ILLINOIS POLLUTION CONTROL BOARD
November 17, 2005

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

ORDER OF THE BOARD (by J.P. Novak):

On December 2, 2003, the Des Plaines River Watershed Alliance, the Livable Communities Alliance, Prairie Rivers Network, and the Sierra Club (collectively, petitioners) filed a petition seeking the Board's review of an Illinois Environmental Protection Agency (Agency) determination. The Agency granted a National Pollutant Discharge Elimination System (NPDES) permit to the Village of New Lenox (Village) for expansion of one of its sewage treatment plants in Will County.

Today the Board first decides a motion for summary judgment filed by petitioners on February 4, 2005. For the reasons discussed below, the Board denies the petitioners' motion for summary judgment as to each of the three grounds stated: nutrient loadings, offensive conditions water quality standard, and copper water quality standard. Having done so, the Board also today decides issues relating to the scope of and schedule for discovery. The Board finds that respondents have not justified their proposed protracted extensive discovery schedules and directs the hearing officer to proceed to hearing consistently with this order.

This order first reviews the procedural history of this case before providing the applicable statutes and standard of review. It then identifies the three issues raised in the motion for summary judgment and summarizes the parties' arguments on those issues. Next, the opinion provides the Board's analysis of and findings on those issues. The opinion then summarizes the parties' positions on the issue of discovery before stating its findings.

PROCEDURAL HISTORY

On December 2, 2003, petitioners filed a petition asking the Board to review an October 31, 2003 determination of the Agency. *See* 415 ILCS 5/40(e) (2004). The Agency granted an NPDES permit to the Village for its sewage treatment plant located at 301 North Cedar Road in New Lenox, Will County. In an order dated December 18, 2003, the Board

accepted the petition for hearing, finding that the third-party petitioners fulfilled all requirements of Section 40(e) of the Environmental Protection Act (Act). 415 ILCS 5/40(e) (2004). On January 23, 2004, the Village waived its right to a decision until it elects to reinstate the decision period.

On January 5, 2004, the Agency filed the Record (R.) of its public hearing documents and permit file documents. On January 26, 2004, the Agency filed a Motion For Leave To Amend Record *Instanter*, accompanied by its Amended Record. In an order dated March 2, 2004, Board Hearing Officer Bradley P. Halloran granted the Agency's motion to file *instanter* and accepted the amended record. On February 13, 2004, the Agency filed a Motion For Leave To Amend Record *Instanter*, accompanied by its Amended Record 2. On August 24, 2005, Board Hearing Officer Bradley P. Halloran granted the Agency's motion to file *instanter* and accepted the second amended record.

In the course of a status conference on March 2, 2004, Hearing Officer Halloran directed the parties to submit proposed discovery schedules by March 11, 2004. On March 11, 2004, the Illinois Chapter of the Sierra Club and the Prairie Rivers Network filed a submission stating "that there should be no discovery in this case" under Section 40(e) of the Act and that six weeks would be an adequate amount of time for any discovery that the Board might allow. Also on March 11, 2004, the Village submitted its proposed discovery schedule:

1. 60 days for issuance of written discovery and responses to written discovery.

2. 60 days for review of written discovery responses and issuance of deposition notices.

3. 60 days for completion of depositions.

4. 60 days for completion of Requests to Admit.

Also on March 11, 2004, the Agency filed a proposed schedule with discovery continuing until January 10, 2005, and a hearing occurring by March 10, 2005.

After discussion of the proposed discovery schedules at a status conference on April 1, 2004, the hearing officer directed the parties to submit briefs addressing issues including justification of the proposed discovery schedules. Specifically, the hearing officer directed the parties to file simultaneous opening briefs by April 21, 2004, and replies by April 30, 2004. On April 26, 2004, the Board received three filings responding to the hearing officer's direction: the Memorandum of the Village of New Lenox on Proposed Discovery Schedule; the Petitioners' Submission in Response to the Hearing Officer Order of April 1, 2004; and a Brief in Support of Agency's Position. On April 30, 2004, the Board received two replies: a Reply of The Village of New Lenox on Proposed Discovery Schedule and the Petitioners' Reply to the Submissions of IEPA and New Lenox Made in Response to the Hearing Officer Order of April 1, 2004. The Board has taken these pleadings under advisement and will address them in a later section of this order. *See infra* at 33-40.

On February 4, 2005, petitioners filed a Motion for Summary Judgment (Mot. SJ), Memorandum in Support of Summary Judgment (Memo. SJ), and Statement of Relevant Facts from the Agency Record (Statement). On March 1, 2005, the Village filed a Motion for Stay of Petitioner's Motion for Summary Judgment. Petitioners' Response to the New Lenox Motion for Stay of Petitioners' Motion for Summary Judgment was filed with the Board on March 3, 2005. On March 8, 2005, the Village filed a Reply to Petitioners' Response to Motion for Stay of Petitioners' Motion for Summary Judgment, accompanied for a Motion to File Reply *Instanter*.

In an April 21, 2005 order, the Board first granted the Village's Motion to File Reply *Instanter* and accepted its reply. The Board then found that a stay of petitioners' motion for summary judgment was not appropriate and directed the hearing officer to establish a briefing schedule regarding that motion. Accordingly, the hearing officer directed that respondents file a response to the motion by May 25, 2005, and that petitioners file a reply by June 8, 2005.

On May 25, 2005, the Village filed The Village of New Lenox's Memorandum of Law in Opposition to Petitioner's Motion for Summary Judgment (Village Memo.) and Response of Village of New Lenox to Petitioners' Statement of Relevant Facts From The Agency Record (Village Statement). Also on May 25, 2005, the Agency filed Agency's Response to Petitioners' Motion for and Memorandum of Law in Support of Summary Judgment (Agency Resp.). On June 8, 2005, petitioners filed Petitioners' Reply Memorandum in Support of Summary Judgment (Pet. Memo.) and Petitioners' Reply Regarding Relevant Facts in the Agency Record (Pet. Statement).

FACTUAL BACKGROUND

On June 10, 2002, the Agency received the Village's application for expansion of its existing wastewater treatment plant. *See* R. at 424-81. The Village proposes to expand the plant's design average flow from 1.54 million gallons per day (MGD) to 2.516 MGD. R. at 1, 354, 430, 460. The proposed expansion would increase the plant's design maximum flow from 2.82 MGD to 5.103 MGD. R. at 1, 354. "The need for expansion is based on projected growth in the community and because the plant is operating at 85 percent capacity." R. at 354. The population of New Lenox is projected to increase from 17,700 in 2000 to 48,568 in 2024. R. at 6. The Village also operates a second treatment plant that discharges to the Jackson Branch of Jackson Creek and is constructing a third plant that will discharge to Spring Creek. R. at 354.

The Village's treatment plant is located at 301 North Cedar Road, New Lenox, Will County, R. at 1, 425, and was constructed in 1973. R. at 81. The plant discharges into Hickory Creek, which is classified as a general use stream and which ultimately discharges into the Des Plaines River. R. at 2. Hickory Creek has a flow of 2.4 cubic feet per second during critical 7Q10 flow and is rated a "C" stream under the Agency's Biological Stream Characteristics (BSC) system. R. at 5. Hickory Creek's segment GG-02 appears on Illinois' draft 2002 list of impaired waters under Section 303(d) of the Clean Water Act. *Id.*, *see* 33 U.S.C. § 1313(d). "The sources associated with the impairment are municipal point sources, combined sewer overflows, construction, land development, urban run-off/storm sewers, hydrologic/habitat modification, and flow regulation/modification." R. at 5. The Illinois Natural History Survey's publication *Biologically Significant Illinois Streams* does not include Hickory Creek as a

biologically significant body of water. *Id*. That publication also does not report any endangered or threatened species supported by Hickory Creek. *Id*. Because the Village's facility has been expanded since the most recent facility-related stream survey in 1991, that survey "is not representative of the stream conditions that exist at this time." R. at 5, 564.

Beginning January 9, 2003, the Agency provided public notice of the application and draft permit in the *Frankfort Star*. R. at 616-18. On March 6, 2003, the Agency mailed notices of an April 24, 2003 public hearing to county and municipal officials, area legislators, environmental organizations, and interested citizens. R. at 41-45. On March 16, 2003, the *Frankfort Star* published notice of the April 24, 2003 hearing. R. at 628-29. The Agency also provided notice of the hearing on its Web site. R. at 51-52.

The Agency held the hearing on the permit application on the evening of April 24, 2003, as indicated in the various forms of notice provided. *See* R. at 61-104 (transcript). Approximately 25 persons attended the hearing. R. at 58, 354. Petitioners provided public comments at the hearing. R. at 61-104. Petitioners also submitted written comments to the Agency. R. at 105-19, 122-308. On October 31, 2003, the Agency approved and the Village's application and issued a permit. R. at 339-76.

NPDES REGULATORY PROVISIONS

Section 302.105 (c)(1) of the Board's water quality rules provides

> Except as otherwise provided in subsection (d) of this Section [Activities Not Subject to a Further Antidegradation Assessment], waters of the State whose existing quality is better than any of the established standards of this Part must be maintained in their present high quality, unless the lowering of water quality is necessary to accommodate important economic or social development. 35 Ill. Adm. Code 302.105(c)(1).

Section 302.105(c)(2)(B)(iii) of the Board's water quality rules provides:

> 2) The Agency must assess any proposed increase in pollutant loading that necessitates a new, renewed or modified NPDES permit or any activity requiring a CWA Section 401 certification to determine compliance with this Section. The assessment to determine compliance with this Section must be made on a case-by-case basis. In making this assessment, the Agency must:
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> * * *
>
> B) Assure the following:
>
> i) The applicable numeric or narrative water quality standard will not be exceeded as a result of the proposed activity;
>
> * * *

iii) All technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading have been incorporated into the proposed activity. 35 Ill. Adm. Code 302.105(c)(2)(B)(iii).

Section 302.203 of the Board's water quality rules provides that "[w]aters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. The allowed mixing provisions of Section 302.102 shall not be used to comply with the provisions of this Section. 35 Ill. Adm. Code 302.203.

Section 302.208 of the Board's water quality rules provides that:

a) The acute standard (AS) for the chemical constituents listed in subsection (e) shall not be exceeded at any time except as provided in subsection (d) [waters where mixing is allowed].

b) The chronic standard (CS) for the chemical constituents listed in subsection (e) shall not be exceeded by the arithmetic average of at least four consecutive samples collected over any period of at least four days, except as provided in subsection (d) [waters where mixing is allowed]. The samples used to demonstrate attainment or lack of attainment with a CS must be collected in a manner that assures an average representative of the sampling period. For the metals that have water quality based standards dependent upon hardness, the chronic water quality standard will be calculated according to subsection (e) using the hardness of the water body at the time the metals sample was collected. To calculate attainment status of chronic metals standards, the concentration of the metal in each sample is divided by the calculated water quality standard for the sample to determine a quotient. The water quality standard is attained if the mean of the sample quotients is less than or equal to one for the duration of the averaging period.

* * *

e) Numeric Water Quality Standards for the Protection of Aquatic Organisms

Constituent	STORET Number	AS (µg/L)	CS (µg/L)
		* * *	
Copper (dissolved)	01040	exp[A+Bln(H)] X 0.960*, where A=-1.464 and B=0.9422	exp[A+Bln(H)] X 0.960*, where A=-1.465 and B=0.8545
		* * *	
where:	µg/L	= microgram per liter,	
	exp[x]	= base natural logarithms raised to the	

		x-power,
ln(H)	=	natural logarithm of Hardness (STORET 00900), and
*	=	conversion factor multiplier for dissolved metals. 35 Ill. Adm. Code 302.208.

Section 304.105 of the Board's water quality rules provides that:

In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard. When the Agency finds that a discharge which would comply with effluent standards contained in this Part would cause or is causing a violation of water quality standards, the Agency shall take appropriate action under Section 31 [Notice; complaint; hearing] or Section 39 [Issuance of permits; procedures] of the Act to require the discharge to meet whatever effluent limits are necessary to ensure compliance with the water quality standards. When such a violation is caused by the cumulative effect of more than one source, several sources may be joined in an enforcement or variance proceeding, and measures for necessary effluent reductions will be determined on the basis of technical feasibility, economic reasonableness and fairness to all dischargers. 35 Ill. Adm. Code 304.105.

Section 309.141(d)(1) of the Board's water quality rules provides:

In establishing the terms and conditions of each issued NPDES Permit, the Agency shall apply and ensure compliance with all of the following, whenever applicable:

* * *

d) Any more stringent limitation, including those:

1) necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any Illinois statute or regulation (under authority preserved by Section 510 of the CWA). 35 Ill. Adm. Code 309.141(d)(1).

Section 122.44(d)(1)(i) of Title 40 of the Code of Federal Regulations provides:

In addition to the conditions established under §122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable

* * *

(d) Water quality standards and State requirements*:* any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

> (i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality. 40 C.F.R. 122.44(d)(1)(i).

STANDARD OF DECISION

The Board has previously concluded that "Section 40(e)(3) of the Act unequivocally places the burden of proof on the petitioner, regardless of whether the petitioner is a permit applicant or a third-party." Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112, slip op. at 8 (Aug. 9, 2001), citing 415 ILCS 5/40(e)(3) (2000). Petitioners thus bear "the burden of proving that the permit, as issued, *would* violate the Act or Board regulations." *Id*. (emphasis in original).

Closely related to the issue of the burden of proof is the standard of review. "IEPA's decision to issue the permit in this instance must be supportable by substantial evidence. This does not, however, shift the burden away from the petitioner, who alone bears the burden of proof in this matter." Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112, slip op. at 9 (Aug. 9, 2001), citing Waste Management v. IEPA, PCB 84-45, PCB 84-61, PCB 84-68 (consolidated), slip op. at 3-10 (Nov. 26, 1984).

