BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VILLAGE OF LAKE BARRINGTON, CUBA TOWNSHIP, PRAIRIE RIVERS NETWORK, SIERRA CLUB, BETH WENTZEL and CYNTHIA SKRUKRUD,	)	
Petitioners,	)	
v.	)	PCB 05-55 (Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

SLOCUM LAKE DRAINAGE DISTRICT OF LAKE COUNTY, ILLINOIS,	)	
Petitioner,	)	
v.	)	PCB 05-58 (Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

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 ASSOC., DONALD KREBS, DON BERKSHIRE, JUDY BRUMME, TWIN POND FARMS HOMEOWNERS ASSOC., JULIA TUDOR, CHRISTINE DEVINEY,	)	
Petitioners,	)	
v.	)	PCB 05-59 (Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on February 28, 2005, I filed with the Illinois Pollution Control Board an original and nine copies of this Notice of Filing and attached THE VILLAGE OF WAUCONDA'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF THE NPDES PERMIT DECISION OF THE AGENCY BELOW, which is hereby served upon you.

Dated: February 28, 2005

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STATE OF ILLINOIS
Pollution Control Board

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THE VILLAGE OF WAUCONDA'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF THE NPDES PERMIT DECISION OF THE AGENCY BELOW

This matter comes before the Illinois Pollution Control Board ("Board") on three separate third-party petitions challenging the issuance of a modified NPDES Permit ("Modified Permit") to the Village of Wauconda ("Wauconda") by the Illinois Environmental Protection Agency ("Agency") on August 23, 2004. The Modified Permit allows the expansion of Wauconda's waste water treatment plant ("WWTP") in two stages: In Stage I from 1.4 million gallons per day ("MGD") to 1.9 MGD; and in Stage II from 1.9 MGD to 2.4 MGD. The first third-party petition was filed by Lake Barrington, Cuba Township, Sierra Club, Prairie Rivers Network, Cynthia Skrukrud and Beth Wentzel ("Governmental and Environmental Group Petitioners") and is PCB 05-55. The second was filed by Slocum Lake Drainage District ("Drainage District") and is PCB 05-58. The third was filed by a group of area residents represented by Attorney Jay Glenn ("Resident Group") and is PCB 05-59. All three matters were consolidated by the Board

by an order dated October 7, 2004. The Modified Permit has been the subject of a public notice proceeding by the Agency.

I. BACKGROUND

Wauconda owns and operates a WWTP pursuant to NPDES Permit IL 0020109. Wauconda's WWTP discharges to Fiddle Creek, tributary to the Fox River. Pursuant to an application by Wauconda, on August 23, 2004, the Agency modified Wauconda's NPDES Permit to allow upgrades, improvements and expansion of Wauconda's WWTP in order to accommodate growth in the community. The Modified Permit was issued after an exhaustive review process by the Agency. Tr. 1-214 and R. 2186-2262.[1] Wauconda's application generated significant public interest from surrounding communities, environmental groups and local residents. As a result, the Agency held a public hearing on September 9 and 10, 2003, to provide information to interested parties about Wauconda's application and to receive comments. Tr. 1-214 and R. 194-230. The Agency also maintained an open public comment period until at least October 31,

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1 Citations to the transcript of the IEPA proceeding, filed as an Amended Record on December 10, 2004, are designated "Tr.__" Citations to the IEPA record are designated "R.__". As the Agency notes in its final fact sheet:

> This permit modification decision follows one of the most extensive technical reviews and community relations outreach and response efforts in the history of the Illinois Environmental Protection Agency. Because of the great degree of public interest in the permit application, Illinois EPA went significantly beyond legal notice and review requirements and extended the hearing record until October 31, 2003. When several citizens at the September 9, 2003 public hearing expressed concern about a year-round disinfection exemption in the MPDES permit for treated wastewater discharges, Illinois EPA and Wauconda reached an agreement, announced on November 13, 2003, for Wauconda to request termination of the exemption and be required to comply with a fecal coliform standard. In addition, director Cipriano personally hosted a meeting in December 2003 attended by 33 representatives of local governments and agencies with a role in protecting natural resources and public health. Agency staff did an exhaustive evaluation of issues raised by the citizens and agencies and conducted further studies. The results of that work are detailed in the Responsiveness Summary.

