BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DES PLAINES RIVER WATERSHED ALLIANCE, LIVABLE COMMUNITIES ALLIANCE, PRAIRIE RIVERS NETWORK, and SIERRA CLUB	)	
Petitioners	)	
v.	)	**PCB 04-88 (APPEAL FROM IEPA (DECISION GRANTING NPDES PERMIT)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF NEW LENOX	)	
Respondents.	)	

NOTICE OF FILING

Ms. Dorothy M. Gunn
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street - Suite 11-500
Chicago, IL 60601

Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
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Center of Midwest
35 E. Wacker Drive - Suite 1300
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PLEASE TAKE NOTICE that on **Friday, April 30, 2004,** we filed the attached **Reply of The Village of New Lenox on Proposed Discovery Schedule** with the Clerk of the Pollution Control Board, a copy of which is herewith served upon you.

Respectfully Submitted,

Sheila H. Deely

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THIS FILING IS BEING SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DES PLAINES RIVER WATERSHED ALLIANCE, LIVABLE COMMUNITIES ALLIANCE, PRAIRIE RIVERS NETWORK, and SIERRA CLUB Petitioners v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF NEW LENOX Respondents.	)	**PCB 04-88** **(APPEAL FROM IEPA (DECISION GRANTING NPDES PERMIT)**

REPLY OF THE VILLAGE OF NEW LENOX ON PROPOSED DISCOVERY SCHEDULE

The Village of New Lenox ("the Village"), by its attorneys Gardner Carton & Douglas LLP, submits this reply concerning a proposed discovery schedule.

1. In NPDES permit appeals, the Illinois Environmental Protection Act requires the Illinois Pollution Control Board to hold a hearing and to hear the appeal "exclusively on the basis of the record before the Agency." See 415 ILCS 5/40(e)(3). Petitioners claim without citation that "the statute contemplates that everyone with something to say about the permit will do so during the public comment period," and conclude 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."

2. It is apparent that Petitioners do not like the Board's procedure for third party permit appeals, for this is Petitioners' third bite at the apple with this argument, and like the others before it, the Board should decline to alter its procedures so fundamentally. Petitioners

made the same argument in *Prairie Rivers Network v. Illinois Environmental Protection Agency and Black Beauty Coal Company*, PCB 01-112 (August 9, 2001), which was upheld by the appellate court in *Prairie Rivers Network v. Illinois Pollution Control Board*, 335 Ill. App.3d 391 (4th Dist. 2002) (*"Black Beauty"),* where the Board declined to so change its procedures, and in the recent rulemaking *In the Matter of: Proposed Amendments to: Public Participation Rules in 35 Ill. Adm. Code Part 309 NPDES Permits and Permitting Procedures*, R03-19. In that rulemaking, Petitioners originally proposed the following language:

> Section 309.120 Obligation of Applicant and Commenters to Place Arguments in Record
>
> All persons, including applicants, who believe any condition of a Draft permit is inappropriate or that the Agency's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing and post-hearing comment period). Any supporting materials that are submitted shall be included in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and regulations, EPA documents of general applicability, or other generally available reference materials. Commenters shall make supporting materials not already included in the administrative record available to EPA as directed by the agency (A comment period longer than 30 days may be necessary to give commenters a reasonable opportunity to comply with the requirements of this section. Additional time shall be granted to the extent that a commenter who requests additional time demonstrates the need for such time).

The Illinois EPA declined to include this limitation in its proposal submitted to the Board as a result of the outcry from stakeholders in that rulemaking. Petitioners in this case, certain of whom were proponents in the rulemaking, did not push this language before the Board.

3. Petitioners misinterpret the purpose of this Section 40(e)(3), as well as the informational hearing held by the Illinois EPA and the public comment period. The applicant is

not in the same position as the public, which is why the public and the applicant are treated differently by the Illinois Environmental Protection Act and in Board regulations. See Section 40(a), applicable to NPDES permit appeals by a permit applicant, which is not limited to the record. The purpose of the informational hearing and public comment period is not to allow the applicant an opportunity to comment or to require the applicant (or the Agency, for that matter) to justify a draft permit for the public. The informational hearing is for the public. It is to allow the Illinois EPA to provide the information required by Board regulations to the public in a public notice or a fact sheet, as required by regulations at Section 309.109 through 309.113, so as to enable them to have information upon which to assess the application and to provide comments for the Illinois EPA's consideration in an informational hearing before the Agency as described in Sections 309.116 through 309.119.

4. Petitioners' unsupported interpretation of one clause in the Illinois Environmental Protection Act is directed at benefiting its challenge and limiting the permit applicant and the Board in this case. But the statute is not intended to provide grist for a challenge or a limitation on the applicant. Section 40(e)(3) is intended to ensure that the public follows the proper procedures and allows submission of public comments in the proper forum. This forum for comments is in the first instance before the Illinois EPA in an informational, non-adversarial hearing, and this procedure must be followed to allow those comments and objections to be brought for the Board's consideration in a contested, adversarial case.

5. Now that Petitioners have raised issues on the record in a shotgun challenge before the Board, the Village has the right to explore those issues in a hearing before the Board, and in discovery. The statute requires a hearing to be held in accordance with Section 40(a) of the Act, which in turn provides that Sections 32 of the Act governs the hearing. An NPDES

permit appeal is a contested matter, and accordingly Section 32 provides that "any party to a hearing . . . may make oral or written statements, offer testimony, cross-examine witnesses, or take any combination of such actions." If "no party" to the proceeding can use any document, testimony, or data that is not part of the Agency record, there would simply be neither a need for nor a permissible way of even having a hearing. The statute must be read as a whole to give each provision proper meaning, and to allow the Board to conduct a meaningful hearing on objections by the public. This means that discovery of the evidence and testimony cited by Petitioners in support of the appeal and claimed to be contrary to the Illinois EPA's decision is what is intended to take place.

Respectfully submitted,

The Village of New Lenox

By: _____
One of Its Attorneys

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CH02/22308194.1

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Notice of Filing** and the attached **Reply of The Village of New Lenox on Proposed Discovery Schedule** was filed by hand delivery with the Clerk of the Illinois Pollution Control Board and served upon the parties to whom said Notice is directed by facsimile on **Friday, April 30, 2004.**