While Section 40(e)(3) provides that "the Board shall hear the petition" according to the Act and Board procedural rules governing permit denial appeals (415 ILCS 5/40(e)(3) (2004)), Section 26 of the Act provides that the Board may provide by rule for the resolution of cases by summary judgment prior to hearing. 415 ILCS 5/26 (2004). Specifically, Section 101.516(b) of the Board's procedural rules provides that, "[i]f the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." 35 Ill. Adm. Code 101.516(b).

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 judgment as a matter of law.'" Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998), citing 735 ILCS 5/2-1005(c) (1996). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.*, citing Kolakowski v. Voris, 83 Ill. 2d 388, 398, 47 Ill. Dec. 392, 415 N.E.2d 397 (1980).

"Summary judgment 'is a drastic means of disposing of litigation,' and therefore it should be granted only when the movant's right to the relief 'is clear and free from doubt.'" *Id.*, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 95 Ill. Dec. 305, 489 N.E.2d 867, 871 (1986). However, the party opposing a motion for summary judgment may not rest on its pleadings, but must "present

a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 203 Ill. Dec. 435, 639 N.E.2d 994, 999 (2nd Dist. 1994) (citations omitted).

ISSUES

In their motion for summary judgment, petitioners emphasize three specific issues. Petitioners characterize these as "the three most salient ways in which the permit falls short of Illinois requirements." Memo. SJ at 2. First, petitioners argue that they are entitled to summary judgment because "[t]he Agency did not assure that all technically and economically reasonable measures were incorporated into the proposed discharge to prevent nutrient loadings to Hickory Creek" in violation of the Board's antidegradation water quality standards. Mot. SJ at 6-7; Memo. SJ at 2; *see also* 35 Ill. Adm. Code 302.105(c)(2)(B)(iii). Petitioners argue that the Agency "did not even seriously consider" phosphorus controls when "phosphorus is known to be a problem in Hickory Creek". Memo. SJ at 2.

The petitioners also argue that the permit fails to assure that continued and increased discharges from the Village's sewage treatment plant will not cause violations of numeric water quality standards for pH and dissolved oxygen. Memo. SJ at 2 n.2. Because petitioners believe that violations of these standards are closely related to nutrient control, they believe that properly addressing nutrients will also address the issues of protecting existing uses, pH, and dissolved oxygen. *Id.*

Second, petitioners argue that they are entitled to summary judgment because "[t]he Agency did not assure that the applicable narrative 'offensive conditions' . . . water quality standards will not be violated as a result of the proposed discharge to Hickory Creek." Mot. SJ at 6-7; Memo. SJ at 3; *see also* 35 Ill. Adm. Code 302.203; 35 Ill. Adm. Code 304.105. Petitioners argue that "it is apparent that the permit does not even pretend to control pollution that may cause or contribute to violations of the narrative offensive conditions standard." Memo. SJ at 2.

Third, petitioners argue that they are entitled to summary judgment because "[t]he Agency did not assure that the applicable . . . numeric copper water quality standards will not be violated as a result of the proposed discharge to Hickory Creek." Mot. SJ at 6-7; Memo. SJ at 3; *see also* 35 Ill. Adm. Code 302.208(e).

SUMMARY JUDGEMENT MOTION AND DISCUSSION

On an issue-by-issue basis, the Board will first summarize the arguments made by the petitioners' motion for summary judgment before summarizing the Agency's and Village's responses and the petitioners' reply. The Board will then conclude each section with an analysis and findings on that issue before reaching its conclusions on the motion for summary judgment and issuing its order.

NUTRIENT LOADINGS

Petitioners' Motion

Petitioners argue that the Village's permit does not comply with the Board's antidegradation water quality standards "because IEPA did not assure that the permit incorporated all reasonable measures to avoid or minimize the extent of the new pollution loading." Memo. SJ at 6. Petitioners characterize the language of those standards as "very clear and plainly mandatory." *Id*. at 8. "Before granting a permit allowing new pollution loadings, the Agency '*must' 'assure'* that *'all'* reasonable measures to minimize the extent of the pollution have been incorporated." *Id*., citing 35 Ill. Adm. Code 105(c)(2)(B)(iii) (emphasis in original). Petitioners argue that the regulations at least require the Agency to determine reasonable levels of nutrient removal and then to impose limits based on those levels. Memo. SJ at 9. In this instance, however, they state that "the record is crystal clear that IEPA did essentially nothing to determine if New Lenox could reasonably reduce the amount of its phosphorus pollution to Hickory Creek." Memo. SJ at 7.

Petitioners describe the policy considerations they view as underlying those antidegradation regulations. They argue that, long before the Board adopted the current regulations in 2002, "it was established Illinois policy that the state would not allow unnecessary pollution even if that new pollution under consideration would not cause a violation of water quality standards." Memo. SJ at 9. From petitioners' perspective, these regulations protect better quality waters. They suggest that antidegradation regulations reject the position that new pollution should be permitted up to a level beyond which water quality violations would occur. Petitioners argue "that the [water quality] standards represent not optimum water quality but the worst we are prepared to tolerate if economic conditions so require." Memo. SJ at 9, citing Water Quality Standards Revisions, R71-14, slip op. at 11 (Mar. 7, 1972).

Petitioners suggest that the Board continued to follow this policy in adopting the current antidegradation regulations in 2002. *See* 35 Ill. Adm. Code 302.105(c). They refer to an Agency explanation of the current regulations sent shortly after those regulations took effect to design engineers. In that explanation, the Agency states that "[t]he revised anti-degradation regulations focus less on the requirements necessary to meet water quality standards . . . and more on what kind of treatment system can be designed to have the least adverse impact on the receiving water." Memo. SJ, Appendix A at 1. Any degradation likely to occur "must be held to the smallest amount practically achievable and such degradation must be fully justified by the benefits of the project." *Id*. Petitioners also note the similarity of the Board's regulation to the federal rule allowing a reduction of water quality only where "necessary to accommodate important economic or social development." Memo. SJ at 9, citing 40 C.F.R. 131.12(a)(2). Petitioners suggest that reducing water quality is not "necessary as long as it can practicably be avoided." *See* Memo. SJ at 9.

Petitioners argue that the law clearly requires that the Agency "should have carefully considered the level of nutrient control that New Lenox could technically and economically provide." Memo. SJ at 7. Petitioners argue that the Agency, in issuing this permit, violated the Board's rules both by failing to obtain information on alternative nutrient controls and by failing to analyze reasonable measures to avoid or reduce nutrient loadings. Memo. SJ at 10; *see also* 35 Ill. Adm. Code 302.105(f)(1)(D); 35 Ill. Adm. Code 302.105(c). Petitioners state that the Agency was asked repeatedly to consider nutrient limits. They further state that the Agency is

aware of phosphorus reductions to concentrations as low as 1 mg/L obtained by "numerous Illinois communities." Memo. SJ at 10 (citing 35. Ill. Adm. Code 304.123).

Petitioners refer to a 1971 publication of the Illinois Natural History Survey naming Hickory Creek as the "outstanding stream" in the Des Plaines River system but also note that the Agency in 2002 listed Hickory Creek as "impaired" in its list of impaired waters. Memo. SJ at 3. Petitioners state that "[i]t is clear that the trend of water quality in Hickory Creek over the last 30 years has been downward." *Id*. The Agency listed phosphorus as one potential cause and named municipal point sources as one potential source of that impairment. Memo. SJ at 3-4, citing Statement at 2 (¶ 5). Petitioners argue that "it is clear that Hickory Creek has high levels of phosphorus and that the New Lenox sewerage treatment plant discharge is a major source of phosphorus." Memo. SJ at 4, citing Statement at 2-4 (¶¶ 9-11).

Petitioners argue that the studies underlying the draft permit did not comply with antidegradation rules protecting existing uses of Hickory Creek. Memo. SJ at 5, citing 35 Ill. Adm. Code 302.105(a). Petitioners note that "[t]he most recent facility related stream survey conducted by the Agency was on June 10, 1991." Statement at 7 (¶ 16), citing R. at 5. Petitioners state that that survey no longer represents stream conditions because the facility has since been expanded. *Id*. Petitioners acknowledge that a contractor for the Village conducted a biological study in 2002 at the Agency's request. Statement at 7 (¶ 17). Nonetheless, petitioners cast doubt on that study by referring to language contained in internal Agency e-mails. Statement at 7-8 (¶¶ 17-20), citing R. at 537, 556-58, 561, 661-98, 700. Petitioners argue that, in spite of this language, the Agency relied on the study to conclude that "[p]ollution intolerant organisms were found both upstream and downstream of the existing discharge." Statement at 8 (¶ 20), citing R. at 562.

Petitioners note figures showing that the Village's current plant releases a daily average of 16.1 kilograms of phosphorus into Hickory Creek. Statement at 3 (¶ 11); citing R. at 303-05 ("Summary of Hickory Creek Water Quality Information by Professors Jenkins and Lemke). Because current nutrient loads upstream include 22.7 kg total phosphorus, petitioners calculate that the plant accounts for 41% of the total Hickory Creek phosphorus load. *Id*., citing R. at 304. Assuming that nutrient levels in plant discharge do not change, petitioners assert that the planned new discharge will release a daily average of 26.3 kg of phosphorus into Hickory Creek and will account for 53.7% of total phosphorus load. Statement at 4 (¶ 11), citing R. at 304. Petitioners emphasize that "the same-sized receiving stream will be bearing . . . 216% of the total P[hosphorus] levels upstream of the plant." Statement at 4 (¶ 11), citing R. 304-05.

Petitioners state that "[p]hosphorus concentrations are high in the creek." Statement at 2 (¶ 9). Relying on a U.S. Geological Survey (USGS) database, they further state that total phosphorus levels exceeded the Agency's trigger values in more than 20 percent of samples between 1992 and 1997. Statement at 3 (¶ 9); citing R. at 67; *see also* R. at 129-59. Petitioners further cite to data collected by the Village in August 2002 showing instream phosphorus concentrations between 1.49 and 1.63 milligrams per liter. Statement at 3 (¶ 9); citing R. at 67, 522-29. "These concentrations are approximately 20 times the U[nited] S[tates] E[nvironmental] P[rotection] A[gency] (USEPA)-recommended criterion and more than twice Illinois EPA's trigger." Statement at 3 (¶ 9); citing R. at 67. Petitioners emphasize that this data also showed

that the phosphorus concentration of the plant's effluent at that time was 2.76 mg/L, a level nearly twice the upstream concentration that day and six times the average concentration for that stream. Statement at 3 (¶ 10); citing R. at 68, 522-29.

Petitioners placed into the record a number of published treatises showing that "elevated nutrient levels cause impairment of streams." *See* Statement at 4-6 (¶ 12). One study states that nutrient enrichment and associated proliferation of algae result in water management problems including aesthetic degradation, loss of invertebrates, and fish kills. Statement at 4 (¶ 12), citing R. at 187-201 (*J. North Am. Benthol. Soc*. 19: 17-31). Another states that growth of algae affects fish populations by altering both the physical and chemical characteristics of a river. Statement at 5 (¶ 12), citing R. at 209-19 (*Science of the Total Environment* 263: 185-95). A third citation suggests that managing nutrient supply could reduce the frequency and duration of the proliferation of algae in streams. Statement at 5 (¶ 12), citing R. at 187-201. Another study states that problems related to algae, including a deficit in dissolved oxygen and elevated pH, affect the ability of a river or stream to support aquatic life. Statement at 6 (¶ 12), citing R. at 176-86 (*J. North Am. Benthol. Soc.* 19:186-96). Specifically, where stream systems receive high nutrient inputs, algae contribute to the variability of dissolved oxygen concentrations over 24-hour periods. Statement at 6 (¶ 12), citing R. at 216. Finally, petitioners note that "[p]hotosynthesis and respiration are the two important biological processes that alter the concentration of oxygen and carbon dioxide. . . . [O]xygen is elevated and carbon dioxide is reduced during the daytime, while the reverse occurs at night." Statement at 5-6 (¶ 12), citing R. at 163 (*Stream Ecology: Structure and Function of Running Waters*).

Petitioners further note that Hickory Creek violated pH standards by exceeding a pH level of 9. Statement at 6 (¶ 15), citing R. at 126; *see also* R. at 129-59. As a basic matter, the petitioners state that "[c]arbon dioxide associates with water to act as an acid." R. at 126 (Prairie Rivers Network post-hearing comments). Generally, the creek experiences higher levels of oxygen and lower levels of carbon dioxide during daylight hours, indicating substantial photosynthetic activity. R. at 67. The highest pH levels are expected in the afternoon when carbon dioxide and the acids they form are generally at their lowest levels. R. at 126. Since an elevated pH level generally corresponds to dissolved oxygen saturation, petitioners see further evidence that nutrients have caused significant algal activity. *Id*. They state that the Agency acknowledged that it's "very possible" that algae saturation photosynthesis contributed to oxygen supersaturation in Hickory Creek. R. at 67. Ultimately, the petitioners conclude that the plant's nutrient discharges "are already adversely impacting Hickory Creek and that reductions of nutrient discharges are needed to prevent further impact." Statement at 6 (¶ 13), citing R. at 305.

Petitioners argue that, in spite of this evidence of elevated phosphors concentrations in Hickory Creek, "the record does not contain any study of the potential effect of increased discharges from the plant on Hickory Creek or the Des Plaines River." Statement at 8 (¶ 21). In addition, petitioners state that the Agency did not study alternatives to allowing the discharge "other than to review a study of land treatment done by the applicant's contractor." Statement at 9 (¶ 26); citing R. at 73-74. Petitioners further state that the Agency did not study the cost of removing phosphorus at the plant. Statement at 9 (¶ 26), citing R. at 74. Petitioners argue that the record does not analyze the cost of treating phosphorus to any level other than 0.5 mg/L or

the cost of treating phosphorus without also treating nitrogen. Statement at 15 (¶ 40); *see* R. 358. Ultimately, "the final permit did not place any limits on the discharge of phosphorus. . . ." Statement at 14 (¶ 37); citing R. at 341-50.