R. 2188, Emphasis added.

2003 and even held a special meeting with various governmental entities to gather additional information. Tr. 6 and R. 1080-1102, 2212. During this timeframe, the only Petitioners that presented technical data to the Agency were the Governmental and Environmental Group Petitioners in PCB 05-55. R. 249-299, 311-345, 388-421, 2000-2001, 2100-2139; Compare to R. 579-828. Wauconda also presented technical data in support of its application as well as in response to issues raised by the various parties below. R. 829-1022, 1522-1579, 1597-1598, 1608-1676, 1774-1776, 1950-1953, 2015-2027, 2045-2048, 2054-2099.

After carefully and exhaustively considering all of the issues raised by the various parties below, the Agency issued the Modified Permit along with a Responsiveness Summary. R. 2186-2262. The Agency's Responsiveness Summary adequately addresses all of the substantive issues raised below as well as those raised herein. R. 2186-2262.

II. MOTION TO DISMISS RESIDENT GROUP'S PETITION

A motion to dismiss challenges the legal sufficiency of the Petition by alleging defects on its face. In challenging the Petition, Respondent must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. Jarvis v. South Oak Dodge, Inc., 201 Ill. 2d 81, 86 (2002). In addition, when considering a Motion to Dismiss, the Board must construe the allegations in the Petition in the light most favorable to the Petitioner. Wakulich v. Mraz, 203 Ill. 2d 223, 228 (2003).

Section 101.302 of the Board's General Rules, 35 Ill. Adm. Code, 101.302, provides in relevant part as follows:

a) This Section contains the Board's general filing requirements. Additional requirements may exist for specific proceedings elsewhere in these rules. The Clerk will refuse for filing any document that does not comply with the minimum requirements of this Section.

* * *

h) Unless the Board or its procedural rules provide otherwise, all documents must be filed with a signed original and 9 duplicate copies (10 total), except that:

1) Documents and motions specifically directed to the assigned hearing officer must be filed with the Clerk with a signed original and 4 duplicate copies (5 total), or as the hearing officer orders;

2) The Agency may file a signed original and 4 duplicate copies (5 total) of the record required by Section 105.116, 105.302, and 105.410;

3) The OSFM may file a signed original and 4 duplicate copies (5 total) of the record required by Section 105.508; and

4) The siting authority may file a signed original and 4 duplicate copies (5 total) of the record required by Sections 107.300 and 302.

(Emphasis added.) In no fewer than five different locations within the rule, the Board requires that documents filed by the parties be signed. This requirement is not insignificant given Illinois Supreme Court Rule 137, which provides as follows:

Rule 137. Signing of Pleadings, Motions and Other Papers – Sanctions

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee.

All proceedings under this rule shall be brought within the civil action in which the pleading, motion or other paper referred to has been filed, and no violation or alleged violation of this rule shall give rise to a separate civil suit, but shall be considered a claim within the same civil action. Motions brought pursuant to this rule must be filed within 30 days of the entry of final judgment, or if a timely post-judgment motion is filed, within 30 days of the ruling on the post-judgment motion.

This rule shall apply to the State of Illinois or any agency of the State in the same manner as any other party. Furthermore, where the litigation involves review of a determination of an

> administrative agency, the court may include in its award for expenses an amount to compensate a party for costs actually incurred by that party in contesting on the administrative level an allegation or denial made by the State without reasonable cause and found to be untrue.
>
> Where a sanction is imposed under this rule, the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

The Board's record in PCB 05-59 reveals that the Petition purportedly filed by attorney Jay Glenn on behalf of the Resident Group Petitioners was not signed. See, http://www.ipcb.state.il.us/Archive/dscgi/ds.py/Get/File-44567.

