

APR 26 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD **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
(APPEAL FROM IEPA
(DECISION GRANTING
NPDES PERMIT)

NOTICE OF FILING

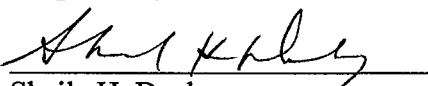
Ms. Dorothy M. Gunn
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street - Suite 11-500
Chicago, IL 60601

Hearing Officer
Illinois Pollution Control Board
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100 West Randolph Street - Suite 11-500
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Albert F. Ettinger, Senior Attorney
Environmental Law and Policy
Center of Midwest
35 E. Wacker Drive - Suite 1300
Chicago, IL 60601

PLEASE TAKE NOTICE that on **Monday, April 26, 2004**, we filed the attached **Memorandum 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,


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THIS FILING IS BEING SUBMITTED ON RECYCLED PAPER

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MEMORANDUM OF THE VILLAGE OF NEW LENOX
ON PROPOSED DISCOVERY SCHEDULE

The Village of New Lenox ("the Village"), by its attorneys Gardner Carton & Douglas LLP and in response to the Hearing Officer's order concerning proposed discovery schedule.

1. Petitioners have raised questions about whether discovery is permissible in this appeal in light of the Board's decision 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*"). Petitioners have argued that discovery is not permissible because it would not be admissible at the hearing in light of the Board's limitation to a hearing "exclusively on the basis of the record before the Agency." See 415 ILCS 5/40(e)(3).

2. The Village believes that discovery is permissible in third party NPDES permit appeals and is warranted in this case. The Village initially notes that discovery was taken in the *Black Beauty* case, on which Petitioners rely. That the Board's review is limited to the

administrative record before the Agency has not precluded discovery on the substance and content of matters in the record in *Black Beauty* or other NPDES permit appeals.

3. Board rules allow discovery on all “relevant information and information calculated to lead to relevant information.” See 35 Il. Adm. Code 101.616. Petitioners have the burden of proof in this appeal. Petitioners have claimed several grounds for appeal in the Petition, certain of which are somewhat unclear to the Village, but which include alleged impacts to Hickory Creek, its water quality, offensive conditions, and economically reasonable alternatives to the discharge. The Petitioners presented many witnesses and exhibits before Illinois EPA, on these issues.

4. Many of the claimed bases for Petitioners’ challenge are conclusory, and these witnesses have not been subject to cross-examination or had their claims tested. There was no contested hearing held on these claims, because Illinois EPA conducts an informational hearing during the proceedings, not a contested hearing.

4. It is at the hearing that Petitioners claims will be tested. See *Community Landfill Company v. Illinois EPA*, PCB 01-48, 01-48 (Apr. 5, 2001). The Village is entitled to discovery on the reliability and substance of the allegations made by those witnesses in the administrative record, as well as the reliability of the documentary evidence in the record. The purpose of the discovery the Village is requesting is to ensure full development of the issues relevant to the hearing. This is entirely in keeping with the purpose of discovery, for the adversarial process is “best served when each party knows as much about the controversy as is reasonably practicable.” *People v. Williford*, 271 Ill. App. 3d 922, 926, 649 N.E.2d 941, 944 (5th Dist. 1995). In Illinois, broad discovery is favored in both the judicial and administrative settings. “The objectives of pretrial discovery are to *enhance the truth-seeking process*, to enable attorneys to better prepare

for trial, to eliminate surprise and to *promote an expeditious and final determination of controversies* in accordance with the substantive rights of the parties.” *D.C. v. S.A.*, 178 Ill. 2d 551, 561, 687 N.E.2d 1032, 1038 (1997) (emphasis added). “Parties in administrative proceedings should use prehearing discovery as parties in trials use pretrial discovery, that is, to aid in preparing a case and eliminating surprise so that the outcome can rest on truth rather than on the maneuvers of counsel.” *Kankakeeland Cmty. Action Program v. Ill. Dept. of Commerce & Cmty. Affairs*, 197 Ill. App. 3d 1067, 1076, 557 N.E.2d 277, 283 (1st Dist. 1990); *see also Smith v. Dept. of Registration & Educ.*, 170 Ill. App. 3d 40, 45, 523 N.E.2d 1273-74 (1st Dist. 1988) (same). Precluding discovery in a contested case would be fundamentally unfair and potentially prejudicial to the Village’s ability to evaluate and challenge Petitioners’ witnesses and arguments at the hearing.

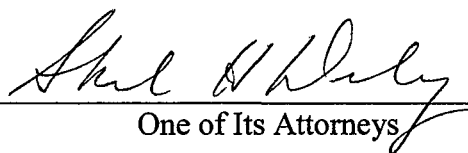
5. Discovery on information in the record before the Agency can only be helpful to the Board, as it will sharpen the issues on appeal and provide the substance necessary for the Board to make its own decision as well. The appropriate consideration is whether the requested discovery is relevant to the issues that the Board will consider at the hearing. *IBP, Inc. v. Ill. Pollution Control Bd.*, 204 Ill. App. 3d 797, 800, 563 N.E.2d 72, 74-75 (3d Dist. 1990). The Village is not requesting discovery outside of the matters that are in the record and, accordingly, should be permitted to engage in the requested discovery.

6. The discovery schedule proposed is also reasonable and is standard in contested cases. It is not a protracted schedule. First, the allegations that appear to be the basis of Petitioner’s challenge to the permit are complicated from both a technical and legal standpoint. Petitioners have raised legal arguments that will be new to the Board and may have a precedent for other municipal wastewater treatment agencies. This is not a one-issue case. Second, the

discovery rules themselves require sufficient time to respond to discovery. The rules require that a party responding to written discovery have twenty eight days, so the sequence of discovery provides very little room for shortening the schedule for written discovery. Section 35 Il. Adm. Code §§ 101.616-618. It is also reasonable to allow sixty days to review discovery responses, evaluate the need for depositions and issue either notices of deposition or subpoenas. The Village believes that given the number of potential witnesses that submitted testimony or evidence on behalf of the Petitioners during the permit proceedings before Illinois EPA and who may therefore be testifying at the hearing, the schedule for taking depositions is very reasonable and there is no flexibility to reduce it. Finally, with respect to admissions, this must be completed after written discovery is taken and depositions are completed to make this a useful exercise, and each party must have sufficient time to prepare these requests. The rules require 28 days for responses to request for admissions.

Respectfully submitted,

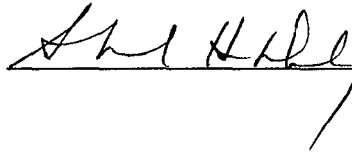
The Village of New Lenox

By: 
One of Its Attorneys

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Notice of Filing** and the attached **Memorandum 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 **Monday, April 26, 2004**.



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