

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCK RIVER WATER RECLAMATION)	
DISTRICT)	
)	
Petitioner,)	
)	
v.)	PCB No. 13-11
)	(Permit Appeal-Water)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	
)	
Respondent.)	

RESPONSE IN OPPOSITION TO RESPONDENT'S
MOTION IN LIMINE TO EXCLUDE IRRELEVANT TESTIMONY
AND DOCUMENTS NOT CONTAINED IN THE RECORD

Now comes Petitioner, Rock River Water Reclamation District ("District"), by its attorneys, Drinker, Biddle & Reath LLP, and requests that the Hearing Officer deny Respondent's Motion in Limine which on its face requests to exclude all testimony in this matter that does not directly relate to the Illinois Environmental Protection Agency's ("Agency") final decision on the permit at issue in this case and its request that the Hearing Officer exclude any and all documents that are not included in the established Permit Record. In support of this response, the District states, as follows:

I. INTRODUCTION

Respondent has apparently failed to actually read what is set forth in the Permit Record or is attempting by this Motion to avoid having to address what is the real issue in this case. This appeal involves the denial of the District's application for a construction permit to build what is acknowledged to be a flow equalization basin that will be used approximately once per year when flows to its wastewater treatment plant exceed 80 million gallons per day ("MGD") as a result of the design rainfall event. As set forth in the application, this event will over a two day

period that includes the initial filling and emptying of the basin back into the interceptor for ultimate treatment. The basin is proposed to be constructed without a liner so that it can be used for the remainder of the time as a constructed wetland to provide treatment for a portion of the wastewater plant effluent to remove nutrients prior to discharge to the Rock River.

As set forth in the prefilled written testimony of all three witnesses and as contained in the record, the District and the Agency had numerous discussions concerning this project. After the March 11, 2011 meeting, the Agency provided copies of a draft Memorandum prepared by Mr. William Buscher regarding his review of the February 2011 preliminary plan and his concerns about the proposed project's impact upon ground water. See Permit Record 175-177. As set forth in the prefilled testimony, the District requested a follow up meeting to discuss Mr. Buscher's concerns (Permit Record 182).

At this meeting held on June 6, 2011, Mr. Buscher explained his concerns and the his belief that the District would need to show that the project would not cause an increase in groundwater concentrations of any pollutant twenty five feet from the basin and also provided a copy of Mr. Richard Cobb's prefilled testimony in R08-18 as further explanation of this position. The District responded to issues raised by Mr. Buscher through a lengthy response by Mr. James Huff that addressed each point raised by Mr. Buscher including Mr. Buscher's argument that the groundwater quality regulations contained in Part 620 of the Board regulations, 35 Ill. Adm. Code Part 620 required that the proposed project not result in the increase in the concentration of any pollutant above background. Mr. Huff responded that it was not the increase in the concentration of any pollutant that constituted water pollution but rather an increase that resulted in the interference with the use of groundwater that constituted water pollution. See Permit Record 187-193. Mr. Huff also explained that this Agency interpretation of what would be

prohibited water pollution would be contrary to all sorts of activities that heretofore had been allowed by the Agency and which in fact were being encouraged for use by the Agency. See Permit Record 193.

All of this was detailed in the materials that the District submitted along with the permit application forms. Thus the Permit Record clearly documents that the Agency relied upon the position espoused by Mr. Buscher that the District would have to show that there would be no increase in background concentrations of pollutants as a result of the use of the unlined flow basin to hold the untreated contents of the sewer system during these design storm events. This is further documented by the e-mail from Ms. Wilhite to the undersigned dated May 20, 2011, which is set forth at Permit Record 179, that references the groundwater degradation issue. As set forth in the prefiled testimony, the District was never provided any justification as to why the Agency believed that the project as proposed could not be permitted other than the draft memo prepared by Mr. Buscher and the statements at the June 6, 2006 meeting. Respondent even supplemented the Permit Record to include another subsequent draft memo prepared by Mr. Buscher outlining the same type of arguments as in his other memo. See Permit Record 867-873.

The record also contains a draft memo from Mr. Buscher to Mr. Cobb that explains his follow up discussions with Mr. Huff concerning the degradation issue. See Permit Record 176-177.

When it became clear that this was going to be the final position of the Agency, the District filed the formal application including all of the background materials it had presented during the previous discussions so as to ensure that it would in fact be included in the formal Permit Record in the event of a denial.