Furthermore, the time period for filing third-party petitions challenging the Modified Permit has long since passed. See 415 ILCS 40(e)(1) (2004), "[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 . . . ." (Emphasis added.) Since the Agency decision to issue the Modified Permit occurred on August 23, 2004, the 35 day deadline expired on September 27, 2004. Accordingly, any properly signed petition filed today or hereafter would be untimely.

Wauconda further submits that the Resident Group's failure to sign its Petition was not unintentional or inadvertent. Since the record of the proceedings below is devoid of a single shred of technical data or evidence submitted by Resident Group to support its claims, the Resident Group's attorney would undoubtedly be hard pressed to certify that its claims are "well grounded in fact" and are "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Wherefore, the Resident Group's Petition in PCB 05-59 should be dismissed with prejudice.

III. MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT ON RESIDENT GROUP'S DUE PROCESS CLAIMS

A motion to dismiss challenges the legal sufficiency of the Petition by alleging defects on its face. In challenging the Petition, Respondent must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. Jarvis v. South Oak Dodge, Inc., 201 Ill. 2d 81, 86 (2002). In addition, when considering a motion to dismiss, the Board must construe the allegations in the Petition in the light most favorable to the Petitioner. Wakulich v. Mraz, 203 Ill. 2d 223, 228 (2003). Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (2004); Gilbert v. Sycamore Municipal Hospital, 156 Ill. 2d 511, 517-18 (1993). Summary judgment should not be granted unless the right of the moving party is clear and free from doubt. Purtill v. Hess, 111 Ill. 2d 229, 240 (1986). While the nonmoving party in a summary judgment motion is not required to prove his or her case, the nonmovant must present a factual basis arguably entitling that party to a judgment. Michigan Avenue National Bank v. County of Cook, 191 Ill. 2d 493, 517-18 (2000).

In its unsigned petition, the Resident Group challenges the procedural sufficiency of the exhaustive public comment, review and hearing process before the Agency. The Resident Group relies upon a local zoning case to argue that full due process should have been afforded to the Petitioners during the proceedings before the Agency. The procedural sufficiency of the NPDES Permit application process, however, is very well established. See Peabody Coal vs. Pollution Control Board, 49 Ill. App. 3d 252, 254-255, (First District, 1977); U.S. Steel vs. Pollution Control Board, 52 Ill. App. 3d 1, 8-9,

(Second District, 1977); Landfill, Inc. vs. Pollution Control Board, 72 Ill. 2d 541, 559-560, (1978); Borg-Warner vs. Mauzy, 100 Ill. App. 3d 862, 869-870 (Third District, 1981); Sauget vs. Pollution Control Board, 207 Ill. App. 3d 974, 982-983 (Fifth District, 1990; Citizens Utilities vs. Pollution Control Board, 265 Ill. App. 3d 773, 780-782 (Third District, 1994); Prairie Rivers Network vs. Pollution Control Board, 335 Ill. App. 3d 391, 402-406 (Fourth District, 2002).

The Illinois Supreme Court spoke very clearly in Landfill, Inc., when it noted:

> Finally, the Board argues that the allowance of a permit can impinge upon third parties' constitutional rights to a healthful environment (Ill. Const. 1970, art. XI, secs. 1, 2) and can threaten property rights (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, sec. 2). Therefore, the Board argues, third parties are entitled by due process to a hearing on the allowance of permits. In the instant case the intervenors did participate in the permit-issuance process, although the Act does not guaranty such participation. The constitutional argument is without merit in light of the statutorily established mechanism for persons not directly involved in the permit-application process to protect their interests without embroiling the Board in an examination of the Agency's permit-granting procedure.
>
> Section 31(b) authorizes citizen complaints against alleged violators of the Act, any Board rule or regulation, or Agency permit; it requires the Board to hold a hearing on all such complaints which are not "duplicitous or frivolous" (Ill. Rev. Stat. 1975, ch. 111 1/2, par. 1031(b)). At that hearing, the complainant bears the burden of showing actual or threatened pollution or actual or threatened violations of any provisions of the Act, rules, regulations, or permits. (Ill. Rev. Stat. 1975, ch. 111 1/2, par. 1031(c).) The grant of a permit does not insulate violators of the Act or give them a license to pollute; however, a citizen's statutory remedy is a new complaint against the polluter, not an action before the Board challenging the Agency's performance of its statutory duties in issuing a permit. As the principal draftsman of the Act has noted, "One receiving a permit for an activity that allegedly violates the law can be charged with causing or *threatening to cause* such a violation in a citizen complaint under section 31(b), and the regulations expressly provide that the existence of a permit is no defense to such a complaint." (Emphasis added.) Currie, *Enforcement Under Illinois Pollution Law*, 70 Nw. U.L. Rev. 389, 478 (1975).

Landfill, Inc. vs. Pollution Control Board, 72 Ill. 2d 541, 559-560, (1978), (Emphasis added).

The Resident Group's reliance upon Klaeren vs. Lisle, 202 Ill. 2d 164 (2002), is misplaced because it involves a previously untested special use zoning proceeding and not the well established NPDES Permit review process before the Agency and the Board. Unlike the special use zoning proceeding challenged in Klaeren, the NPDES

Permit review process provides third-parties the opportunity to present technical data and testimony in opposition to the proposed permit. It also affords third-parties the opportunity to test the Agency's conclusions during a hearing before the Board. In this case, however, the Resident Group Petitioners chose to waive their rights to a full hearing before the Board. See Transcript of February 10, 2005 Hearing. http://www.ipcb.state.il.us/Archive/dscgi/ds.py/Get/File-46586. As a consequence, they should not now be heard to complain that they were not provided an opportunity to test the Agency's conclusions when they fully and freely gave it up.

The record in this case is replete with evidence that the Agency followed the public notice and opportunity requirements minimally required the Illinois Environmental Protection Act and the Board regulations. See Tr. 1-214 and R. 2186-2262. More importantly, unlike the proceeding challenged in Klaeren, the proceeding here does not need to provide full due process protection because Petitioners are able to file a citizen's suit against Wauconda for actual or threatened violations of the Illinois Environmental Protection Act. See, 415 ILCS 31(d) and (e) (2004). As the Court has already stated in Landfill, Inc., "a citizen's statutory remedy is a new complaint against the polluter, not an action before the Board challenging the Agency's performance of its statutory duties in issuing a permit." Landfill, Inc., Id. at 559-560. If and when the Resident Group Petitioners are able to demonstrate with reliable scientific data rather than scare tactics and innuendo that Wauconda is in violation of the provisions of the Illinois Environmental Protection Act the regulations thereunder, they can have their day in court.

Wherefore, the Resident Group's due process claims in PCB 05-59 should be dismissed with prejudice.

IV. THE DECISION OF THE AGENCY IS AMPLY SUPPORTED BY THE RECORD

As noted above, the August 23, 2004 decision by the Agency to issue the Modified Permit was the result of an unusually extensive and exhaustive public comment and Agency review process. Tr. 1-214 and R. 2186-2262. The process was initiated by an application filed by Wauconda along with supporting technical documentation. R. 829-1022, 1522-1579, 1597-1598, 1608-1676, 1774-1776, 1950-1953, 2015-2027, 2045-2048, 2054-2099. Wauconda's application resulted in a draft NPDES Permit being developed by the Agency and publicized for public review and comment. R. 194-230. Due to significant public interest in the draft Permit, the Agency decided to hold a public hearing, to allow public comment after the hearing, to host a meeting of local governmental agencies and to consult with other state agencies. Tr. 1-214 and R. 1080-1102. The Agency also sought and received additional supporting documentation from Wauconda and also conducted additional field surveys of its own to verify the accuracy of technical information provided by various parties. R. 829-1022, 1522-1579, 1597-1598, 1608-1676, 1774-1776, 1950-1953, 2015-2027, 2045-2048, 2054-2099, 2168-2171.