In conclusion, petitioners argue that "[t]here is no doubt that the kind of algal growth and pH and variations in dissolved oxygen levels that have been seen in Hickory Creek are generally a result of high levels of nutrients in the water, particularly phosphorus." Memo. SJ at 4. Further, state petitioners, "it is clear in the record that Hickory Creek has high levels of phosphorus and that the New Lenox sewerage treatment plant discharge is a major source of phosphorus." *Id*. Petitioners state that "evidence in the record shows without dispute that the nutrient pollution from facilities like New Lenox's can practicably be reduced substantially." Memo. SJ at 7. Furthermore, argue petitioners, the Agency "went forward without getting information on alternative controls from the applicant" and without analyzing reasonable measures to avoid or minimize nutrient loadings. Memo. SJ at 10. Ultimately, petitioners state that the Agency violated 35 Ill. Adm. Code 302.105(c)(iii) by failing to assure that all technically and economically reasonable measures were incorporated into the proposed discharge to prevent or minimize nutrient loadings into Hickory Creek. Mot. SJ at 6.

Petitioners accordingly request that the Board grant their motion for summary judgment on this issue, revoke and remand the permit to the Agency, and direct that the Agency incorporate into any future permit "all technically and economically reasonable measures to avoid or minimize the extent of nutrient loadings to Hickory Creek." Mot. SJ at 7; Memo. SJ at 2-3; Statement at 11 (¶29(a)).

Agency's Response

The Agency disputes the petitioners' view that Board regulations require the Agency to include phosphorus treatment controls in the Village's permit. Agency Resp. at 28; *see* 35 Ill. Adm. Code 302.105(c)(2). Specifically, the Agency does not accept petitioners' argument that Section 302.105 "requires that the Agency *must* assure that *all* reasonable measures to minimize the extent of the pollution have been incorporated." Agency Resp. at 28, citing Memo. SJ at 8 (emphasis in original). The Agency argues that the petitioner's interpretation of Section 302.105(c)(2) would require controls in a permit wherever there is increased pollutant loading resulting from an activity and a technology available to treat it. Agency Resp. at 29.

The Agency stresses the language of the regulation providing that assessment of any increase in pollutant loading "must be done on a case-by-case basis." Agency Resp. at 29, *see* 35 Ill. Adm. Code 302.105(c)(2). In the Agency's view, Section 302.105(c)(2) requires the Agency in its assessment to consider reasonable technical and economical alternatives to an activity. The Agency argues that "[t]he real objective of this assessment is to reduce the pollutant loading if it is reasonable to do so." Agency Resp. at 29. The Agency further argues that "water quality may be lowered if necessary to accomplish important economic or social development in the area in which the waters are located." *Id*. (emphasis on original), citing Revisions to Antidegradation Rules, R01-13, slip op. at 3 (June 21, 2001); *see also* 35 Ill. Adm. Code 302.105(c)(1). The Agency argues that petitioners have ignored this balancing test. Agency Resp. at 29.

The Agency also disputes the petitioners' claim that the Agency did not rely on a recent valid study to measure the effects of the Village's existing discharge. Agency Resp. at 21. The Agency states that, in addition to other information, it considered a study showing that the discharge had no significant impact as measured by macroinvertebrates. *Id*., citing R. at 368, 403-18, 512-21. The Agency also disputes petitioners' claim that this study was deficient. Agency Resp. at 21. The Agency acknowledges "that the procedures used by the Village's consultant were not exactly as the Agency would have used." Agency Resp. at 22-23. The Agency states that any e-mail discussion in the record "simply provides the views of various Agency staff members who were involved in reviewing the Village's study" (Agency Resp. at 21) and "is not the Agency's final conclusion on the validity of the Village's study for the intended purposes." Agency Resp. at 22. Ultimately, the Agency states that it "considers the Village's study as valid for its limited purpose to show that the existing discharge is not adversely impacting Hickory Creek." *Id*.

The Agency states that it has conducted its assessment of alternatives to the increase in pollutant loading proposed by the Village. Agency Resp. at 29; *see* R. at 5-7 ("Antidegradation Assessment"); R. at 372-74 ("Alternatives to Discharge to Stream"). Specifically, the Agency states that it considered land application of effluent. Agency Resp. at 29; *see* R. at 6. The Village's consultant estimated that land application required 425 acres, including approximately 270 acres for irrigation and the remainder for treatment and to serve as a buffer zone. Agency Resp. at 29-30, R. at 374. The Agency noted that a system treating 0.93 million gallons per day would cost more than $23 million, an amount more than eight times the cost of the proposed expansion of the Village's facility. R. at 6. The Village asked a neighboring golf course to consider using its effluent, but the course declined the request because of high groundwater and artesian wells feeding its ponds. R. at 374. Based on the costs of land, pumping, and transmission, the Agency concluded that land application is not a feasible alternative. *Id*.; *see also* R. at 6. Accordingly, the Agency argues that, contrary to the petitioners' claims, it did consider all technically and economically reasonable alternatives to minimize the Village's pollution loading to the receiving stream. Agency Resp. at 30.

The Agency also disputes the petitioners' claim that the Village is a major source of phosphorus in Hickory Creek. Agency Resp. at 30. The Agency also states that there is no basis in the record to claim that phosphorus from the Village is having a detrimental effect on the stream. *Id*. The Agency notes that, in addition to non-point sources, there are at least twelve wastewater treatment plants that discharge to Hickory Creek, nine of which are situated upstream from the Village's plant. *Id*.

Furthermore, the Agency states that material facts remain in dispute and need to be developed at hearing. Agency Resp. at 1, 8, 10. First, the Agency disputes the petitioner's statements with regard to the quality of Hickory Creek and questions whether the conditions described by the petitioners prevailed throughout it. Agency Resp. at 10, 11, *see* Statement at 1. Although petitioners state as fact that "Hickory Creek . . . was once known for its exceptionally high water quality and biological integrity" (Statement at 1 (¶ 1)) and cite a survey describing it as an "outstanding stream' (*id*.; R. at 115 (1971 stream classification)), the Agency suggests that this is not relevant to determining conditions in the immediate vicinity of the Village's plant. *See* Agency Resp. at 10, 11. Specifically, the Agency notes that the Northeastern Illinois

Planning Commission found in 1981 that land downstream from the plant was primarily residential and commercial in nature and featured "numerous sewers and Combined Sewers Overflows in the Joliet area." Agency Resp. at 11. The Agency states that, since 1986, its water quality reports have shown the upper twelve miles of the creek as fully meeting aquatic life use while the lower ten miles partially supported it. Agency Resp. at 10. While petitioners stress municipal point sources as a source of impairment (Statement at 2 (¶ 5)), the Agency notes that other factors include combined sewer overflows, urban runoff/storm sewers, land development, and flow regulation and modification. Agency Resp. at 12. In addition, the Agency reports that unusual species such as the rosyface shiner have been reported as recently as 2003 both upstream and downstream from the Village's plant. Agency Resp. at 10. Finally, the Agency states that "Hickory Creek is not on the current list of biologically significant streams compiled by the Illinois Department of Natural Resources" (*id*.), and that no endangered or threatened species exist in the segment of the creek including the Village's discharge. Agency Resp. at 10-11.

Second, the Agency states that material facts are in dispute with regard to phosphorus levels in Hickory Creek. *See* Agency Resp. at 14-15. The Agency notes that two monitoring stations used to assess Hickory Creek for the 2002 Illinois Water Quality Report showed "total phosphorus concentrations that exceeded the Agency's cause listing criterion of 0.61 mg/L." Agency Resp. at 15. Despite these concentrations, the assessment showed the station upstream from the Village's plant including full aquatic life based on biological data and the station downstream as partially supportive based on water chemistry. *See* Agency Resp. at 14-15. The Agency argues that 1997 concentrations at these two stations were "similar." Agency Resp. at 15. The Agency again notes that, in addition to non-point sources, there are at least twelve wastewater treatment plants that discharge to Hickory Creek, nine of which are situated upstream from the Village's plant. Agency Resp. at 14. The Agency states that "[p]hosphorus is only listed as a possible cause of impairment if other data, biological and/or water quality standards, indicate impairment." Agency Resp. at 15. Since "national criteria recommendations are based on statistical distribution and recurrence frequencies, not direct relationship to detrimental or impaired stream conditions" (*id*.; R. at 365), the Agency argues that it correctly "concluded that there is nothing unusual about stream phosphorus values such as those reported for Hickory Creek." Agency Resp. at 15, citing R. at 365. The Agency further argues that petitioners' statement that "[p]hosphorus concentrations are high in the creek" (Statement at 2 (¶ 9)) is not a fact but an opinion. Agency Resp. at 15.

Third, the Agency disputes statements offered by the petitioners with regard to the effects of the Village's discharge on Hickory Creek. Agency Resp. at 15-20: *see* Statement at 3-7 (¶¶ 11-15). Specifically, the Agency states that comments regarding discharges from the Village's plant do not provide any proof that those discharges would cause violation of water quality standards. Agency Resp. at 16; *see* Statement at 3-4 (¶ 11), R. at 304-05 ("Summary of Hickory Creek Water Quality Information"). Similarly, the Agency disputes treatises cited by petitioners on the effects of elevated nutrient levels on streams. Agency Resp. at 19; *see* Statement at 4-7 (¶¶ 11-15). The Agency states that these treatises do not establish that the discharge from the Village's plant would cause violation of water quality standards. Agency Resp. at 19. In addition, the Agency states that these treatises are "directed at developing criteria for nutrients, and not at developing effluent limits for a discharge." *Id*. Finally, the Agency also dispute petitioners' statement as fact that nutrient discharges are likely already affecting the creek and

that discharge reductions are necessary to prevent further effects. Agency Resp. at 19; *see* Statement at 6 (¶ 13); R. at 305. The Agency argues that this is an opinion in written comments submitted after the permit hearing and is not a statement of fact. Agency Resp. at 20.

In conclusion, the Agency states that it is evident that there remain genuine issues as to various material facts. Agency Resp. at 7. The Agency further states that "[p]etitioners are not entitled to judgment as a matter of law." Agency Resp. at 7-8. Accordingly, the Agency urges the Board to deny the petitioners' motion for summary judgment because there are genuine issues of material fact and because "the permit, as issued, does not violate the applicable provisions of the Act or Board regulations." Agency Resp. at 8.

Village's Response

The Village disputes petitioners' contention that "Illinois EPA failed to comply with anti-degradation regulations because it did not ensure that reasonable controls were put on nutrients." Vill. Memo. at 6. The Village notes that petitioners support this contention by referring to anti-degradation regulations pertaining to high quality waters. *Id*., citing Memo. SJ at 7; *see* 35 Ill. Adm. Code 302.105(c). The Village argues that "High Quality Waters are those whose existing quality exceeds the state's adopted water quality standards, which is not the case here, and Hickory Creek does not meet this standard." Vill. Memo. at 6. Arguing that the high quality waters provisions do not apply to Hickory Creek, the Village states that the antidegradation analysis should instead follow "the minimum level of protection at Section 302.105(a) applicable to waters that meet existing uses." *Id*.; *see* 35 Ill. Adm. Code 302.105(a).

The Village stresses that Hickory Creek is not listed by the Illinois Department of Natural Resources (DNR) as a biologically significant stream, a designation the Village states is relevant to antidegradation assessment. Vill. Memo. at 5. The Village further notes that the stream is not an Outstanding Resource Water and does not support threatened or endangered species in the vicinity of the Village's discharge. *Id*.; *see* R. at 5, 371. The Village states that the Agency in reviewing its permit application examined the basis for including Hickory Creek on the 303(d) list of impaired waters. Vill. Memo. at 5. The Village notes that the Agency concluded that "only total dissolved solids can be implicated as a cause of whatever impairment may exist in this stream segment outside the immediate area of the New Lenox effluent outfall." *Id*.; *see* R. at 360 (Agency Responsiveness Survey). The Village reports that the Agency sought limits in the permit on total dissolved solids and that the Village accepted those limits. Vill. Memo. at 5; *see* R. at 343.

The Village also addresses the biological study performed by its contractor. To the extent that the record contains discussion of the study by Agency staff (R. at 537, 556-58, 561, 661-98), the Village characterizes that as "appropriate internal agency deliberation about the information [the contractor] provided as well as general discussion about the manner in which these studies are performed." Vill. Statement at 13. The Village argues that the contractor revised its study to reflect the Agency's methodology and that the Agency properly relied upon the study. Vill. Statement at 14, citing R. at 370.

The Village states that the Agency considered nutrient data in performing its antidegradation analysis. Vill. Memo. at 6. On the date the Village sampled effluent, it showed a total phosphorus concentration of 2.76 mg/L. *Id*.; R. at 525. The Village also noted that four downstream samples revealed phosphorus concentrations of 1.60 mg/L (R. at 526), 1.63 mg/L (R. at 527), 1.47 mg/L (R. at 528), and 1.52 mg/L (R. at 529). The Village emphasizes that the Agency concluded "there is nothing unusual about stream phosphorus values such as those reported for Hickory Creek." Vill. Memo. at 6; *see* R. at 365. Specifically, the Village notes that the Agency determined that "the incremental nutrient loading anticipated to result from this project is not expected to increase algae or other noxious plant growth, diminish the present aquatic community or otherwise aggravate existing stream conditions." Vill. Memo. at 6-7; R. at 6.

The Village argues that "[t]he Agency also fully considered the economic and technical feasibility of a range of alternatives." Vill. Memo. at 7. Specifically, the Village evaluated the alternative of treating the increased discharge at an off-site spray irrigation system. R. at 413-18 (Evaluation of Spray Irrigation). This alterative required 425 acres of land and resulted in estimated costs of $23.2 million. R. at 413. The same evaluation determined that the costs attributable to the increased discharge are $2.8 million. *Id*. Ultimately, the Agency concluded that "[l]and application is not considered feasible because the land costs and the pumping and transmission costs would be prohibitive." R. at 565. The Village also sought to use treated wastewater in the irrigation of a golf course, but the course declined to implement this alternative. R. at 634.

