

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

WESLEY BRAZAS, JR.,)	PCB No. 06-131
)	
Petitioner,)	
)	Appeal from IEPA decision
vs.)	granting modified NPDES Permit
)	
JEFFREY R. MAGNUSSEN,)	
PRESIDENT, VILLAGE OF)	
HAMPSHIRE, AND THE)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondents.)	

**BRIEF AND ARGUMENT
OF APPELLEE JEFFREY R. MAGNUSSEN / VILLAGE OF HAMPSHIRE
ON REVIEW OF DECISION OF THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY TO ISSUE TO THE VILLAGE OF HAMPSHIRE
A MODIFIED NPDES PERMIT**

Mark Schuster #2519089
Schnell, Bazos, Freeman, Kramer, Schuster & Vanek
Attorneys for Appellee Jeffrey R. Magnussen / Village of Hampshire
1250 Larkin Avenue #100
Elgin, IL 60123
847-742-8800
mschuster@sbfklaw.com

ISSUE PRESENTED

Whether -- in a case where the receiving stream had been listed on the Section 303(d) list of impaired waters -- the Illinois Environmental Protection Agency violated the public notice requirements for issuance of a Modified NPDES Permit for the Village of Hampshire (No. IL 0020281 – Kane County) when (in the Fact Sheet published in support of the Draft Permit) IEPA identified a specific formula for calculation of pollutant load limits,¹ and then in the Final Permit established an absolute load limit for such pollutants without utilizing the formula.

¹ DAF or DMF x Concentration x 8.34 = Limit

(i.e., Design Average Flow and/or Design Maximum Flow in MGD) x (Applicable Concentration in mg/L) x 8.34 (conversion factor) = load limit

ARGUMENT

BECAUSE THE RECEIVING STREAM IS LISTED ON THE SECTION 303(d) LIST OF IMPAIRED WATERS, IEPA PROPERLY ASSIGNED AN ABSOLUTE LIMIT TO LOADING FOR POLLUTANTS IN THIS CASE

IEPA properly set the load limit for various potential pollutants in the Village of Hampshire Modified NPDES Permit in this case. Because the receiving stream (Hampshire Creek) has been listed on the Section 303(d) list of impaired waters of the State of Illinois, IEPA is prohibited under the Clean Water Act from allowing any more loading of such any pollutant in the stream. Under these circumstances, IEPA correctly set an absolute load limit for such pollutants in Hampshire Creek at a certain limit of pounds per day. The action of the Environmental Protection Agency in this case must be upheld.

Background Facts

The Village of Hampshire operates a wastewater treatment facility of 0.75 mgd capacity and discharges the effluent from the facility into Hampshire Creek. In 2004, Hampshire Creek was listed on the Section 303(d) list of impaired waters of the State of Illinois. The principal source of pollutants was identified in the listing as the Village's wastewater treatment facility.

In 2004, the Village applied for modification of its NPDES permit to allow for an expansion of the capacity of the WWTF from 0.75 mgd capacity to 1.5 mgd capacity. In July, 2005, IEPA published a Draft Permit together with the required Fact Sheet supporting same. The Draft permit identified a load limit for CBOD₅ at 63 lbs/day; for TSS at 75 lbs/day; for phosphorus at 13 lbs./day; and for ammonia at a varying standard depending upon the time of year.

The Fact Sheet accompanying the Draft Permit also stated as follows:

* Load limits are calculated by using the formula:

$$8.34 \times (\text{Design Average and/or Maximum Flow in MGD})$$

x (Applicable Concentration in mg/L)

The Fact Sheet also stated the following:

Section 303 (d) listed impacts, as well as concerns for continued degradation of the receiving stream, led to restrictions on pollutant loading for the expanded (1.5 MGD) plant. Further increases in BOD and TSS loading are not allowed due to the documented dissolved oxygen problems in Hampshire Creek. The permit for the expanded plant must therefore allow no increase in loading from previously permitted levels. This will result in correspondingly lower effluent concentrations of BOD and TSS. Similarly, because ammonia was also listed as a cause of impairment, no loading increase may be allowed for this substance and likewise, lower effluent concentrations will result. The result will be a very high quality effluent that will bring about positive changes in both the biological and chemical condition of Hampshire Creek.

Public comment on the draft permit was accepted by IEPA, in accordance with the requirements for permit consideration and issuance as stated in the Illinois Administrative Code.

Wesley J. Brazas, Jr. filed with IEPA a letter dated July 11, 2005 during this public comment period. In this letter, Mr. Brazas raised no issue concerning the published notice of conditions to be included in the NPDES permit.

After much consideration of the matter, IEPA at length determined that no public hearing was warranted in the matter of this application. However, before issuance of the permit, a public meeting was arranged for and conducted in the Village of Hampshire, after notice to all persons who had submitted written comment. The purpose of the public meeting was to address comment that had been filed within the initial public comment period, and to further consider the the plan for expansion; to identify issues pertinent to the modification of the permit; and to note all other non-relevant issues raised during the public comment period.