First, it is important to note that the Agency's focus and statutory authority in this proceeding is very specific. Pursuant to Section 39(a) of the Illinois Environmental Protection Act, "it 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 this Act or of regulations hereunder." 415 ILCS 39(a) (2004). Simply put, the Agency's duty and authority is limited to determining whether the discharge, as proposed, will cause a violation of the water quality standards under the Act the Board regulations. If the Agency determines that adequate proof has been submitted by the applicant, it has a duty to issue the requested permit or a permit with appropriate conditions. 415 ILCS 39(a) (2004). On a third-party appeal of the permit decision by the Agency, the burden is on the Petitioners to demonstrate that the Agency's decision was in error. 415 ILCS 40(e)(3) (2004).

During the course of this exhaustive public review process, numerous issues and concerns were raised by the petitioners. A number of these issues fell outside of the narrow scope of the Agency's review of Wauconda's permit application. In response to the various concerns and issues that were relevant, however, the Agency modified the draft Permit in several significant respects. R. 2188-2189, 2195. Additionally, the Agency issued a Responsiveness Summary concurrent with the issuance of the Modified Permit that fully addresses all of the issues raised by the Petitioners below. R. 2211-2250. The Agency's Responsiveness Summary is also fully supported by the technical documentation submitted by Wauconda as well as independent field studies done by the Agency. R. 829-1022, 1522-1579, 1597-1598, 1608-1676, 1774-1776, 1950-1953, 2015-2027, 2045-2048, 2054-2099, 2168-2171.

In sum, the Petitioners have claimed and Wauconda and the Agency have responded as follows:

1. The permit allows discharges of phosphorus and nitrogen that cause, have reasonable potential to cause, or contribute to violations of the water quality

standards regarding offensive conditions, 35 Ill. Adm. Code 302.203, in violation of 40 CFR 122.44(d) and 35 Ill. Adm. Code 309.141. Tr. 61-76, 151-154, 180-197. R. 249-310, 479-480, 566-568, 1023-1025, 1054-1057, 1069-1070, 1793-1795, 2102-2113. In response, the Agency revised the Permit to include phosphorus removal as a requirement. R. 2186-2262. The Agency also added DO limits and Special Condition 17 requires Wauconda to conduct a study of DO and nutrients in Fiddle Creek with a possible permit reopening to add additional treatment requirements. R. 2186-2262.

2. The permit allows discharges that may cause, have a reasonable potential to cause, or contribute to violations of state water quality standards regarding dissolved oxygen ("DO"), 35 Ill. Adm. Code 302.206, in violation of 40 CFR 122.44(d) and 35 Ill. Adm. Code 309.141. Tr. 57-60, 61-76, 97-101. R. 163-164, 249-310, 441-444, 470-480, 566-573, 578-828, 1023-1025, 1054-1057, 1069-1070, 1793-1795, 2102-2113. In response, the Agency added DO limits and Special Condition 17 to the Modified Permit that requires Wauconda to conduct a study of DO and nutrients in Fiddle Creek with a possible permit reopening to add additional treatment requirements. R. 2186-2262.