` As a matter of policy, the Village notes that the Agency has acknowledged that there are no numeric water quality standards for nutrients applicable to Hickory Creek. *See* R. at 357. The Village argues that the "science concerning nutrients and their effect on waterbodies is both complicated and uncertain." Vill. Memo. at 7. While the Agency conducts an ongoing effort to adopt water quality standards for nutrients, the Village argues that "it would be inappropriate to set nutrient standards in the context of an NPDES permit." *Id.*

Furthermore, the Village argues that material facts remain in dispute, defeating petitioners' motion for summary judgment. Vill. Memo at 2. First, the Village disputes petitioners' statement that "[p]hosphorus concentrations are high in the creek." Statement at 2 (¶ 9). The Village notes that this conclusion is based in part on monitoring data obtained from a station approximately seven miles downstream from New Lenox and obtained during a period ending six years before the Agency issued the Village's permit. Vill. Statement at 6. In addition, the Village suggest that petitioners' reliance on "trigger values" as evidence of high phosphorus levels is misguided. The Village states that the trigger values are neither USEPA criteria nor Illinois regulatory standards. The Village argues that the triggers are used to rank streams and do not measure the impact of phosphorus upon them. *Id*. The Village also stresses that "the national criteria recommendations are based on statistical distribution and recurrence frequencies, not direct relationship to detrimental or impaired stream conditions. *Id*., citing R. at 365, 639.

Second, the Village agrees that, on August 20, 2002, a grab sample of its effluent showed a total phosphorus concentration of 2.76 mg/L. Vill. Statement at 7; *see* R. at 525. The Village

further agreed that four downstream samples revealed phosphorus concentrations of 1.60 mg/L, 1.63 mg/L, 1.47 mg/L, and 1.52 mg/L. Vill. Statement at 7; *see* R. at 526-29. However, the Village also suggests that these data also fail to show that the creek's phosphorus level is high. *See* Vill. Statement at 7. The Village refers to its consultant's statement that "[i]t is misleading to compare concentrations in the creek and in the plant effluent when the flows are not the same." *Id*., citing R. at 632. The Village argues that, considering both the results from August 20, 2002 and average conditions, total phosphorus from the plant effluent was one-fourth of the upstream total phosphorus. Vill. Statement at 7, citing R. at 632-33. Generally, the Village stresses that, because the concentration of phosphorus in effluent can vary widely, the results of a single grab sample yield limited information. Vill. Statement at 7. Particularly since phosphorus is not an acute pollutant, the Village argues that long-term average values are more significant. *See id*.

The Village also disputes statements made by Professors Jenkins and Lemke regarding nutrient loading by the Village's plant into Hickory Creek. The Village argues that the professors erred by comparing data obtained from samples gathered more than two years apart and by using incorrect figures for the flow of the creek. Vill. Statement at 7, citing R. at 635. Generally, the Village states that the professors' conclusions about nutrient loading rely on "undisclosed scientific and mathematical support." Vill. Statement at 7. The Village further states that the Agency considered both the professors' comments and the existence of point and non-point sources before granting this permit. *Id*. The Village particularly disputes the professors' statement that the Village needs to reduce nutrient discharges in order to prevent further adverse impacts on Hickory Creek. Vill. Statement at 11, citing R. at 305. The Village characterizes this statement as an unfounded conclusion that does not describe any adverse impact and that was submitted to the Agency in an unsworn comment. Vill. Statement at 11.

The Village also disputes published treatises placed in the record with regard to the issues of elevated nutrient levels and stream impairment. Vill. Statement at 10-11. The Village states that these treatises are unsworn and do not refer specifically to Hickory Creek or the Village's effluent. *Id*. Based on the source and nature of the treatises, the Village suggests that they would be more appropriately considered in setting generally applicable standards than in determining water quality standards for one discharger among many. *Id*. The Village again stresses that the Agency does not expect adverse effects from the nutrient loading resulting from this expansion. Vill. Statement at 11, citing R. at 565.

In conclusion, the Village states that it is evident that there remain disputed issues of material fact. Vill. Memo. at 2. The Village further states that petitioners' "motion is an inappropriate vehicle for resolution of a third party permit appeal." *Id*. Because it argues that petitioners' motion misstates the law and draws selectively from the record in this case, the Village argues that the petitioners are not entitled to summary judgment on the issue of nutrient loadings. Vill. Memo. at 1-2.

Petitioners' Reply

Petitioners first claim that a "fundamental flaw" marks the Agency's and Village's responses. Pet. Memo. at 1. Petitioners argue that the respondents treat this as an enforcement

case in which the petitioners must "indisputably" prove with sworn testimony that the Village has caused violations of water quality standards. *Id.* The petitioners state that this action "is a permit review in which the question is whether IEPA followed the Environmental Protection Act and the Board Rules in issuing the permit." *Id.* While acknowledging that respondents might present issues of fact relevant to an enforcement action against the Village, petitioners claim that "most of Respondents' factual claims are simply not relevant to this permit appeal." Pet. Memo. at 7.

Petitioners also claim that "many" of respondents' statements are not supported by the record and that the Board should not accept any of the Village's or Agency's statements "without carefully studying the record." Pet. Memo. at 5. Petitioners claim that documents in the record cited by the respondents often contain "simply a naked conclusion without any scientific or factual basis." Pet. Memo. at 6. Petitioners argue that "'[b]ecause I say so' is not a valid basis for IEPA decision-making." *Id.* Petitioners further argue that "[r]espondents cannot properly rely on blind trust in IEPA's supposed scientific expertise." *Id.* Where, as petitioners argue, the Agency has produced evidence by making an unsupported statement and then quoting that statement, the Board should not accept that evidence on the basis of *ipse dixit*, or solely on the Agency's authority. Pet. Memo. at 7.

On the issue of nutrient loadings, petitioners summarize their position by arguing that "IEPA never considered putting any limit on discharges of phosphorus although the public asked that such limits be considered and it is indisputably feasible to remove much of the phosphorus from New Lenox's discharge." Pet. Memo. at 2. Petitioners further argue that "nothing in the record excuses this failure unless the Board accepts the proposition that the fact that IEPA is working on developing numeric nutrient standards means it does not have to comply with 35 Ill. Adm. Code 302.105(c) [Antidegradation – High Quality Waters]." Pet. Memo at 3.

Petitioners also claim that "[r]espondents do not contest the facts that are essential to Petitioners' motion." Pet. Memo. at 4. Petitioners argue that, to establish that the Village's permit violates the Board's rules with regard to nutrient loading, they must establish that "IEPA did not find that it was necessary for New Lenox to discharge into Hickory Creek without providing phosphorus removal." *Id*., citing Statement at 15 (¶ 40). Petitioners claim that the Agency gave no consideration to the necessity of the proposed discharge, in spite of an awareness that phosphorus posed "at least a potential problem in Hickory Creek." Pet. Memo. at 8. The petitioners further argue that they "requested that IEPA consider placing some limit on phosphorus discharges in the permit." Pet. Memo. at 4, citing Statement at 12-14 (¶¶ 31-33, 36); *see* 415 ILCS 5/40(e) (2004) (standing requirements). Petitioners place these facts "beyond serious dispute" (Pet. Memo. at 5) and characterize the record as "crystal clear." Pet. Memo. at 8. They argue that respondents "do not really try to contest them" and only "offer a number of other denials and statements that are of marginal relevance or no relevance to the motion." Pet. Memo. at 5.

Petitioners argue that reviewing the objectives underlying the CWA and Illinois' antidegradation rules illuminate "why the legal arguments of IEPA and New Lenox utterly fail." Pet. Memo. at 9. Petitioners first note that the purpose of the CWA is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Id*., citing 33 U.S.C. §

1251(a). Petitioners then argue that federal antidegradation rules require that states enact three types of protection for their waters. Pet. Memo. at 9, citing 40 C.F.R. § 131.12. Petitioners further argue that their motion for summary judgment is based on application of what they term "Tier II" antidegradation protection. Pet. Memo. at 9; *see* 40 C.F.R. 131.12(a)(2). The Board adopted this level of protection in Part 302 of its regulations. Pet. Memo. at 9; 35 Ill. Adm. Code 302.105(c) (Antidegradation – High Quality Waters).

Petitioners argue that, with regard to Tier II protection, both the federal and Board regulations require that new loadings must be "necessary to accommodate important economic or social development." Pet. Memo. at 11; *see* 40 C.F.R. 131.12(a)(2); 35 Ill. Adm. Code 302.105(c)(1). In order to prove that a new or expanded discharge is necessary, petitioners claim that "[i]t is not enough to show that the new pollution is reasonable, thought to meet a cost/benefit test, or politically expedient." Pet. Memo. at 10. Petitioners further claim that the background of the antidegradation regulations demonstrates that "new or increased discharges should only be allowed where they are indispensable." *Id*. In this case, however, petitioners argue that "IEPA can point to nothing in the record that shows that it even considered whether the increased phosphorus loading was necessary." Pet. Memo. at 15. Petitioners note that the Agency allows the discharge in part because the Village "is not a major source of phosphorus to Hickory Creek." Pet. Memo. at 16, citing Agency Resp. at 30. Petitioners dismiss Agency reliance on this claim, arguing that it "is irrelevant to the question of whether the phosphorus loading is necessary." Pet. Memo. at 16.

Petitioners claim that meeting water quality standards and showing the necessity of the phosphorus loading are independent permitting requirements. Pet. Memo. at 10-11, citing Columbus and Franklin County Metropolitan Park Dist. v. Shank, 600 N.E.2d 1042, 1054 (Ohio 1992). In other words, petitioners argue that respondents must show that the proposed discharge is "necessary" and that it will not cause a violation of the water quality standards. Pet. Memo. at 9, citing 35 Ill. Adm. Code 302.105(c)(1). In support of this conclusion, petitioners cite to the Board order adopting the state's original nondegradation policy: water quality standards do not represent "optimum water quality but the worst we are prepared to tolerate if economic conditions so require." Pet. Memo. at 10, citing Water Quality Standards Revisions, R 71-14, slip. op. at 11 (Mar. 7, 1972).

Petitioners go on to characterize as "swinging for the fences" the Village's argument that the Board need not consider whether the Agency complied with Tier II protection requirements as these apply only to high quality water listed on DNR's list of biologically significant streams and not to Hickory Creek. Pet. Memo. at 11, citing Vill. Memo. at 6, Vill. Statement at 1. Petitioners claim that this argument "rams smack into the language" of the Board's antidegradation rules, which provide that "water of the State whose existing water quality is better than *any* of the established standards . . . must be maintained in their present high quality . . . ." Pet. Memo. at 11-12, citing 35 Ill. Adm. Code 302.105(c)(1) (emphasis in original). Petitioners thus argue that, unless the body of water violates *all* standards, it is protected as a high quality water under Section 302.105(c). Pet. Memo. at 12 (emphasis in original). In other words, petitioners claim that Hickory Creek must be protected because "'high quality waters' is determined on a parameter-by-parameter basis and a water can be 'high quality' as to one pollutant even when it is impaired as to others." Pet. Memo. at 13, citing Amendments to 35 Ill.

Adm. Code 302.105; Proposed 35 Ill. Adm. Code 303.205, 303.206 and 35 Ill. Adm. Code 106.990 through 106.995, R01-13, transcript at 123-24 (Nov. 22, 2000).

Petitioners next argue that, although Board regulations require economically reasonable technology to control phosphorus, the Agency never considered the cost of phosphorus removal or whether the Village could bear that cost. Pet. Memo. at 13. Although they state that the Agency claims to have considered alternatives including land treatment and sending the discharge to a golf course, petitioners argue that the Agency only examined phosphorus removal by citing a study that combined the costs of removing both nitrogen and phosphorus. Pet. Memo. at 13-14, citing R. at 358 (estimating capital costs in excess of $5.4 million). Petitioners characterize this citation as "just tossing out a cost figure." Pet. Memo. at 14.

Describing the Village as a "wealthy and growing community," petitioners claim that the record contains no evidence that the Village is unable to pay the cost of phosphorus removal. Pet. Memo. at 14. Without that evidence, petitioners suggest that it cannot be determined whether it is "necessary" to allow the Village's discharge without phosphorus removal. *See id.* If it is "necessary" to lower water quality in order to accommodate development, then petitioners argue that "it must be the case that the development cannot practicably go forward without allowing lower water quality." Pet. Memo. at 14. In a supplemental authority attached to its memorandum, petitioners refer to interim water quality guidance supplied by USEPA. That guidance provides that, if the total pollution control cost per household is less than 1.0 percent of median household income, "then the requirements are not expected to impose a substantial economic hardship on households and would not interfere with the development." Pet. Memo. at 14, citing Interim Economic Guidance for Water Quality Standards Workbook, p. 5-5 (Mar. 1995). Although petitioners acknowledge that this supplemental authority is "only guidance," they argue that the record does not contain the data needed to perform this calculation determining whether it is necessary to allow nutrient loadings to Hickory Creek. Pet. Memo. at 14. "IEPA did not look at such factors." *Id.* If those data became available, petitioners argue, it is "extremely unlikely" that the proposed discharge would be "necessary" in a large and prosperous community such as the Village. Pet. Memo. at 14-15.

