period, he should be precluded from having them heard by the Board.

We note that many community residents raised the same issues found in Petitioner's appeal in writing and in public forums, so do not agree with the Board's narrow ruling.

Therefore, we have to disagree with the Board's finding that material prejudice would result from its proceeding to [conduct] a hearing on issues "not within the Board's jurisdiction."

The "material prejudice" in Section 101.506 addresses whether a motion is filed within prescribed time limits. The IEPA motion was not timely filed.

We believe that it is the public's interest that has been materially prejudiced here, by the Board's allowing the Agency that practices before it on a regular basis to be excused from the application of the rules, then to use that untimely motion to exclude matters clearly raised in the public record preceding the permit's issuance. It is far from evident how the issues excluded from hearing are "novel" or how the failure to exclude them would materially prejudice Petitioner or any community residents who support his effort.

##### B. The IEPA's failure to provide a public hearing re the modified permit in question deprived community residents of due process rights.

When Hampshire community residents requested a hearing on the permit pursuant to 35 Admin. Code 309.115, the Agency prevaricated. It is evident from the Record that the public interest ran counter to the IEPA's wish to just get the permit "outta here," and to Village consultants, EEI's wish to get Hampshire Creek off the 303(d) list so they could get more generous permit terms.

Hampshire residents were offered an October 4, 2005 "informational meeting" under rules written by the Village and IEPA, with four days' notice to prepare, with no opportunity to cross-examine, and no answers to the antidegradation and performance questions they asked.

It is clear from the IEPA Record that residents' concerns were dismissed as the "usual growth complaints," and that a hearing was to occur -- until the Director of the IEPA convinced State Senator Chris Lauzen to withdraw his support for a hearing.

The consequence: community residents were deprived of the opportunity of creating a record that should be before this Board in this proceeding.

#### II. The modified permitting process failed to meet Board backsliding prohibitions and antidegradation requirements.

##### A. The permit, as modified on December 9, 2006, allows backsliding, prohibited by II Admin. Code section 302.

NPDES Permit No. IL 0020281 for 0.75 mgd. was modified on February 20, 2001. Special condition 14: "Thirty-six months from the modification date of this Permit [i.e., February 2004] the following ammonia nitrogen (as N) limits shall become effective " [emphasis added];

	Load limits lbs/day		Concentrations limits mg/l	
	<u>monthly average</u>	<u>daily max</u>	<u>monthly average</u>	<u>daily max.</u>
Apr-Nov	5.7 (15)	21 (54)	1.5	5.4
Nov-3-31	6.8 (18)	20 (52)	1.8	5.2

These are stricter than limits in the Dec. 9, 2005 permit. This is impermissible backsliding.

B. In his October 27, 2004 letter to EEI, Village consultants, Bob Mosher disagrees that adding more flow to the creek would improve its impaired status. He asks for a new stream study in 2005 to meet the antidegradation test. The IEPA's Record contains no evidence to confirm or deny that such a study was conducted, what it produced, and if it met the test.

### III. Board approval of the modified permit would violate the Clean Water Act, the Public Trust Doctrine and Board rules.

A. The permit would be in violation of the Clean Water Act's prime objective: the restoration and maintenance of the chemical, physical and biological integrity of the Nation's waters. 33 U.S.C. 1251 et seq.

The village's application states that the creek is included in "waters of the United States."

The village's consultants, Hey and Associates, in a May 2004 study, state that conditions are very poor for fish and aquatic life at the plant's outfall, the Dissolved Oxygen levels are below the General Use standard.

It is of concern that when data showing DO levels below stream standards was noted by Bob Mosher, EEI resubmitted that data, but omitted the date with the low number in that submission. Record, pp. 116, 285.

As shown above, the permit would allow increased pollutant loading, further degrading the stream quality.

B. The permit would allow a degradation of resources deemed to be held in public trust by the State for the benefit of the people.

The Public Trust Doctrine, as held in the seminal case, *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892), prohibited the alienation of lands lying beneath navigable waters, such lands considered a natural resource held in trust for the people by the state. The definition of navigable waters has been extended to tributaries of navigable waters, so would include Hampshire Creek.

We believe that the stream and the biotic community it should support are protected by the Public Trust Doctrine, and that by allowing discharging of additional pollutants into the stream, the IEAPA's modified permit violates the Doctrine.

We further believe that the Doctrine could be extended to protect the recharge function of increasingly vulnerable local aquifers. NPDES permits to discharge into streams instead of treating to higher standards then reusing that water to recharge aquifers is no longer acceptable.

C. The increased pollutant load allowed by the permit violates what has come to be regarded as the Board's most significant protection of stream water quality, its antidegradation rules intended to prevent further deterioration of the State's streams. This permit would further degrade Hampshire Creek.

### CONCLUSION

For the foregoing reasons, we urge this Board to grant Petitioner's Appeal and reconsider the IEPA's decision to issue the subject modified permit.

June 6, 2006

Respectfully submitted,



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SENT BY FACSIMILE

DATE: Tuesday, June 6, 2006  
TO: Clerk of the Illinois Pollution Control Board, 312-814-3669  
RE: PCB 06-131

Please find the attached documents, filed by facsimile, by permission of Hearing Officer Brad Halloran:

- Notice of Filing [1 page]
- Motion for Leave to File and Amicus Curiae Brief [2 pages]
- Amicus Curiae Brief [4 pages]

If there are any problems with this filing, please let me know.

Thank you.

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