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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

APR 26 2004

STATE OF ILLINOIS
Pollution Control Board

DES PLAINES RIVER WATERSHED ALLIANCE, LIVABLE COMMUNITIES ALLIANCE, PRAIRIE RIVERS NETWORK, and SIERRA CLUB,	)	
Petitioners,	)	
v.	)	PCB 04-88 (NPDES Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF NEW LENOX	)	
Respondents.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that the Illinois Chapter of the Sierra Club, and Prairie Rivers Network have filed PETITIONERS' SUBMISSION IN RESPONSE TO THE HEARING OFFICER ORDER OF APRIL 1, 2004.

Albert F. Ettinger (Reg. No. 3125045)
Counsel for Petitioners

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312-795-3707

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PETITIONERS' SUBMISSION IN RESPONSE TO THE HEARING OFFICER ORDER OF APRIL 1, 2004

In compliance with the Hearing Officer Order of April 1, 2004, Petitioners hereby submit further justification for the discovery schedule that was proposed by Petitioners on March 11, 2004 in this matter. We continue to see no reason for discovery in this case. Given the clear language of the governing statute, it appears that any discovery would be wasteful.

A. The petition must be heard "exclusively on the basis of the record before the Agency."

In interpreting a statute one must, of course, begin by looking at the language of the statute. Michigan Avenue Nat'l Bank. v. County of Cook, 191 Ill. 2d 493, 503, 732 N.E. 2d 528, 535 (2000). This case is a third party appeal of decision by IEPA regarding an NPDES permit. The case is governed by 415 ILCS 5/40(e) that states that the Board shall hear the petition "exclusively on the basis of the record before the Agency." It is apparent that no party to this proceeding can use any document, testimony or data that is not part of the Agency record.

415 ILCS 5/40(e) has been applied by the Board to hold that only matters that were actually before the Agency at the time it made its decision may be considered by the Board in a

Third Party permit appeal. The Board, in the Prairie Rivers Network v. IEPA and Black Beauty Coal Company (PCB 01-112) Opinion and Order of the Board of August 9, 2001 pp.10, 25, noted that it was "bound by the clear directives of Section 40(e)(3)" and affirmed the hearing officer's decision to limit evidence "to the record that was before IEPA at the time the permitting decision was made."

Although not decided under Section 40(e), Community Landfill Company v. City of Morris, 2001 Ill. Env. Lexis 553 (December 6, 2001) is also instructive. In that case numerous decisions by the hearing officer to exclude evidence that was not before the Agency at the time it made its decision were affirmed. The only exception recognized by the Board in Community Landfill was related to a rare circumstance in which the party offering the testimony had no practical opportunity to offer testimony on the issue before the permitting decision had been made. No party claims anything of the sort happened in this case. Obviously, both of the respondents in this case had a full opportunity to put anything into the record in support of the permit that they wished to offer. The applicant had this right at least up to the close of the public comment period and, under Agency practice, the Agency could add materials to the record even after the close of the public comment period that ended petitioners' ability to comment.

It might be suggested that the Board is free to hear testimony outside of the hearing record in appeals heard under Section 40(e) as long as the issue was raised during the permit proceedings. This ignores the clear language of the statute that limits appeals to issues raised "during the public notice period" and states that the Board should hear the appeal "exclusively on the basis of the record" before the Agency. 40(e)(2)(A), 40(e)(3)(iii) This proceeding is not only limited to the issues raised in the record, it is limited to the evidence in the record.

The statute contemplates that everyone with something to say about the permit will do so during the public comment period. In this case, the applicant did not testify at the hearing, ask any questions at the hearing or apparently even bother to attend the hearing. Further, the applicant did not attempt to respond to the questions raised by petitioners at the hearing, or supplement the record after the hearing during the comment period or thereafter. That the applicant may now regret its use of this stratagem does not change the clear language of the law.

Under the governing statute everything that may be raised in the appeal proceeding must be part of the Agency record. Apparently, the purpose of the hearing to be held before the Board in third party appeals is to present arguments based on the Agency record as the record is defined at 35 Ill. Adm. Code 105.212.

In short, at the hearing and in any subsequent briefing allowed by the hearing officer, all the parties will be free to argue what they wish from the permit record as it has been presented by the Agency. There is no need or possibility for discovery given that everything that is relevant is already in plain view in the Agency record.

B. It is petitioners' burden to show that the issue was issued improperly.

With regard to standard for decision, the governing statutes are again fairly clear. 415 ILCS 5/40(e)(3) states that the "burden of proof shall be on the petitioners." This means the petitioners have the obligation to show that the permit was issued improperly either because proper procedures were not followed in issuing the permit or because the permit as issued violates the Environmental Protection Act or the regulations issued under that Act. Prairie Rivers Network v. Black Beauty Coal Company, 335 Ill. App. 3d 391, 781 N.E. 2d 372, 379-80 (4th Dist. 2002)

It is, perhaps, unusual for a statute to speak of a "burden of proof" with regard to a proceeding that will only involved presentation of testimony and documents contained in an Agency record. But whether it is usual or not, it seems clear in this case that the Board is supposed to look at the record that was before the Agency and decide the issues as the Agency should have done. Of course, given that the burden is on the petitioners, petitioners must show that it is more likely than not that the permit should not have been issued on the basis of the Agency record.

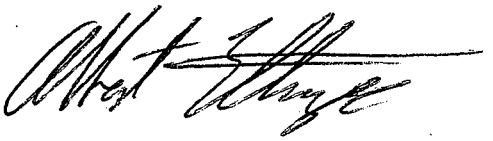
Under 415 ILCS 5/39(a), the Agency shall issue a permit "upon proof by the applicant that the facility ... will not cause a violation of [the] Act or regulations." This statutory language bears on one of the ways in which petitioners may show that the permit was improperly issued. If the record does not show that the applicant proved that the facility would not cause a violation of the Act or regulations, the permit must be overturned. Of course, the applicants are then free to reapply and perhaps offer more evidence showing that the permit will not cause a violation of the Act or regulations in renewed Agency proceedings.

CONCLUSION

Wide ranging discovery in this case might allow petitioners to cross-examine the applicant's officials responsible for the application and the consultants who wrote the applicant's reports, none of whom appeared at the public hearing. It would allow petitioners to probe thoroughly the logic of Agency and its internal memos and responses to public comments. If it is decided that discovery is appropriate in this case, petitioners will wish to participate. But the

statutes governing this proceeding leaves all sides with the record before the Agency at the time it made its decision without supplementation with additional factual matter.

Respectfully submitted,



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April 26, 2004

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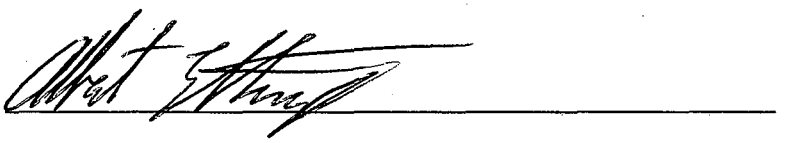
CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that on April 26, 2004, I filed the attached PETITIONERS' SUBMISSION IN RESPONSE TO THE HEARING OFFICER ORDER OF APRIL 1, 2004. An original and 4 copies was filed, on recycled paper, with the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL 60601, and copies were served via United States Mail and via facsimile to those individuals on the included service list.



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