Petitioners further argue that respondents misunderstand the requirements of the Board's antidegradation regulations. Pet. Memo. at 15. Petitioners first claim that the Agency "passes over the term 'necessary'" in those regulations. *Id.*, citing 35 Ill. Adm. Code 302.105(c)(1). They then claim that the Agency misstates the requirement of reasonableness, arguing that the term "reasonable" must not be read in isolation but in the context of the entire subsection in which it is contained. *See* Pet. Memo. at 15. Petitioners emphasize that the Board's regulations assure "[a]ll technically and economically *reasonable measures to . . . minimize* the extent of the proposed increase in pollutant loading have been incorporated into the proposed activity." Pet. Memo. at 15-16, citing 35 Ill. Adm. Code 302.105(c)(2)(B)(iii) (emphasis in original). In this context, petitioners argue that "minimize" requires action to "reduce to the smallest possible number, degree, or extent." Pet. Memo. at 16, citing U.S. v. Focarile, 340 F. Supp. 1033 (D.Md. 1972) (addressing interception of communications under Omnibus Crime Control and Safe Streets Act of 1968). Since petitioners argue that Congress established the goal of eliminating all discharges to the nation's waters by 1985 (Pet. Memo. at 9, citing 33 U.S.C. § 1251(a)(1)), they claim that "reasonable to minimize" requires that "a measure should be used to avoid or

minimize pollution unless it has been shown to be economically unfeasible." Pet. Memo. at 16. In support of this conclusion, petitioners include in an appendix to their motion a 2002 letter in which the Agency's permit section manager states that "degradation must be held to the smallest amount practically achievable and such degradation must be fully justified by the benefits of the project." Mot. SJ, App. A at 1.

Petitioners claim that the Agency actually provided only a single reason in the record for not considering phosphorus limits: "that IEPA was working to develop numeric water quality standards for phosphorus." Pet. Memo. at 17. Petitioners also note that the Village added that research into "the precise levels of nutrients that cause problems is not yet settled." *Id*., citing Vill. Memo. at 7. Petitioners claim in response that the requirements imposed by numeric water quality standards and by antidegradation are distinct. Pet. Memo. at 17. "The requirement that unnecessary new pollution not be allowed applies even if all of the other water quality standards are actually satisfied and it has been shown that the new pollution will not have an effect on existing uses." Pet. Memo. at 17-18. Petitioners claim that, if research on safe phosphorus levels is unsettled, then unnecessary new phosphorus loadings should not be permitted. Pet. Memo. at 18, Pet. Statement at 15.

Whatever the state of that Agency research, petitioners argue that the Board, relying on existing technology, has found that "for systems of greater than 5000 population, a 1.0 mg/L [phosphorus] limitation is economically reasonable." Pet. Memo. at 16-17, citing Village of Wauconda v. IEPA, PCB 81-17, slip op. at 2 (May 1, 1981) (denying variance from phosphorus limitation). Also, petitioners suggest that the Agency's claim that it would not be reasonable to require phosphorus controls is inconsistent with evidence submitted by the Agency in an open rulemaking docket addressing interim phosphorus standards. *See* Pet. Memo. at 17, citing Interim Phosphorus Standards Proposed 35 Ill. Adm. Code 304.123(g-k), R04-26. Petitioners argue that that evidence favors a 1.0 mg/L phosphorus effluent limit for new or increased discharges of more than 1 million gallons per day. Pet. Memo. at 17. Petitioners express confidence that, if their motion is granted, "IEPA will find that it is not necessary for New Lenox to discharge more than 1 mg/L of phosphorus into Hickory Creek." Pet. Memo. at 17.

Petitioners emphasize that the Board is to hear and decide this permit appeal "exclusively on the basis of the record before the Agency." Pet. Memo. at 3, citing 415 ILCS 5/40(e)(3)(ii) (2004). They thus argue that "summary judgment is an appropriate method for resolving this case." Pet. Memo. at 3. Petitioners claim that "[s]ummary judgment cannot be said to be a drastic remedy and is likely to be appropriate in a proceeding in which there can never be a trial in which new evidence is offered." *Id*. (citations omitted). Petitioners suggest that a hearing would have no purpose other than "to further summarize the evidence and provide oral argument." *Id*.

Board Analysis and Findings Regarding Nutrient Loading

The Board will first look to whether genuine issues of material fact exist concerning the nutrient loading issue. Only if not will the Board turn to whether petitioners have proven they are entitled to judgment as a matter of law. While petitioners argue that there is no issue of material fact with regard to nutrient loadings and that they are entitled to judgment as a matter of

law (Memo. SJ at 1), both the Agency and the Village disagree that there are no genuine issues of fact remaining to be decided.

While the Agency states that it considered land application as an alternative to nutrient loading, petitioners characterize this consideration as *pro forma*. While the Agency argues that it has correctly concluded that "there is nothing unusual about stream phosphorus values such as those reported for Hickory Creek," petitioners state that phosphorus concentrations are high there. While the Agency states that comments regarding the Village's discharges do not prove that those discharges would cause a violation of water quality standards, petitioner state that nutrient discharges already affect Hickory Creek and that discharges must be reduced to prevent further effects. Also, while petitioners cite treatises on the effects of elevated nutrients on streams, the Agency argues that these documents do not establish that that the discharge from the Village's plant would cause violation of water quality standards.

The Village also disputes petitioners' statement that phosphorus levels are high in Hickory Creek. The Village contends that this conclusion is based on data obtained some distance from the plant years before the Agency issued this permit. The Village also contends that the conclusion is based on "trigger values" that rank streams and do not have a direct relationship to stream conditions. The Village further contends that a single grab sample of its effluent fails to show that overall stream phosphorus levels are high. The Village also disputes statements made by Professors Jenkins and Lemke concerning nutrient loading. While contending that the professors' statements are flawed by incorrect calculations and undisclosed support, the Village nonetheless argues that the Agency considered their comments before granting the permit. Finally, like the Agency, the Village disputes petitioners' reliance on published treatises, arguing that they make no specific reference either to Hickory Creek or to the Village's effluent.

Considering the pleadings as it must strictly against the petitioners (Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d at 370, citing 735 ILCS 5/2-1005(c) (1996)), the Board cannot conclude that there is no genuine issue of material fact with regard to the issue of nutrient loadings. Although the disputes listed in the preceding two paragraphs are not intended to be exhaustive, they nonetheless indicate that significant factual issues remain unresolved with regard to matters such as the present quality of Hickory Creek, the effects of the Village's proposed discharge on the creek, and the Agency's consideration of alternatives to that discharge. As to the issue of nutrient loading, petitioners' motion for summary judgment is denied.

OFFENSIVE CONDITIONS WATER QUALITY STANDARD

Petitioners' Motion

Section 302.203 of the Board's water quality rules provides that "[w]aters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. 35 Ill. Adm. Code 302.203. Petitioners argue that, in issuing the Village's permit, the Agency "did not assure that the applicable narrative 'offensive conditions' . . . standards will not be violated as a result of the proposed discharge to Hickory Creek." Mot. SJ at 6. Petitioners state that "the permit does not even

pretend to control pollution that may cause or contribute to violations of the narrative conditions standard." Memo. SJ at 2, citing 35 Ill. Adm. Code 302.203.

Petitioners argue that "[t]here is no dispute in the record that Hickory Creek is being affected by severe vegetative growth." Memo. SJ at 4. At the Agency's March 2003 public hearing, Kimberly Kowalski, president of the Livable Communities Alliance, reported seeing algae in Hickory Creek. R. at 74-76; *see also* R. at 322 ("algae floating on top of the water"). Brad Salamy, whose property adjoins Hickory Creek, observed during the summer preceding the hearing that "the creek was greener than I had ever seen it." R. at 82-83. Jim Bland, representing Des Plaines River Watershed Alliance, described the stream as "covered almost completely" with surface algae. R. at 80.

In addition to these accounts of algae, Petitioners cite to other evidence, including wide swings in levels of dissolved oxygen and pH levels that violate Illinois' water quality standards, to show that Hickory Creek is experiencing unnatural vegetative growth. Memo SJ at 4. As above in the discussion of phosphorus, petitioners suggest that the proliferation of algae results in high rates of photosynthesis, which increases daytime levels of dissolved oxygen and also increases pH levels in the stream. Since these results have been observed in Hickory Creek, petitioners attribute them to "unnatural vegetative growth." Memo. SJ at 4. "Nothing was offered into the record by the applicant or IEPA to refute any portion of this record testimony and other evidence." Memo. SJ at 12.

Petitioners state that the Board's regulations require that "any effluent or combination of effluents [must] be regulated to insure that there is compliance with all applicable water quality standards in all receiving or downstream waters that may be affected by the discharge." Memo. SJ at 11, citing 35 Ill. Adm. Code 304.105. Petitioners further note that federal regulations require that NPDES permits control "all pollutants . . . which will cause, have a potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." Memo. SJ at 11, citing 40 C.F.R. § 122.44(d)(1)(i) and American Paper Institute v. USEPA, 996 F.2d 346, 350 (D.C. Cir. 1993). Petitioners also argue that "these federal principles are fully applicable to Illinois NPDES permits under applicable Board regulations requiring permits to meet any federal law or regulation." Memo. SJ at 12, citing 35 Ill. Adm. Code 309.141(d)(2).

Based on these authorities, petitioners argue that, although the Agency cannot issue a permit that would cause or contribute to a violation of the state's narrative offensive conditions standard, the record is clear that they have done so. Memo. SJ at 12 (referring to 35 Ill. Adm. Code 304.105 and 35 Ill. Adm. Code 309.141). Petitioners state that the permit includes no limits to prevent violation of the narrative offensive conditions standard. Statement at 15, *see* R at 341-50. In this regard, petitioners stress that the Agency stated it would only include nutrient limits in the Village's permit after specific standards are adopted. Statement at 15, citing R. at 356. Although the Agency acknowledges that a narrative standard forbids unnatural algal growth, petitioners emphasize that the Agency stated that "[t]his is a very difficult standard to apply to a permit." Statement at 15, citing R. at 357. Petitioners characterize this statement as merely an "excuse" offered in lieu of compliance with Board regulations. Memo. SJ at 2.

Petitioners accordingly request that the Board grant their motion for summary judgment, revoke and remand the permit to the Agency, and direct that the Agency in any future permit to assure that the Village's discharges do not cause or contribute to violations of the "offensive conditions" water quality standard. Mot. SJ at 7; Memo. SJ at 2-3; Statement at 11.

Agency's Response

The Agency disputes the petitioners' view that the Village's permit does not assure compliance with the narrative standard for offensive conditions. Agency Resp. at 31. The Agency notes that "[w]aters of the State shall be free from . . . plant or algal growth, color or turbidity of other than natural origin." Agency Resp. at 31-32, citing 35 Ill. Adm. Code 302.203 (emphasis in the original). On the basis of this language, the Agency concludes that a violation of the standard occurs only if algae of unnatural origin occurs in the receiving waters. Agency Resp. at 32. "Mere presence of algal growth that is of natural origin is not prohibited by Section 302.203." Agency Resp. at 33. In the Agency's view, the petitioners' statements suggest only that witnesses observed algae in Hickory Creek. Agency Resp. at 32. "The record lacks any evidence to suggest that unnatural algal growth exists below the Village's discharge point." *Id*.

The Agency rejects any argument by petitioners that Section 302.203 prohibits the discharge of any level of phosphorus into receiving waters. Agency Resp. at 32. The Agency stresses that phosphorus is required for virtually all aquatic plant life and is an essential nutrient for all aquatic life. *Id*. Although phosphorus concentrations may limit plant growth, waters may also have algae that is not limited by phosphorus but by another nutrient or by water quality factors. *Id*. Furthermore, the Agency notes that phosphorus and other nutrients occur in water as a result of both natural and anthropogenic causes. *Id*. The Agency thus argues that Section 302.203 does not and should not totally prohibit small discharges of phosphorus into receiving streams. Agency Resp. at 32-33.

Furthermore, the Agency states that material facts remain in dispute and need to be developed at hearing. Agency Resp. at 1, 8, 10-27. The Agency states that "[i]t is possible to have excessive algal growth even if nutrients are not substantially elevated." Agency Resp. at 12. Dams, stream flows, sunlight, and turbidity are all factors other than nutrient levels that can contribute to excessive algal growth. *Id*. To the extent that witnesses reported algae blooms in Hickory Creek, the Agency argues that their statements do not clearly show whether those occurred upstream or downstream from the Village's plant or whether they occurred during high, normal, or low flow conditions. *Id*.; *see* Statement at 2, R. at 76-83.

The Agency specifically disputes the petitioners' statement with regard to comments made at the Agency's public hearing. Agency Resp. at 13; Statement at 2. The Agency suggests that Jim Bland's comment overlooks the existence of a dam and the role that dam may play in generating algal growth. *See* Agency Resp. at 13. Since Bland's comment did not locate the end of the algal bloom, it may have extended upstream from the Village's discharge. The Agency argues that that extension would not have occurred if the bloom resulted from that discharge. *See* Agency Resp. at 13. Similarly, the Agency argues that Brad Salamy's comments do not situate algae in relation to the Village's discharge. Agency Resp. at 14; Statement at 2; R. at 82-

83. The Agency suggests that Salamy's comment overlooks the existence of water willows that may play a role in algal growth. *See* Agency Resp. at 14.

The Agency also takes issue with the petitioners' statement that the Village's permit requires but does not include limits to prevent a violation of the offensive conditions narrative standard. Agency Resp. at 27; Statement at 15. The Agency responds that, based on information in its record, it had determined that Hickory Creek does not show offensive conditions and that it does support a healthy and diverse aquatic ecosystem. Agency Resp. at 26, 27. The Agency specifically concluded that "the incremental loading of nutrients from the discharge is not expected to increase algae or other noxious plant growth, or diminish the present aquatic community or otherwise worsen the existing stream conditions." Agency Resp. at 6, citing R. at 6. Accordingly, the Agency states that the permit did not require limits for offensive conditions. *Id*. Finally, the Agency argues that the petitioners' statement that the permit does not include limits is not a fact but a statement of law. Agency Resp. at 27. The Agency suggests that the petitioners have usurped the Board's authority to determine whether the Agency properly issued the permit. *See id*.