Following this public meeting, additional public comment was submitted by Mr. Brazas in a letter dated October 11, 2005 (R. 320). In this letter, Mr. Brazas wrote, in a paragraph titled, "Errors by IEPA in setting effluent discharge limits":

Proposed concentration limits must be cut in half to correspond to required mass limits.

...40 CFR 122.45(b) requires pollution control concentrations to be calculated based upon design flow, which are typically stated in concentrations of mg/l. In addition to concentration limits, 40 CFR 122.45 (f)(ii) requires pollutant limits to be restated as mass-based limits, typically, pounds. The mass-based limits should be easily calculated by the formula contained on page 3 of the Public Notice for this permit: Concentration limit mg/l x Design Flow mgd x 8.34 conversion factor = Mass lbs/day.

* * *

In my review of the file at the only location I could view it, IEPA's Springfield Office, I was surprised a summary of previous actions regarding this permit was not included. One could not trace the history of permitted discharges and concentration limits to determine the trend of mass limits going up or down over the years and correlate these limits with the resulting impacts to the water quality of the creek.

The final permit was issued December, 2005. The permit set a load limit for CBOD₅ at 63 lbs/day, for TSS at 75 lbs/day; and for phosphorus at 13 lbs/day, and for ammonia at a varying limit in lbs/day (depending upon the time of year), without reference to any particular formula or calculation.

IEPA also responded to Mr. Brazas in a letter dated December 9, 2005 (R. 545), stating the following:

Errors in effluent limits proposed by IEPA:

The effluent limits in the Village of Hampshire's NPDES permit are correct and the treatment plant will not be allowed to violate the effluent concentration limits or the load limits stated in their permit. The concentration of a pollutant in the treatment plant effluent will vary constantly depending on the amount of flow being discharged and the mass of the pollutant being discharged. Federal regulations do not require mass limits to convert exactly to concentration limits.

40 CFR 122.45 (f)(2) states: Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations.

The applicable effluent concentration limits, as required in 35 Ill. Adm. Code, Section 104.120, are reflected in the modified permit. The mass effluent load limits will remain the same as the present 0.75 MGD treatment plant effluent load limits due to the present listing of Hampshire Creek as an impaired water.

Argument

Mr. Brazas is limited in this appeal to solely one issue. He claims that IEPA acted erroneously when it stated in the Fact Sheet issued with the Draft Permit that load limits would be calculated according to a certain formula, and then in the final permit, abandoned that formula in calculating the load limit for the pollutants listed in the permit. This argument overlooks several key factors.

First, the draft permit is published for the purpose of inviting public comments on its issuance and content. Public participation in the permitting process is a key element of the procedures for such permits. Indeed, Illinois' first attempt at establishing permitting procedures was struck down for its failure to include adequate public participation, as required by the Clean Water Act. Citizens for a Better Environment v. Environmental Protection Agency, 596 F.2d 720 (7th Cir. 1079). Adequate and correct public participation occurred in this case. In fact, a second chance at public comment was extended to interested parties in this case, and it was only during this second chance opportunity that Mr. Brazas raised the point at issue in this appeal.

Assuming arguendo that Mr. Brazas means to say that the Fact Sheet / Draft Permit gave notice to the public that pollutant load limits would be assigned in this case only pursuant to a specific formulaic calculation, the assertion could not be honored. The Draft Permit did not set forth the wrong standard, or two different standards for pollutant load limits. It set a fixed, mass-based standard, in light of the fact that the receiving stream has been listed on the Section 303(d)

list of impaired waters. There was adequate notice of this fact in the Draft Permit. Nothing in the underlying Fact Sheet changed this notice to the public.

Second, in his appeal, Mr. Brazas overlooks the fact that Hampshire Creek is listed on the Section 303(d) list of impaired waters of the State. This listing requires that IEPA restrict the load limit to the existing conditions in the creek. Under such circumstances, the restriction has nothing to do with any formulaic approach – it is an absolute limit.

The formula identified in the Fact Sheet published with the Draft Permit constitutes only one means of addressing the pollutant limits for discharge to a receiving stream. Brazas would have the IEPA go backwards through the formula (from the absolute limit required by the Section 303(d) listing) to establish a new concentration limit (which is not applicable in this situation). IEPA is not required to do so. IEPA may use an alternative means of setting the limit. Where a stream is listed as an impaired water, the requirement is that there may be no increase in any load limit.

These factors were explained in the record before the Board on this Appeal.