3. The permit and the Illinois EPA assessments did not comply with Illinois antidegradation rules protecting the existing uses of the receiving waters. 35 Ill. Adm. Code 302.105(a). Tr. 57-76, 97-101, 151-154; R. 163-164, 249-310, 441-444, 470-478, 566-573, 1023-1025, 1054-1057, 1793-1795, 2102-2113. In response, the Agency revised the Permit to include phosphorus removal as a requirement. R. 2211-2262. The Agency also added DO limits and Special Condition 17 requires Wauconda to conduct a study of DO and nutrients in Fiddle Creek with a possible permit reopening to add additional treatment requirements. R. 2186-2262. The Agency correctly noted that

the technical reports submitted by Wauconda adequately demonstrate that the NPDES discharge has not had an adverse impact on the downstream wetlands. R. 2232, referencing Wauconda technical submittals in R. 829-1022. The Agency has also correctly noted that whatershed and wetlands management are not appropriate to mandate in an NPDES permit. R. 2233.

4. The Illinois EPA assessment fails to include the analysis of alternatives required by 302.105(f). Tr. 57-76, 97-101, 151-154; R. 163-164, 249-310, 441-444, 470-478, 566-573, 1023-1025, 1054-1057, 1793-1795, 2102-2113. The Agency Responsiveness Summary addresses this point by reference to a technical report submitted by Wauconda. R. 2234-2235, referencing Wauconda technical submittals in R. 829-1022, 1950-1953.

5. Illinois EPA's antidegradation assessment was insufficient under 302.105(f) by failing to consider impacts to biological communities, increased loadings, or alternatives or by providing a showing of benefits which fully justify the project. Tr. 57-76, 97-101, 151-154; R. 163-164, 249-310, 441-444, 470-478, 566-573, 1023-1025, 1054-1057, 1793-1795, 2102-2113. In response, the Agency revised the Permit to include phosphorus removal as a requirement. R. 2186-2262. The Agency also added DO limits and Special Condition 17 requires Wauconda to conduct a study of DO and nutrients in Fiddle Creek with a possible permit reopening to add additional treatment requirements. R. 2186-2262. The Agency correctly noted that the technical reports submitted by Wauconda adequately demonstrate that the NPDES discharge has not had an adverse impact on the downstream wetlands. R. 2232, referencing Wauconda technical submittals in R. 829-1022, 2054-2099. The Agency has also correctly noted

that whatershed and wetlands management are not appropriate to mandate in an NPDES permit. R. 2233.

6. Illinois EPA's permit analysis, including its 2003 antidegradation assessment, fails to address the impact of the discharge on the Fox River, an impaired waterway. Tr.61-76; R.249-310, 470-478, 566-573, 1793-1795. In response, the Agency correctly points out in its Responsiveness Summary that, "Due to the size of the facility and distance from the Fox River, the Agency made the determination that this discharge would not have a measurable impact on the Fox River." R. 2240. This conclusion is backed up with a technical analysis submitted by Wauconda's Engineer. R. 2054-2099.

7. Fiddle Creek should be considered an impaired waterway for nutrients, phosphorus and total nitrogen, and low DO and should be subject to federal requirements for such waters. Tr. 57-76, 97-101. R. 163-164, 249-310, 441-444, 470-480, 566-573, 578-828, 1023-1025, 1054-1057, 1069-1070, 1793-1795, 2102-2113, 2186-2262. In response, the Agency added DO limits and Special Condition 17 to the Modified Permit that requires Wauconda to conduct a study of DO and nutrients in Fiddle Creek with a possible permit reopening to add additional treatment requirements. R. 2186-2262. The Agency also responded with a thorough analysis of this issue in the Responsiveness Summary. R. 2243.

8. In light of the wetland impacts already experienced, Wauconda should be required to develop, with the concurrence of its wetland neighbors, a wetland management plan to maintain and restore the Fiddle Creek wetlands. Tr. 48-52, 57-60, 180-97; R. 20, 52, 231-239, 351-421, 441-444, 470-478, 578-828, 1069-1070. In

response, the Agency revised the Permit to include phosphorus removal as a requirement. R. 2186-2262. The Agency also added DO limits and Special Condition 17 requires Wauconda to conduct a study of DO and nutrients in Fiddle Creek with a possible permit reopening to add additional treatment requirements. R. 2186-2262. The Agency correctly noted that the technical reports submitted by Wauconda adequately demonstrate that the NPDES discharge has not had an adverse impact on the downstream wetlands. R. 2232, referencing Wauconda technical submittals in R. 829-1022, 2054-2099. The Agency has also correctly noted that whatershed and wetlands management are not appropriate to mandate in an NPDES permit. R. 2233.