In conclusion, the Agency states that it is evident that there remain genuine issues of material fact. Agency Resp. at 7. The Agency further argues that "[p]etitioners are not entitled to judgment as a matter of law." Agency Resp. at 7-8. Accordingly, the Agency urges the Board to deny the petitioners' motion for summary judgment because there are genuine issues of material fact and because "the permit, as issued, does not violate the applicable provisions of the Act or Board regulations." Agency Resp. at 8.

Village's Response

The Village disputes petitioners' argument that algal growth in Hickory Creek constitutes an offensive condition requiring nutrient limits in the Village's permit. Vill. Memo. at 9. The Village argues that algae is not itself the problem, as it is a vital part of aquatic life. *Id*.; Vill. Statement at 26-27; R. at 364. The Village further argues that algae must be assessed in relation to levels of dissolved oxygen and fish populations. Vill. Memo at 9; Vill. Statement at 27. Specifically, algal activity can result in nighttime dissolved oxygen depletion, which in turn may adversely affect fish. R. at 361. However, the Village states that the Agency found "Hickory Creek has fish populations that are not indicative of low dissolved oxygen concentrations." Vill. Memo at 9; R. at 361. The Village also stresses the Agency's conclusion that "the incremental nutrient loading anticipated to result from this project is not expected to increase algae . . . . " Vill. Memo. at 9, citing R. at 565; Vill. Statement at 27. The Village argues that that the Agency's permitting decision should be upheld where the Agency has appropriately considered petitioners' arguments and assessed the water quality of Hickory Creek. Vill. Memo. at 9.

The Village further argues that, even if the Agency had accepted petitioners' claims regarding algae, the Agency still could reasonably have determined that nutrient limits are not appropriate. Vill. Memo. at 9. The Village first notes that the Agency is aware that other entities discharge into the stream. *Id*.; *see* R. at 68 (characterizing creek in hearing testimony as "effluent-dominated stream"). The Village argues that, under these circumstances, nutrient limitations should be applied to the entire stream and not to a single discharger. Vill. Memo. at

9, citing Communities for a Better Environment v. State Water Resources Control Board, 1 Cal. Rptr. 3d 76 (Cal. 1st Dist. 2003). The Village further notes that the Agency has begun to consider nutrient standards and argues that standards should not now be applied through the Board's determination of a permit appeal. Vill. Memo. at 10.

Furthermore, the Village argues that material facts relating to the offensive conditions narrative water quality remain in dispute. Specifically, the Village disputes petitioners' statement with regard to comments made at the public hearing. The Village first states that petitioners have mischaracterized the comment of Kim Kowalski. Vill. Statement at 4. Although petitioners state that she reported "algal blooms" (Statement at 2), the Village states that she described "algae." Vill. Statement at 4, citing R. at 76. The Village further argues that any algae she observed may be attributable to low flow conditions or solar heating. Vill. Statement at 4-5, R. at 639. The Village also questioned Jim Bland's comments reporting algae in the vicinity of Pilcher Park. The Village states that Pilcher Park, located approximately two miles from New Lenox, is the site of a dam. Vill. Statement at 5. The Village notes that "[d]ams are one aquatic feature that are associated with algae." *Id*. Regarding both Jim Bland and Brad Salamy, the Village notes that their comments are unsworn and cannot be considered "testimony." *Id*., citing Statement at 2.

The Village also disputes petitioners' statement that the Agency acknowledged that daytime dissolved oxygen levels in Hickory Creek resulted from algae photosynthesis saturation. Vill. Statement at 12, citing Statement at 6. Elaborating on an answer provided by Agency employee Bob Mosher, the Village states that it is "very possible that algae photosynthesis *had a part* in levels of supersaturated dissolved oxygen levels during the period of 1979 to 1997." Vill. Statement at 12 (emphasis in original), citing R. at 67. The Village further notes that Mosher refers to dissolved oxygen levels obtained from a gauge approximately seven miles downstream from New Lenox. Vill. Statement at 12.

The Village also disputes petitioners' statement that "Hickory Creek also violated pH standards by exceeding a pH of 9, likely as a result of algal activity." Vill. Statement at 12, citing Statement at 6-7 and R. at 126 (post-hearing statement of Prairie Rivers Network). The Village first characterizes this as a conclusory statement based on an unsworn comment. Vill. Statement at 12. The Village also notes that the conclusion appears to be based on Agency sampling at a gauge seven miles downstream from the Village's discharge. *Id*. The Agency itself has cautioned that the monitoring station there may not have similar morphology to that in the vicinity of New Lenox and that "drawing direct conclusions between sites may not be valid." *Id*., citing R. at 369. The Village also points to sampling revealing average pH of 7.8, with only two samples showing a value of 9.0 and a single sample showing a value of 9.1. Vill. Statement at 12, citing R. at 640; *see* R. at 129-54. The Village further states that its own water quality report showed pH values between 6.77 and 8.21. Vill. Statement at 12.

Again, the Village concludes that there remain disputed genuine issues of material fact. Vill. Memo. at 2. The Village further states that petitioners' motion is an inappropriate vehicle for resolution of a third party permit appeal." *Id*. Because it argues that petitioners' motion misstates the law and draws selectively from the record in this case, the Village argues that the

petitioners are not entitled to summary judgment on the issue of the narrative offensive conditions water quality standard. Vill. Memo. at 1-2.

Petitioners' Reply

On this issue, petitioners summarize their argument by stating that, "[d]espite evidence (later confirmed by IEPA itself) that Hickory Creek is having unnatural algal blooms and that discharges like those from New Lenox could contribute to such blooms, IEPA failed to consider whether any permit limits or conditions were necessary to prevent discharges that could cause or contribute to violations of the narrative 'offensive conditions' standard, 35 Ill. Adm. Code 302.203." Pet. Memo. at 2. Petitioners further argue that "[r]espondents do bravely attempt to argue that IEPA need not require compliance with narrative standards . . . ." Pet. Memo. at 3. Petitioners suggest that failing to remand the permit to the Agency on this basis would indicate that "IEPA may ignore regulations that are difficult to apply." *Id*.

Petitioners elaborate upon their argument that "many" of respondents' statements are not supported by the record and that the Board should not accept any of the Village's or Agency's statements "without carefully studying the record." Pet. Memo. at 5. As an example, Petitioners claim that the Agency's responsiveness summary does not support the Village's statement that the "Illinois EPA made the determination that no limits were required to address offensive conditions." *Id*., citing R. at 357. That summary stated a conclusion that "the expansion will not exacerbate any existing problems in Hickory Creek due to nutrients." R. at 357. Petitioners argue that this statement acknowledges the possibility of problems with algal growth and the prospect of limits to address it. Pet. Memo. at 6. Petitioners also elaborate upon their claim that documents in the record cited by the respondents often contain "simply a naked conclusion without any scientific or factual basis." *Id*. Petitioners argue that respondents both claim that "the incremental nutrient loading anticipated to result from this project is not expected to increase algae or other noxious plant growth . . . ." *Id*., citing Vill. Memo. at 6-7, Agency Resp. at 6. Petitioners argue that the antidegradation assessment provides "[n]o scientific justification or any reasoning for this conclusion." Pet. Memo. at 6, citing R. at 565.

Petitioners argue that respondents offer only a series of failing legal arguments to excuse the Agency's failure to assure that the Village's discharge would not cause or contribute to violations of the narrative offensive conditions standard. Pet. Memo. at 18. While petitioners claim that "[m]uch of Respondents' argument seems based on the notion that narrative standards do not really count," petitioners state that "Board [r]ules explicitly treat the narrative standards as independent standards that must be satisfied along with the [numeric] standards." *Id*., citing 35 Ill. Adm. Code 302.105(c)(2)(B)(i). Petitioners argue that "[t]he notion that it is good enough to comply with numeric standards cannot be reconciled with the law." Pet. Memo. at 19. In support of this conclusion, Petitioners cite Board rules (35 Ill. Adm. Code 304.105), federal regulations (40 C.F.R. § 122.44(d)(1)(i)), Board case law (People v. Chalmers, PCB 96-111 (Feb. 3, 2000)), and federal case law (Sierra Club v. Hankinson, 939 F. Supp. 865, 870 (N.D.Ga. 1996)).

Petitioners emphasize that "numerous persons stated in comments that unusual algal blooms have occurred in Hickory Creek." Pet. Memo. at 19, citing Statement at 2 (¶¶ 6-8).

Suggesting the respondents' responses on this issue are mere quibbling, petitioners state that, if a contractor reported no organic pollution on August 20, 2002, then the contractor "must have either been there on a different day than the day that the reported algal bloom took place or the contractor does not see well." Pet. Statement at 8. Petitioners argue that respondents cannot deny that the conditions described in the record are known to result from discharges like the Village's. Pet. Memo. at 19; *see* Pet. Statement at 7.

Petitioners claim that respondents cannot point to anything in the Village's permit that would prevent a violation of the narrative standard or assure that a violation would not worsen. *See* Pet. Memo. at 20. Petitioners argue that that Agency has not specifically concluded that the permit does not require limits to prevent offensive conditions or that the Village's discharges could not wholly or partly cause offensive conditions. *Id*., citing R. at 357. Petitioners stress that the Agency's responsiveness summary states that the narrative standard "is a very difficult standard to apply to a permit." Pet. Memo. at 20, citing R. at 357. Petitioners suggest that respondents address these failures by shifting the burden of proof and requiring petitioners to prove that violation of a water quality standard would result solely from the Village's discharge. *See* Pet. Memo. at 20-21, citing Agency Resp. at 33. Petitioners characterize this as "try[ing] to rewrite the Board's rules." Pet. Memo. at 20. In this proceeding, petitioners argue that they have successfully met this burden by "show[ing] that the permit as issued violated the Act or the Board rules." Pet. Memo. at 21-22, citing Prairie Rivers Network v. PCB, 781 N.E.2d at 380.

Petitioners also dispute the Village's suggestion that it would be unreasonable to regulate discharges that might contribute to algal blooms without controlling all sources. Pet. Memo. at 22, citing Vill. Memo. at 10. Petitioners argue that the Agency cannot issue a permit that "alone or in combination with other sources" will violate standards. Pet. Memo. at 22, citing 35 Ill. Adm. Code 304.105. "[T]he fact that IEPA could not completely control the problem by controlling discharges by New Lenox is no justification for issuing a permit that will add to the loading of pollutants known to cause algal blooms." Pet. Memo. at 23.

Petitioners also dispute the Village's claim that the Agency could not place limits in its permit without setting numeric limits through a rulemaking proceeding. Pet. Memo. at 23, citing Vill. Memo. at 10. Petitioners argue that they have not asked the Agency to adopt a rule without following rulemaking procedures. Pet. Memo. at 24. Petitioners note that the offensive conditions standard cannot be applied on a statewide basis through a numeric standard. *Id*. Instead, petitioners state that they seek to have the Agency consider site-specific permit conditions that would prevent the Village from causing or contributing to a violation of the narrative offensive conditions standard. *Id*., citing 35 Ill. Adm. Code 302.203.

Board Analysis and Findings on Offensive Conditions Issue

The Board will first look to whether genuine issues of material fact exist concerning the offensive conditions issue. Only if not will the Board turn to whether petitioners have proven they are entitled to judgment as a matter of law. While petitioners argue that there is no genuine issue of material fact with regard to the offensive conditions narrative water quality standard and that they are entitled to judgment as a matter of law (Memo. SJ at 1), both the Agency and the Village disagree that there are no genuine issues of fact remaining to be decided.

While petitioners argue that the Village is a major source of phosphorus and thus a cause of algal growth, the Agency argues that unnatural algae blooms can result from causes such as dams, stream flows, sunlight, and turbidity even if nutrient levels are not elevated. While petitioners rely on descriptions of surface algae, the Agency argues that these descriptions either did not specifically locate the algal growth or overlooked such factors as a dam or low flow conditions. While petitioners argue that that the Agency's permit does not even pretend to control pollution that may cause or contribute to violation of the narrative standard, the Agency states that Hickory Creek has a diverse fish population belying an offensive conditions violation.

Like the Agency, the Village also disputes comments made at the public hearing on this permit by arguing that those comments have not considered the role of low flow conditions, solar heating, or a dam in generating algae growth. While petitioners argue that pH violations in Hickory Creek likely resulted from algal activity, the Village argues that this conclusion appears to be based upon sampling conducted at a point seven miles downstream from the Village's discharge with results that do not match its own reports.

Considering the pleadings as it must strictly against the petitioners (Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d at 370, citing 735 ILCS 5/2-1005(c) (1996)), the Board cannot conclude that there is no genuine issue of material fact with regard to the issue of the narrative offensive conditions standard. Although the disputes listed in the preceding two paragraphs are not intended to be exhaustive, they nonetheless indicate that significant factual issues remain unresolved with regard to matters such as the source of algae in Hickory Creek, the extent and location of algae in the creek, any effects of algae on the creek, and the Agency's consideration of those effects. As to the issue of the narrative offensive conditions water quality standard, petitioners' motion for summary judgment is denied.

COPPER WATER QUALITY STANDARD

Petitioners' Motion

Petitioners argue that the Agency in issuing the Village's permit "did not assure that the applicable . . . numeric copper water quality standards will not be violated as a result of the proposed discharge to Hickory Creek. Mot. SJ at 6. They argue that, while the Agency "at least purported to consider what limits were necessary to prevent violations of numeric water quality standards" (Memo. SJ at 13), "their efforts fell far short of assuring that the copper limit would not be exceeded." *Id*. Petitioners conclude that "the permit does not control discharges that may cause or contribute to violations of the copper water quality standard." Memo. SJ at 2.