First, the Agency responded directly to Mr. Brazas at a public meeting conducted in the Village on October 4, 2006. At the meeting, Mr. Alan Keller and Mr. Gary Bingenheimer on behalf of IEPA told Mr. Brazas “It should be one-half the former discharge, if double the effluent, to relate to pounds of contaminants.” Mr. Brazas stated, “Why is the draft permit not accurate in its math?” And Mr. Bingenheimer stated, “It must be both [concentration and pounds]. R. 446

At the same meeting, another interested party, Ms. Jane Collins, inquired, “If there is to be ‘no new loading’ and ‘a very high quality effluent,’ how will this occur?” Mr. Keller again responded, “The permit will require there not be any more pollutants in the receiving stream –

the limits are what is permitted presently, the limits are the same, the concentration limits are the same [sic], the pounds limits are the same as in 2001...” R. 447

Second, on December 9, 2005, Mr. Keller specifically advised Mr. Brazas in writing that the effluent limits in the Village of Hampshire’s NPDES permit were correct. He explained that IEPA was required to consider the Section 303(d) listing under applicable law and regulations, and concluded that the Village would not be allowed to operate its treatment plant in a manner that would violate the effluent concentration limits or the load limits stated in the permit. He referred Mr. Brazas to the two applicable laws / regulations in question: 40 CFR 122.45 (f)(2) and 35 Ill. Adm. Code, Section 104.120, which justified the statement of limitations included in the draft permit.

Last, the record also reflects that IEPA identified the need to preclude the Village from additional loading in the creek in an Internal Memorandum dated 11-14-05 (R. 508). A revised version of the Memorandum also appears in the record as an attachment in correspondence directed to State Senator Christopher Lauzen, in response to his various inquiries concerning issuance of the modified permit at issue in this case (R. 528). In each document, it is clearly stated by IEPA that the load limits for the expansion of Hampshire’s wastewater treatment plant are being held within the current limits and there will be no increase in load limits for the proposed expansion of the plant’s capacity.

At the hearing held on this Appeal on May 15, 2006, Mr. Brazas neither expanded on nor brought to light any new points concerning his argument in this case. His testimony and/or oral argument at the hearing was largely directed to portions of the case which had been stricken. In short, he complained to the Hearing Officer that the NPDES process utilized by the Illinois Environmental Protection Agency was not adequate to control growth – and any negative

environmental impacts which might result therefrom – in the State of Illinois. He concluded, “The process must change.”

As to the specific issue in this case, concerning concentration limits for pollutants, Mr. Brazas argued that the draft permit for the Village of Hampshire set limits which in fact exceed those otherwise allowed by IEPA for discharges into Lake Michigan. “The load limits for the Village of Hampshire must not exceed the limits allowed for Lake Michigan.” Brazas never otherwise specifically referred to the allegations of Paragraph 24 of his Amended Complaint in this case. He never specifically criticized the formula referred to in the Draft Permit or Final Permit, or objected to the IEPA explanation for setting an absolute limit on the pollutants identified in the permit.

On the other hand, the allegations in Paragraph 24 of the Amended Complaint in this case, that the concentration limits set in the draft permit do not fit the formula for calculation of mass load limits identified in the draft permit, are clearly refuted on the record before the Board.

IEPA has made clear that there are two limits which will apply to the Village of Hampshire; for example, in regard to CBOD₅:

- a) a mass loading limit of 63 lbs. per day; and
- b) a concentration limit of 10 mg/l.

The limit of 63 lbs. per day controls. As to the other pollutants addressed in the permit, the loading limit similarly will control.

Obviously, if or when the design average flow (DAF) or design maximum flow (DMF) reaches 1.5 mgd, the concentration limit will of necessity be less than 10 mg/l. This will be required in order to meet the 63 lb. per day load limit. In the meantime, however, before the treatment facility reaches full flow or capacity, it will not be necessary to have a concentration

limit of 5 mg/l. Under the formula, and given the limit on loading, the concentration limit under the formula will vary depending on the flow.

Under the permit, the applicable Federal standards, and Illinois rules, there is no confusion on this point in the permit issued to the Village of Hampshire, and the permit should be upheld.

CONCLUSION

In sum, Mr. Brazas has failed to establish on the record before the Board that any error occurred when IEPA established a strict loading limitation on the pollutants listed in the final modified NPDES permit issued to the Village of Hampshire. The issue raised by Mr. Brazas concerning the load limitation was fully addressed in the process of reviewing the application for and subsequently issuing the modified NPDES permit. The record makes clear beyond a doubt that the limit has been properly established.

For all these reasons, the decision of IEPA to issue the modified NPDES Permit (No. IL 0020281) to the Village of Hampshire must be upheld.

Respectfully submitted,

JEFFREY R. MAGNUSSEN, President, and
VILLAGE OF HAMPSHIRE,

By: _____

Mark Schuster
Schnell, Bazos, Freeman, Kramer, Schuster
& Vanek
Attorney for the Village

Mark Schuster #2519089
Schnell, Bazos, Freeman, Kramer, Schuster & Vanek
1250 Larkin Avenue #100
Elgin, IL 60123
847-742-8800
847-742-9777 (fx)
mschuster@sbfklaw.com