II. RESPONSE TO SPECIFIC OBJECTIONS:

1. Part 620 Regulations.

By arguing that because the Agency did not cite the Part 620 regulations in their denial letter, Responded is trying to ignore the interpretation that was clearly presented by the Agency as to the basis for its conclusion that water pollution would occur if the project was constructed and therefore the reason why the permit would not be granted. Apart from the position exposed by Mr. Buscher, there is no other reason set forth in the Permit Record for their position that water pollution would result or why a liner and groundwater monitoring would be required. Respondent acknowledges this when they state in their Motion “(t)he first, and most significant basis was that the facility, as proposed, would cause, threaten or allow the discharge of contaminants, causing threatening or allowing water pollution in violation of 415 ILCS 5/12 (2010).” Contrary to Respondent’s apparent assertion, it is not the once per year use of the basin to temporarily store the diluted wastewater during design storm events that constitutes “water pollution” in and of itself. It is the result of this use and the resulting impact that must be judged as to whether this limited retention of dilute raw wastewater results in “causing, threatening or allowing water pollution in violation of 415 ILCS 5/12 (2010)”.

The Act defines provides the following definition of the term “water pollution”:

Sec. 3.545. Water pollution. "Water pollution" is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic

life. 415 ILCS 5/3.545) (was 415 ILCS 5/3.55)

(Source: P.A. 92-574, eff. 6-26-02.)

The primary basis for the denial is that the District has not shown that the projected once per year use of the basin to temporarily store diluted wastewater will not cause a violation of Section 12(a) of the Act (415 ILCS 5/12 (2010)) which provides:

No person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.
(415 ILCS 5/12) (from Ch. 111 1/2, par. 1012)

Clearly what constitutes water pollution is relevant to this appeal and central to the decision of the Agency on appeal. Respondent's motion to exclude testimony and other evidence relevant to this issue cannot be properly granted.

2. Exclusion of specific documents

Respondent seeks to exclude two specific documents that are attached to the prefiled testimony of Mr. Huff and Mr. Carroll because they are not included in the Permit Record. As discussed above, the Agency provided the draft testimony of Mr. Cobb to the District at the June 6, 2011 meeting. What is attached to the prefiled testimony of Mr. Huff is a copy of Mr. Cobb's actual testimony from the hearing record in R08-18. Clearly this is relevant to the case at hand and should be allowed.

The second item is a 2010 Illinois EPA letter to the General Assembly related to storm water which is attached to the prefiled testimony of Mr. Dana Carroll. As set forth above and as explained in the proposed testimony, the District did provide argument to the Agency that the position it was taking in its review of the request to construct the proposed unlined basin was directly at odds with other types of projects being promoted by the Agency. Mr. Carroll uses this letter as evidence that the Agency was in fact promoting this type of project that would have the same impact that was being objected to in this case, namely an increase in the concentration of pollutants in the ground water as a result. How can Respondent argue that “(t)here is no evidence that Illinois EPA relied, or even knew about these (and other) documents, now being proposed as evidence” when the objected to item is from the Agency’s own website. It cannot be seriously argued that the District did not raise this general issue of inconsistent treatment of projects and potential for prohibition of such “green” projects as a result of this apparent decision to deny the proposed basin.

Respondent’s motion to exclude these two specific documents should be denied for these reasons.

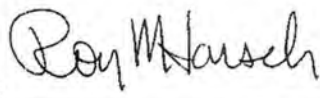
III. Conclusion

What Respondent has actually attempted to do by this Motion is frame the issue on appeal in a manner to have the Pollution Control Board ignore the basis for the Agency’s objection to the proposed use of the unlined basin. Clearly the basis for their position, and the the acknowledged primary reason for the denial, is their belief that it would result in “water pollution” because it would result in the increase in pollutant concentration in the ground water. This basis is relevant to the denial and was clearly presented throughout the Permit Record. The objections to the two cited documents are likewise unsupported for the reasons set forth above.

WHEREFORE, the District requests that the Hearing Officer Respondent deny the Motion, allow the proposed testimony and exclude the two objected to documents.

Respectfully submitted,

ROCK RIVER WATER
RECLAMATION DISTRICT
Petitioner,

By: 

One of its Attorneys

Dated: November 26, 2012
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CERTIFICATE OF SERVICE

I, ROY M. HARSCH, an attorney, do certify that I caused to be served this 26 day of November, 2012, Petitioner's Motion in Limine to Exclude Irrelevant Testimony and Documents not Contained in the Record and Notice of Filing upon the persons listed below by electronic mail and by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago, Illinois.



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