In drawing these conclusions, petitioners rely upon the hearing testimony and written comments of Cynthia Skrukrud, Ph.D., a Clean Water Advocate with the Illinois Chapter of the Sierra Club. Ms. Skrukrud stated that, in analyzing the "reasonable potential" to exceed water quality standards, USEPA in its *Technical Support Document for Water Quality Based Toxics Control* (TSD) recommends the use of a multiplier to determine that potential when the analysis is based on a small number of samples. R. at 70, 264-65; *see also* R. at 508 (providing multiplier of 3.8). Ms. Skrukrud suggested that the use of the multiplier is needed to avoid a finding of no

reasonable potential to exceed standards that is based upon data that are few in number and not fully representative of the receiving stream. *See* R. at 265.

In this case, however, Ms. Skrukrud argues that the Agency "abandoned" the method including the use of a multiplier that is recommended by USEPA. R. at 265. In its reasonable potential analysis of Hickory Creek, the Agency obtained only two samples with regard to copper. *Id*.; R. at 508. The highest concentration of the two samples was 20.5 mg/L, while the chronic standard for copper at the hardness level found in Hickory Creek is 20.6 mg/L. R. at 265, 508. The Agency concluded that "no regulation of copper is necessary and that no monitoring beyond the routine requirements is needed." R. at 508. Petitioners state that the record includes no explanation why the Agency did not follow USEPA's recommendation in determining whether there is a reasonable potential to violate water quality standards for copper. Statement at 14. Based on the use of two samples and because the maximum concentration of copper is "so close to a violation of the chronic standard," Ms. Skrukrud believes that there does exist a reasonable potential for violation and that it warrants further investigation. R. at 70; Statement at 13. To determine whether there is a need for additional copper monitoring, "IEPA should either use the multiplier in their analysis or require that more samples be collected." R. at 70, 265.

Petitioners accordingly request that the Board grant their motion for summary judgment, revoke and remand the permit to the Agency, and direct that the Agency incorporate into any future permit assurance that "discharges from New Lenox STP #1 not cause or contribute to violations of the numeric water quality standard for copper provided in 35 Ill. Adm. Code Section 302.208(e)." Mot. SJ at 7; Memo. SJ at 2-3.

Agency's Response

The Agency disputes the petitioners' view that the Village's permit does not comply with Section 302.105 or 309.141 of the Board's regulations because it does not limit all pollutants that might cause or contribute to a violation of the copper water quality standard. Agency Resp. at 34; Memo. SJ at 14; *see* 35 Ill. Adm. Code 302.105, 309.141. The Agency states that "[p]etitioners' argument is flawed in that it assumes that [a] copper limit was necessary in this case." Agency Resp. at 34.

The Agency notes that it uses the TDS as technical guidance to determine whether further analysis of receiving water is necessary. Agency Resp. at 34. Because the TDS recommends the use of a multiplier, the Agency does not believe that TDS procedure is valid where there exists only a small number of water samples. *Id*. When it has limited data, the Agency instead "evaluates these substances against the water quality standards applicable to the receiving stream." *Id*. The Agency argues that "[t]his approach is especially appropriate in cases where the facilities have been previously identified through the pre-treatment program as having low risk of high levels of metals and other industrial pollutants in treated domestic waste effluents." *Id*. In this case, the Agency states that it concluded that the Village's plan had a low risk of elevated copper levels. *See id*.

The Agency reports that the Village in 2001 reported copper samples of 0.0141 mg/L and 0.0205 mg/L, the average of which is 0.0173 mg/L. Agency Resp. at 35; *see* R. at 508. Since this average concentration was less than the chronic copper water quality standard of 0.0206 mg/L, the Agency determined that the permit did not require a limit for copper. Agency Resp. at 24, 35. The Agency states that, if one of the samples or the average of the two samples had exceeded the chronic water quality standard, it would have incorporated a copper limit into the permit or required six months of monitoring. Agency Resp. at 35. The Agency notes that there is no known source of copper discharging into the Village's waste stream (*id*., R. at 361), and land use in the area is not a source of copper. Agency Resp. at 6, citing R. at 361.

Furthermore, the Agency states that genuine issues of material fact remain in dispute and need to be developed at hearing. Agency Resp. at 1, 8. Petitioners stated as fact that USEPA's method of calculation showed a reasonable potential for copper concentrations to exceed both the chronic and acute water quality standards. Statement at 8-9, citing R. at 508. Because the average copper concentration in two samples is less than the chronic water quality standard, the Agency concluded that "there was no reason to incorporate permit limits for copper." Agency Resp. at 24. The Agency suggests that these samples did not indicate a reasonable potential to exceed these standards. *See id*.

In conclusion, the Agency states that it is evident that there remain genuine issues as to material facts. Agency Resp. at 7. The Agency further states that "[p]etitioners are not entitled to judgment as a matter of law." Agency Resp. at 7-8. Accordingly, the Agency urges the Board to deny the petitioners' motion for summary judgment because there are genuine issues of material fact and because "the permit, as issued, does not violate the applicable provisions of the Act or Board regulations." Agency Resp. at 8, 27.

Village's Response

The Village also disputes petitioners' argument that the permit does not violate applicable numeric copper water quality standards. *See* Vill. Memo. at 11; Mot. SJ at 6. The Village argues that the Agency specifically considered whether the proposed discharge had the reasonable potential to violate water quality standards for copper. Vill. Memo. at 11. The Village notes that the Agency specifically considered whether to use USEPA methods to determine reasonable potential to exceed standards. *Id*.; R. at 509. The Agency concluded that the USEPA method using a high multiplier did not provide valid results with a small number of samples. Vill. Memo. at 11; R. at 508-09 (providing multiplier of 3.8 for copper). For the Village, the Agency noted that "[a]ll copper samples were reported less than the acute and chronic water quality standards." R. at 509. The Village argues that the Agency correctly considered the reasonable potential to exceed copper water quality standards on the basis of sample results, the type of the Village's facility, and the nature of its discharge. The Village further argues that petitioners insist upon application of a USEPA analysis that is not appropriate in this case and would produce "artificially high results." Vill. Memo. at 11. The Village concludes by arguing that its effluent would not violate the chronic standard for copper and that "[n]o permit limit was necessary for copper." *Id*.

Furthermore, the Village argues that material facts relating to the numeric copper water quality standards remain in dispute. Petitioners had stated as fact that, using USEPA calculations, there existed a reasonable potential for copper levels to be more than double the acute water quality standards and to be more than 3.7 times the chronic standard. Statement at 8-9, citing R. at 508. The Village stresses that its facility has a low risk for high levels of metals in its treated domestic effluent. Vill. Statement at 17, citing R. at 509. In addition, the Village notes that the Agency, following its policy, did not evaluate reasonable potential to exceed standards using the USEPA calculations. Because it had obtained five or fewer effluent samples, the Agency determined that USEPA calculations would not yield valid results. Vill. Statement at 17; R. at 509. The Village specifically disagrees with Cynthia Skrukrud's statement that the Agency "should either use the multiplier in their analysis or require more samples." Vill. Statement at 24; citing R. at 264-65. Generally, the Village stresses that the Agency has considered and addressed comments in its Responsiveness Summary and has properly concluded that copper does not present a reasonable potential for exceeding water quality standards. *See* Vill. Memo. at 11.

Again, the Village concludes that disputed issues of material fact remain. Vill. Memo. at 2. The Village further states that petitioners' motion is an inappropriate vehicle for resolution of a third party permit appeal." *Id*. Because it argues that petitioners' motion misstates the law and draws selectively from the record in this case, the Village argues that the petitioners are not entitled to summary judgment on the issue of the numeric copper water quality standard. Vill. Memo. at 1-2.

Petitioners' Reply

Petitioners summarize their argument on this point by stating that "IEPA failed to assure that copper discharges will not cause or contribute to violations of the copper water quality standard although testing by New Lenox's contractor showed that there was a reasonable potential that copper discharges would cause such violations." Pet. Memo. at 2. Petitioners argue that the Agency did nothing more than "go through the motions of considering placing copper limits in the permit" and that the record does not support its decision. Pet. Memo. at 3. Petitioners further argue that "copper limits or further testing is needed before the discharge can be permitted properly." *Id*.

Specifically, petitioners note that respondents admit that the Agency performed analysis recommended by USEPA but failed to follow the corresponding recommendations regarding permit limits. Pet. Memo. at 25, citing Vill. Statement at 25, Agency Resp. at 34. Although the Agency stated that it did not accept USEPA procedures applying a high multiplier to a small number of samples (Agency Resp. at 34), petitioners argue that this "explanation does not make sense." Pet. Memo. at 25. Petitioners characterize as "common sense" the principle that a limited amount of data increases the level of uncertainty. *Id*. Petitioners further argue that the solution to the problem of limited data is the acquisition of more data. Pet. Memo. at 25-26.

Petitioners also dispute the Agency's statement that it considered the Village to be a low risk for metals. Pet. Memo. at 26; *see* Vill. Statement at 34. "Whatever was reasonable to think before testing was done, it was not reasonable to assume that New Lenox was a low risk for

metals after tests run by New Lenox's contractor showed high copper levels." Pet. Memo. at 26. Petitioners further argue that the Agency's practice with regard to the copper data appears to be a general rule applied wherever there are limited data. *Id*. As implementation rule, petitioners state that it should go through rulemaking procedures and be submitted for approval to USEPA. *Id*.

Board Analysis and Findings on Copper Issue

The Board will first look to whether genuine issues of material fact exist concerning the offensive conditions issue. Only if not will the Board turn to whether petitioners have proven they are entitled to judgment as a matter of law. While petitioners argue that there is no genuine issue of material fact with regard to the copper water quality standard and that they are entitled to judgment as a matter of law (Memo. SJ at 1), both the Agency and the Village disagree that there are no genuine issues of fact remaining to be decided.

While petitioners argue that the Agency's efforts failed to assure that the copper water quality standard would not be violated, the Agency argues that two samples showed copper concentrations less than the chronic water quality standard. While petitioner argues that USEPA guidance recommends use of a multiplier to determine the potential to violate where there is a small number of samples, the Agency argues that it has compared that limited data against applicable water quality standards. While petitioners argues that the Agency should either apply USEPA's multiplier or obtain additional samples, the Agency argues that there is no known source of copper discharging into the Village's waste stream and that land use in the area is also not a source of copper.

While petitioners argue that the Agency merely purported to consider copper limits, the Village argues that the Agency specifically concluded that USEPA's methodology would not yield valid results. While petitioners conclude that that the permit does not control discharges that would cause or contribute to a violation of the copper water quality standard, the Village argues that the Agency correctly decided that issue on the basis of the Village's samples, facility, and discharges.

Considering the pleadings as it must strictly against the petitioners (Dowd & Dowd, Ltd. v. Gleason, 693 N.E.2d at 370, citing 735 ILCS 5/2-1005(c) (1996)), the Board cannot conclude that there is no genuine issue of material fact with regard to the issue of the copper water quality standard. Although the disputes listed in the preceding two paragraphs are not intended to be exhaustive, they nonetheless indicate that significant factual issues remain unresolved with regard to matters such as the analysis of the Village's samples, and the Agency's consideration of copper limits. As to the issue of the narrative offensive conditions water quality standard, petitioners' motion for summary judgment is denied.

DISCOVERY ISSUES

Having decided that this case cannot be decided on the basis of petitioners' summary judgment motion, the Board finds that discovery issues are ripe for its consideration.

Proposed Discovery Schedules

During a March 2, 2004 status conference, Board Hearing Officer Bradley P. Halloran directed the parties "to submit proposed discovery briefing schedules on or before March 11, 2004." On March 11, 2004, petitioners filed a submission (Pet. Sched.) stating "that there should be no discovery in this case." Petitioners argue that the Board hears the petition "exclusively on the basis of the record before the Agency." Pet. Sched. at 1, citing 415 ILCS 5/40(e) (2004); Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112, slip op. at 10 (Aug. 9, 2001).

Petitioners state that "the purpose of the hearing to be held in third party appeals is generally limited to presentation and highlighting of the evidence in the Agency record." Pet. Sched. at 1. While acknowledging that there might appropriately be discovery regarding the contents of the Agency record or where there was an allegation of tampering with that record, petitioners stated that they were not aware of any issues of that nature. *Id*. at 1-2. In the event that the Board decided that there should be discovery in this case, petitioners requested that discovery be limited to a period of six weeks. *Id*. at 2.

Also on March 11, 2004, the Village submitted its proposed discovery schedule commencing on issuance of the hearing officer's order (Vill Sched.):

1. 60 days for issuance of written discovery and responses to written discovery.

2. 60 days for review of written discovery responses and issuance of deposition notices.

3. 60 days for completion of depositions.

4. 60 days for completion of Requests to Admit.

Vill. Sched. at 1.

Also on March 11, 2004, the Agency filed its proposed discovery schedule (Agency Sched.):

1. Submission of written discovery request to parties involved by May 25, 2004.

2. Responses to written discovery by June 25, 2004.

3. Notification to deposition witnesses by August 25, 2004.

4. Completion of depositions by November 9, 2004.

5. Completion and submission of request to admit by December 9, 2004

6. Responses to request to admit by January 10, 2005.

7. The Illinois Pollution Control Board hearing by March 10, 2005.

Agency Sched. at 2.

Parties' Briefing on Discovery Issues

At a status conference on April 1, 2004, the parties agreed that, before setting a final and complete discovery schedule, the parties should submit briefs on the issues of what the Board is to base its decision on and what constitutes the record before the Agency in this case. The hearing officer directed the parties to file simultaneous briefs on or before April 21, 2004, and to file replies, if any, on or before April 30, 2004.

The hearing officer's order directed the parties, particularly those favoring a protracted discovery schedule, to elaborate upon the information they believe is relevant, discoverable, and admissible that was not before the Agency at the time the permit was issued. *See* Prairie Rivers Network v. IPCB, *et al.*, 781 N.E.2d 372, 379 (4th Dist. 2002), *aff'g.* Prairie Rivers Network v. IEPA, *et al.*, PCB 01-112, slip op. at 10 (Aug. 9, 2001). The order stressed that, under Section 39 of the Act, the third-party petitioner has the burden of proving that the permit as issued would violate the Act or the Board's regulations. 415 ILCS 5/39 (2004). The order also stressed that Section 40(a)(3)(ii) provides that the Board shall hear the petition for review "exclusively on the basis of the record before the Agency." 415 ILCS 5/40(a)(3)(ii) (2004); *see* Prairie Rivers Network v. IEPA, *et al.*, PCB 01-112, slip op. at 10 (Aug. 9, 2001).