9. Plant and algal growth along Fiddle Creek, stimulated by excessive nutrients, has impeded the capacity of the creek during high flow conditions, causing flooding. Wauconda should be required to limit discharges, both loading and hydraulic, to reduce such impacts and should be required to contribute to the maintenance of such waterway. Tr.73-76, 110-115; R. 142-144, 148-149, 441-444, 470-480, 569-573, 1054-1057, 1069-1070. In response, the Agency revised the Permit to include phosphorus removal as a requirement. R. 2186-2262. The Agency also added DO limits and Special Condition 17 requires Wauconda to conduct a study of DO and nutrients in Fiddle Creek with a possible permit reopening to add additional treatment requirements. R. 2186-2262.

10. The IEPA permit fails to require Wauconda to implement a pretreatment program for its industrial dischargers. Tr. 48-56, 61-73, 180-197; R. 163-164, 169, 351-421, 479-480, 487-488, 569-573, 578-828, 1045, 1048-1049, 1054-1057, 1069-1070, 1742, 1744-1746. In response, the Agency has required Wauconda to update its

annual industrial user survey so that the need for pretreatment program can be reevaluated. See Permit Special Condition 8. R. 2257. See also R. 1522-1579, 2054-2099.

11. Wauconda filed a false application because it failed to note on the application that it accepts pretreated leachate waste from the Wauconda Sand & Gravel Superfund Site. R. 579-828. While true that Wauconda did not disclose this particular fact on its application, it is clear from the record as a whole, that the Agency was not oblivious to the facts as they were disclosed by Wauconda in other documents. See, e.g., R. 1522-1579. In fact, to the contrary, the record clearly indicates that Agency issued a pretreatment permit to the Wauconda Sand & Gravel site. R. 2054-2099. It is also clear that when the Superfund Site's 2000 GPD are mixed with the 1.9 MGD of waste flow to the Wauconda WWTP from all other sources, any contaminants in the pretreated leachate are diluted to below detectable limits before they reach the WWTP. R. 2168-2171. Accordingly, even assuming the oversight on the application was intentional, which is was not, it was not material. Furthermore, the Agency has required Wauconda to update its annual industrial user survey so that the need for pretreatment program can be reevaluated. See Permit Special Condition 8. R. 2257. See also R. 1522-1579, 2054-2099.

Wherefore, for all of the foregoing reasons, Wauconda respectfully requests that the Board affirmed the decision of the Agency.

V. SETTLEMENT EFFORTS

As the Board is fully aware, Wauconda has reached an agreement with the Governmental and Environmental Group Petitioners. See Stipulation previously filed herein by Wauconda on behalf of Wauconda and the Governmental and Environmental Group Petitioners. Wauconda fully understands and accepts the Board's decision to decline acceptance of the Stipulation without the opportunity to conduct its own independent review. Once the Board has completed its review of the record, Wauconda believes that the Board will find that the Agency's decision in this case is fully supported by the record. Nevertheless, since Wauconda is bound by the terms of its agreement with the Governmental and Environmental Group Petitioners, Wauconda is prepared to accept a Board order in this case that is consistent with the Stipulation previously filed herein.

February 28, 2005

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STATE OF ILLINOIS
Pollution Control Board

It is hereby certified that true copies of the foregoing THE VILLAGE OF WAUCONDA'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF THE NPDES PERMIT DECISION OF THE AGENCY BELOW were hand delivered or faxed and mailed by overnight mail, on February 28, 2005 to each of the following persons:

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