

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

MAR - 3 2005

STATE OF ILLINOIS
Pollution Control Board

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

Petitioners,

v.

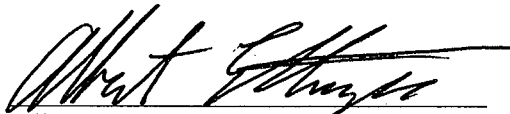
ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY and VILLAGE OF NEW LENOX

Respondents.

PCB 04-88
(NPDES Permit Appeal)

NOTICE OF FILING

PLEASE TAKE NOTICE that the Des Plaines River Watershed Alliance, the Livable Communities Alliance, Prairie Rivers Network, and the Sierra Club have filed the attached PETITIONERS' RESPONSE TO THE NEW LENOX MOTION FOR STAY OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT



Albert F. Ettinger (Reg. No. 3125045)

*Counsel for Des Plaines River Watershed Alliance, Livable
Communities Alliance, Prairie Rivers Network and Sierra
Club*

DATED: March 3, 2005

Environmental Law and Policy Center
35 E. Wacker Dr. Suite 1300
Chicago, Illinois 60601
312-795-3707

RECEIVED
CLERK'S OFFICE

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MAR - 3 2005

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.

STATE OF ILLINOIS
Pollution Control Board

PCB 04-88
(NPDES Permit Appeal)

**PETITIONERS' RESPONSE TO THE NEW LENOX MOTION FOR STAY OF
PETITIONERS' MOTION FOR SUMMARY JUDGMENT**

Respondent Village of New Lenox ("New Lenox") has filed a motion designed to prevent key issues in this case even from being briefed until the Board rules on certain discovery issues. The discovery issues, however, are irrelevant to the issues raised by Petitioners' Motion for Summary Judgment. Petitioners' motion should be granted, the New Lenox motion denied and the permit remanded to the Agency for reconsideration.

In its motion for a stay, New Lenox claims it will not reargue the issue of the proper scope of this appeal. New Lenox then argues for a stay as though it has some sort of legal right to hide during the public comment process and then later depose members of the public who comment. The key point here, though, is that New Lenox has not identified anything that could possibly be disclosed by discovery that would have any bearing on the three bases for granting summary judgment demonstrated by Petitioners' Motion for Summary Judgment.

The affidavit filed by New Lenox obviously does not comply with Supreme Court Rule 191 (b) as it provides no detail regarding what discovery New Lenox wants or what it thinks such discovery would show. No specific witness is identified and no hint is given as to what New Lenox hopes to prove with any witness.

New Lenox in its motion (¶4) does state generally what subjects it thinks might be the object of discovery. These subjects for discovery can be broken down into two broad categories: discovery regarding comments placed in the public record and discovery regarding the conclusions Petitioners draw from the Agency record.¹ However, even assuming, contrary to the governing statute (415 ILCS 5/40(e)), that New Lenox could use evidence from outside the record before the Agency to oppose Petitioners' motion, nothing could be developed through discovery as to either of these categories of possible discovery that would be relevant to any of the claims made in Petitioners' Motion for Summary Judgment.

A. Discovery from Petitioners and other members of the public cannot help New Lenox respond to Petitioners' motion.

Looking first at the testimony, comments and treatises placed in the record about which New Lenox seeks discovery, it is critical to see that Petitioners are not relying in their motion for summary judgment on any claim that the evidence in the agency record proves that New Lenox is causing or contributing to violations of water quality standards.² Petitioners' argument is rather that the record show that Illinois EPA failed to assure to that all reasonable measures to minimize the new pollution be incorporated into the permit, failed to assure that New Lenox discharge would not cause or contribute to a violation of the "offensive condition" and failed to assure that

¹ New Lenox refers to unsworn statements, verified claims, unsworn treatises and conclusions as to pH. (New Lenox Motion p.2)

New Lenox would not violate the “copper” water quality standard. See Memorandum in Support of Summary Judgment p.3.

The arguments Petitioners made in their motion do not rely on the truth of anything said in the record by Petitioners or other members of the public. They rely on what the record shows that Illinois EPA did not do. The important points about the public comments are that they were made in the record to the Agency but were practically ignored in the permit decision. A fire department that takes no action in response to an alarm cannot be said to have “assured” the safety of the building involved whether there was a fire or not.