Petitioners' Submission

In their submission (Pet. Sub.), Petitioners again stress that Section 40(e)(3) of the Act provides that the Board hears this third-party petition "exclusively on the basis of the record before the Agency." Pet. Sub. at 1; 415 ILCS 5/40(e) (2004). Petitioners argue that "[i]t is apparent that no party to this proceeding can use any document, testimony, or data that is not part of the Agency record." Pet. Sub. at 1. Petitioners note that the Board has affirmed a hearing officer's decision to limit evidence in a third-party appeal "to the record that was before IEPA at the time the permitting decision was made." Pet. Sub. at 2, citing Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112, slip op. at 10, 25 (Aug. 9, 2001).

Petitioners state that it might be argued that the Board under Section 40(e) can hear testimony not contained in the record as long as that testimony addresses an issue that was raised in the permit proceedings. Pet. Sub. at 2. However, petitioners argue that this claim ignores statutory language: Section 40(e) "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." *Id.*, citing 415 ILCS 5/40(e)(2)(A), 40(e)(3)(iii) (2004) (emphasis in original). Petitioners conclude that the Board's proceeding is limited both to issues and to evidence contained in the record. Pet. Sub. at 2. With the record now complete, petitioners argue that "[t]here is no need or possibility for discovery given that everything that is relevant is already in plain view in the Agency record." Pet. Sub. at 3.

On the issue of the burden of proof, petitioners acknowledge statutory language placing that burden upon them. Pet. Sub. at 3, citing 415 ILCS 5/40(e)(3) (2004). "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." Pet. Sub. at 3, citing Prairie River Network v. Black Beauty Coal Co., 781 N.E.2d 372, 379-80 (4th Dist. 2002). With the Board limited exclusively to the Agency record and the burden of proof upon them, petitioners argue that they "must show that it is more likely than not that the permit should not have been issued on the basis of the Agency record." Pet. Sub. at 4. "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." *Id*.

Agency's Brief

Although acknowledging in its brief (Agency Brief) that the Act and the Board's regulations provide that "the Board shall hear the petition . . . exclusively on the basis of the record before the Agency", the Agency states that "this section is silent as to whether discovery is allowed in a third party permit appeal." Agency Brief at 4, citing 415 ILCS 5/40(e) (2004) and 35 Ill. Adm. Code 105.214(a).

In support of its view that discovery is allowed in this case, the Agency first notes that Part 105 of the Board's procedural rules applies to appeals from the Agency's final decisions. Agency Brief at 4 n.1, citing 35 Ill. Adm. Code 105.100. The Agency then quotes Part 105, which states that, "[u]nless this Part provides otherwise, proceedings held pursuant to this Part will be in accordance with the rules set forth in 35 Ill. Adm. Code 101.Subpart F." Agency Brief at 4 n.1, citing 35 Ill. Adm. Code 105.110 (Hearing Process). Subpart F of Part 101 provides the Board's general rules regarding hearings, evidence, and discovery. 35 Ill. Adm. Code 101.600 – 101.632. The Agency specifically relies upon Section 101.616(a), providing that "[a]ll relevant information and information calculated to lead to relevant information is discoverable," except materials protected from disclosure. Agency Brief at 4, citing 35 Ill. Adm. Code 101.616 (emphasis in original). The Agency cites a number of cases and other authority in support of the proposition that the scope of discovery in Illinois is broad. *See generally* Agency Brief at 5-6.

Turning specifically to this case, the Agency argues that discovery is "essential" in order to learn the bases of the petitioners' arguments and conclusions. *See* Agency Brief at 6. The Agency further argues that discovery is needed in order to avoid surprise and as a matter of "fundamental fairness." *See id*. The Agency argues that, if it cannot conduct discovery, it would have no means for testing petitioners' opinions and would be disadvantaged at hearing. Agency Brief at 6-7. The Agency cites Board precedent for the proposition that the Agency should be able to admit into evidence at hearing documents that are "demonstrative only, and cumulative to other information in the record." Agency Brief at 8, citing Community Landfill v. IEPA, PCB 01-48, 01-49, slip op. at 20 (Apr. 5, 2001).

The Agency also suggests that discovery is needed to overcome the shortcomings of the informational hearing the Agency held in this case. That hearing is not adjudicatory in nature and did not allow the Agency to cross-examine petitioners' witnesses. Agency Brief at 6-7.

"The sole purpose of these hearings is to inform the public of a proposed Agency action or to gather information or comments from the public prior to making a final decision on a matter." Agency Brief at 7, citing 35 Ill. Adm. Code 166.120.

Concluding, the Agency states that Section 40(e)(3) and Section 101.616(a) together define the scope of discovery in a third-party permit appeal. Agency Brief at 7. In the Agency's view, the Agency's record determines the scope of relevant information. *Id*. "[N]ew information is not discoverable." *Id*., citing 35 Ill. Adm. Code 101.616(a). If a fact or issue is not found in the Agency record, it is new information that is not relevant and thus is not discoverable. *Id*.

Village Memorandum

In its Memorandum (Vill. Discovery Memo.), the Village first notes that that petitioners rely upon Prairie Rivers Network v. IEPA and Black Beauty Coal Co., 781 N.E.2d 372 (4th Dist. 2002), in which the parties took discovery. Since the limited scope of the Board's review "has not precluded discovery on the substance and content of matters in the record," the Village states that discovery is both permissible and warranted in this case. Vill. Discovery Memo. at 1-2.

The Village further argues that many of petitioners' claims are conclusory in nature and that petitioner's witnesses have not been cross-examined. Vill. Discovery Memo. at 2. The Village argues that precluding discovery would be "fundamentally unfair and potentially prejudicial to the Village's ability to evaluate and challenge Petitioners' witnesses and arguments at hearing." Vill. Discovery Memo. at 3. The Village cites cases in support of the general proposition that allowing discovery in this case is consistent with the general purposes of discovery. *Id*. (citations omitted).

The Village further notes that the Board's rules allow discovery on all "relevant information and information calculated to lead to relevant information." Vill. Discovery Memo. at 2, citing 35 Ill. Adm. Code 101.616. The Village argues that "[d]iscovery of information in the record before the Agency can only be helpful to the Board, as it will sharpen issues on appeal and provide the substance necessary for the Board to make its own decision." Vill. Discovery Memo. at 3. Furthermore, the Village states that it "is not requesting discovery outside of the matters that are in the record." *Id*.

Petitioners' Reply

Petitioners' Reply (Pet. Reply) suggests that the Agency and the Village have not seriously challenged the statutory language providing that the Board is to hear this appeal exclusively on the basis of the record before the Agency. Pet. Reply at 1, citing 415 ILCS 5/40(e) (2004). Petitioners argue that "[t]he general language on discovery in civil cases or in other types of administrative proceedings cited by both respondents is clearly beside the point given the clear language of 415 ILCS 5/40(e)." Pet. Reply at 2. Petitioners further argue that proceedings such as review of an administrative decision do not necessarily include cross-examination. *See id*. Again, petitioners emphasize Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112 (Aug. 9, 2001). In that case, petitioners claim that the Board

"decided that 40(e) meant what it says" and decided the appeal solely on the basis of the Agency record. Petitioners acknowledge that discovery took place in that case but attributes its occurrence to failure by petitioner's counsel to object effectively to discovery or to the admission of irrelevant material before the hearing.[1] Pet. Reply at 2. Petitioners argue that, after the time and cost of depositions and other discovery, none of that discovery played a role in the Board's resolution of the case. Pet. Reply at 2-3.

Village Reply

In its Reply (Vill. Reply), the Village states that "Petitioners do not like the Board's procedure for third party appeals and argues that petitioners have unsuccessfully lodged their position in previous Board proceedings. Vill. Reply at 1-2. Specifically, the Village argues that petitioners have misinterpreted that Act and the Agency's permitting procedures. *See* Vill. Reply at 2-3. The Village argues that the informational hearing in this case does not require the applicant or the Agency to justify a draft permit. *Id.* The village submits that the hearing is for the benefit of the public, as they receive information with which they can assess a permit application and submit comments. *Id.*, citing 35 Ill. Adm. Code 309.109-309.113, 309.116-309.119.

The Village argues, now that petitioners have launched what it considers a "shotgun challenge" (Vill. Reply at 3), that it may explore issues raised by the petitioners both at hearing before the Board and through discovery. The Village argues that the Act requires a hearing to be held according to Section 40(a) and according to procedures in Section 32. *Id.*, citing 415 ILCS 5/32, 5/40(a) (2004). The Village further argues that the Act "must be read as a whole" and allows discovery of the evidence and testimony relied upon by the petitioners. *Id.* at 4.

Board's Analysis and Findings

Section 40(e)(3) of the Act requires the Board to "hear the petition . . . exclusively on the basis of the record before the Agency." 415 ILCS 5/40(e)(3) (2004). The Board's procedural rules reflect this requirement: "[t]he hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued." 35 Ill. Adm. Code 105.214(a). Board cases have also reflected this requirement. "The Board has consistently held that, in permit appeals, its review is limited to the record that was before IEPA at the time the permitting decision was made." Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112, slip op. at 10 (Aug. 9, 2001), citing Alton Packaging Corp. v. IPCB, 516 N.E.2d 275, 280 (5th Dist. 1987) (disallowing introduction of new evidence not presented to the Agency in the permit proceeding); Community Landfill Co. v. IEPA, PCB 01-48, 01-49 (Apr. 5, 2001); Panhandle Eastern Pipeline Co. v. IEPA, PCB 98-102 (Jan. 21, 1999); West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-125, 95-199 (Oct. 17, 1996). Furthermore, the Board's decision "is not based on information developed by the permit applicant, or the Agency, after the Agency's decision." Community Landfill Co. and City of Morris v. IEPA, PCB 01-48,

[1] The Board notes that counsel for petitioners in this case also filed the petition for review of the Agency's decision in Prairie Rivers Network v. IEPA and Black Beauty Coal Co., PCB 01-112 (Jan. 30, 2001).

01-49, slip op. at 3 (Apr. 5, 2001), citing Alton Packaging, 516 N.E.2d at 280. Consequently, "evidence that was not before the Agency at the time of its decision is not admitted at hearing or considered by the Board." Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, 01-49, slip op. at 3 (Apr. 5, 2001), citing Alton Packaging, 516 N.E.2d at 280; Panhandle Eastern Pipeline Co. v. IEPA, PCB 98-102 (Jan. 21, 1999); West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-125, 95-199 (Oct. 17, 1996).

The Board's procedural rules provide that "[t]he Agency must file its entire record of its decision with the Clerk in accordance with Section 105.116." 35 Ill. Adm. Code 105.212; *see* 35 Ill. Adm. Code 105.116 (providing 30-day deadline for filing record). The procedural rules further provide that "the record must include:

1) Any permit application or other request that resulted in the Agency's final decision;

2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;

3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;

4) The hearing file of any hearing that may have been held before the Agency, including any transcripts and exhibits; and

5) Any other information the Agency relied upon in making its final decision." 35 Ill. Adm. Code 105.212(b).

The Board notes that, in one Agency permit appeal, "[d]iscovery in the action was extensive." Waste Management, Inc. v. IEPA, PCB 84-45, PCB 84-61, PCB 84-68 (consolidated), slip op. at 1 (Oct. 1, 1984), *aff'd. sub nom.* IEPA v. IPCB, 503 N.E.2d 343 (1986). The record in the Waste Management case, however, shows significant difficulties in compiling and filing a voluminous record. *Id*. (including in record more than 2,000 pages of transcripts and ten boxes of documents). A Board order on May 18, 1984, allowed the Agency additional time to file its record. Board orders dated July 19, 1984, and August 10, 1984, allowed the Agency to file additional materials in order to complete the required record. In this case, however, the Board has before it no dispute about the contents of the Agency record. Particularly under those circumstances, the Board finds there is no compelling reason to permit discovery to supplement the Agency record with materials required by Section 105.212 of the Board's procedural rules. 35 Ill. Adm. Code 105.212(b).

The Board notes that the Board's rules allow the parties to agree to supplement the record pursuant to Section 40(d) of the Act. 415 ILCS 5/40(d) (2004); 35 Ill. Adm. Code 105.214(a). Section 40(d) of the Act refers specifically only to permits issued under Section 9.1(c) of the Act, which relates to permits issued under the Clean Air Act. 415 ILCS 5/9.1(c) (2004). Because the Act contains no specific means for supplementing the record in NPDES appeals, the Board must

limit its review to the record that was before that Agency and could not properly consider evidence or testimony disclosed through discovery.

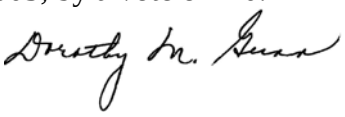
The issue in this case is whether the administrative record supports the Agency's decision to issue the Village's permit. The Board cannot conclude under the circumstances of this case that the respondents have persuasively identified any additional discoverable evidence. In a permit appeal such as this, respondents do not have the same opportunity to engage in discovery as they would in an enforcement case. Consequently, the Board directs the hearing officer to proceed to hearing on terms consistent with this order.

CONCLUSION

For the reasons stated above, the Board denies petitioners' motion for summary judgment as to each of the three grounds stated: nutrient loadings, offensive conditions water quality standard, and copper water quality standard. In addition, the Board determines that neither the Agency nor the Village has justified the discovery sought in their respective submissions, and the Board directs the hearing officer to proceed to hearing on terms consistent with this order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 17, 2005, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board