

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD APR 30 2004

STATE OF ILLINOIS
Pollution Control Board

DES PLAINES RIVER WATERSHED ALLIANCE,)
LIVABLE COMMUNITIES ALLIANCE,)
PRAIRIE RIVERS NETWORK, and SIERRA CLUB,)

Petitioners,)

v.)

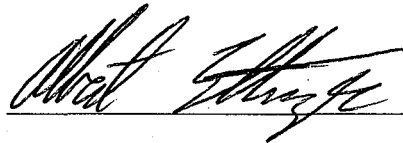
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY and VILLAGE OF NEW LENOX)

Respondents.)

PCB 04-88
(NPDES Permit Appeal)

NOTICE OF FILING

PLEASE TAKE NOTICE that the Illinois Chapter of the Sierra Club, and Prairie Rivers Network have filed PETITIONERS' REPLY TO THE SUBMISSIONS OF IEPA AND NEW LENOX MADE IN RESPONSE TO THE HEARING OFFICER ORDER OF APRIL 1, 2004.



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April 30, 2004

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DES PLAINES RIVER WATERSHED ALLIANCE,
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PETITIONERS' REPLY TO THE SUBMISSIONS OF IEPA AND NEW LENOX MADE IN
RESPONSE TO THE HEARING OFFICER ORDER OF APRIL 1, 2004

Neither the Agency nor New Lenox seriously attempt to grapple with the import of the General Assembly's provision that the Board is to hear this appeal "exclusively on the basis of the record before the Agency" 415 ILCS 5/40(e). They both cite general law that discovery extends to all relevant matters but simply beg the question of how discovery as to anything other than the contents of the record before the Agency could be relevant in this proceeding.

The respondents' submissions do serve to make clear that the issue of the scope of the proceedings should be resolved before the parties spend substantial time or money taking discovery and preparing for the hearing.

A. Consideration of the merits of the appeal is limited to the record as defined by 35 Ill. Adm. Code 105.212.

The respondents have not offered any interpretation of "exclusively on the basis of the record" other than the straightforward discussion presented by petitioners. No one has claimed that there was something that should have been included in the Agency record under 35 Ill. Adm. Code 105.212 that was not filed by the Agency. Thus, in considering the merits of this appeal,

the Board is limited to the approximately 700 pages of materials that have been filed by the Agency as the Agency record.

The 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). Also irrelevant are Board cases on permit appeals by applicants that indicate that in such appeals applicants may question the Agency's reasons for denying the permit. New Lenox agrees with the Agency in this proceeding. If the permit was issued properly, the record should support the Agency decision. If the preponderance of the evidence in the record does not support the Agency decision, the permit should be set aside. New Lenox could then reapply for a permit and include additional evidence in proceedings on the new application.

It is true that straightforward application of the language of 40(e) precludes the parties in this proceeding of any opportunity to cross-examine in this proceeding. It is not, however, unusual for parties to be precluded from cross-examination in proceedings that are in the nature of a review of an administrative decision. Moreover, petitioners are not aware of any general right to cross-examination in NPDES permit proceedings.¹

The only case mentioned by respondents that was decided under 415 ILCS 5/40(e) is Prairie Rivers Network v IEPA and Black Beauty Coal Company (PCB 01-112). In that case it was decided that 40(e) meant what it says and the Board considered the appeal exclusively on the basis of the agency record. It is true that considerable discovery was taken in Black Beauty, but that happened because the counsel for petitioner in Black Beauty is rather slow-witted and failed to object effectively to discovery or admission of irrelevant material until the hearing. As a

¹ If there is such a right, New Lenox should have attempted to exercise it in the hearing before the Agency. New Lenox could have appeared at the Agency hearing and attempted to cross-examine. It may well have been prevented from doing so by the Agency Hearing Officer, but its objection would have been preserved for this proceeding.

result, days of depositions and other discovery was developed, at substantial cost; none of which discovery figured in the Board's decision of the case.

It is also suggested by New Lenox that discovery is needed to allow it to depose potential witnesses. Assuming, however, that the appeal is to be heard exclusively on the basis of the Agency record, petitioners do not anticipate that any witnesses can be offered in the hearing.

B. A clear demarcation of the scope of this proceeding in advance of the hearing would be highly beneficial.

Petitioners believe that the statute makes the scope of these proceeding clear, but it is critical that uncertainty be resolved before the hearing to the extent possible. This is important both in terms of setting the limits of discovery and in terms of determining the scope of the hearing. Petitioners do not wish to spend thousands of dollars from very limited not-for-profit organization budgets on discovery or hearing preparation that proves to have been irrelevant. Conversely, if there is to be broad discovery in this case and, contrary to the plain language of 40(e), the Board may consider matters outside the record, petitioners will wish to utilize the opportunities presented by those procedures.

Accordingly, if the Hearing Officer were in doubt as to the proper scope of these proceedings, petitioners would support use of any opportunities for interlocutory review available under the Board rules.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Albert Ettinger", written in a cursive style.

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

CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that on April 29, 2004, I filed the attached PETITIONERS' REPLY TO THE SUBMISSIONS OF IEPA AND NEW LENOX MADE IN RESPONSE TO THE HEARING OFFICER ORDER OF APRIL 1, 2004. An original and 4 copies was filed, on recycled paper, with the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL 60601, and copies were served via United States Mail and via facsimile to those individuals on the included service list.



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April 30, 2004

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