Looking at Petitioners’ first claim in their motion, what could discovery possibly disclose as to whether the Agency properly considered setting phosphorus limits in the permit? Certainly no discovery from anyone who testified or commented will speak to that issue. The fact that members of the public asked the Agency to consider more measures to minimize pollution, to the extent that is relevant, is beyond rational denial.³ Unless New Lenox contends that Illinois EPA secretly did the work necessary to assure compliance with 35 Ill. Adm. Code 302.105(c)(2)(B)(ii) but failed to place information on this work into the Agency Record, there is nothing New Lenox could find that will help it.⁴

² It is in fact causing such a violation, but Petitioners’ motion for summary judgment does not rely on that fact.

³ Presumably, New Lenox does not intend to claim that the court reporter at the hearing and IEPA’s counsel in developing the record for the Board both fabricated evidence showing that members of the public asked IEPA to consider additional measures to reduce the pollution to be allowed by the permit.

⁴ And, of course, if the Agency actually did such work but kept it secret, the permit would still have to be remanded because permit issuance then violated the requirement of giving proper public notice and allowing public participation. 35 Ill. Adm. Code 302.105(f).

Similarly, the truth of what the public said about the potential of the discharge to cause or contribute to violations of the offensive conditions standard (35 Ill. Adm. Code 302.203) is irrelevant. Even if New Lenox through discovery could somehow prove that all the eyewitness reports, expert testimony and published treatises cited in the record were somehow in error, the fact would remain that Illinois EPA issued the permit without assuring that the offensive conditions standard would be protected. Illinois EPA accepted all of the testimony, comments and science and did nothing with it. If Illinois EPA believed that that all those materials were false, that is not what it said on the record. The reason Illinois EPA gave for not placing a limit to prevent violation of the narrative standard is that the offensive conditions standard is "very difficult to apply." (Responsiveness Survey, Hearing Record at 357)

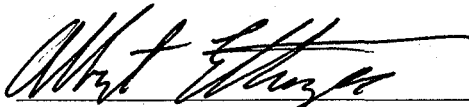
It is also clear that discovery would not help New Lenox respond to Petitioners' argument regarding Illinois EPA's failure to assure that discharges under the permit do not cause or contribute to violation of the copper standard. The basic document involved in this claim is a laboratory report submitted by a New Lenox contractor. The Agency looked at that laboratory data and determined that under U.S. EPA guidance a permit limit was necessary yet decided not to place any limit in the permit. (see Hearing Record at 508) It may well be that New Lenox' contractor did a poor job and that cross examination by New Lenox of its contractor would disclose that fact. But proof that Illinois EPA relied on bad data would certainly do nothing to show that Illinois EPA had fulfilled its duty to assure that the permit would not allow discharges that might cause or contribute to violations of the copper standard.

- B. New Lenox clearly does not need discovery to respond to Petitioners' conclusion drawn from the record before the Agency.

Even more obviously, New Lenox does not need discovery to respond to Petitioners' "conclusions derived from internal agency deliberations, alleged confusion by IEPA" and statements from the hearing.⁵ Petitioners have not cited anything with regard to internal agency deliberations that does not appear in the official record that was filed by IEPA's counsel in this proceeding. That record is fully available to New Lenox, which is represented by counsel. New Lenox can read that record just as easily as Petitioners and can correct or contradict any unsupported conclusions drawn from the record. If New Lenox does not like the record that confronts it, it can put new evidence into the record in an agency proceeding after remand.

Conclusion

New Lenox's Motion for a Stay should be denied. If New Lenox chooses not respond to Petitioners' Motion for Summary Judgment on the date currently set by the Hearing Officer, it has that option. The Board, however, should rule on Petitioners' Motion for Summary Judgment on the basis of whatever briefs are before it at the close of the briefing period that has been set by the Hearing Officer.



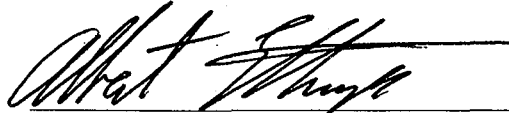
Albert F. Ettinger (Reg. No. 3125045)
Counsel for Des Plaines River Watershed Alliance, Livable
Communities Alliance, Prairie Rivers Network and Sierra Club

DATED: March 3, 2005

⁵ New Lenox mischaracterizes the hearing as an "informational hearing" as though the hearing is there to provide a learning experience to the public. It is a formal hearing required by federal and state law designed to develop evidence on which to base an agency decision. See 40 CFR 124.12 and 35 Ill. Adm. Code 309.116-119.

CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that on December 21, 2004, I filed the attached PETITIONERS' RESPONSE TO THE NEW LENOX MOTION FOR STAY OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT. An original and 9 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 to those individuals on the included service list.

A handwritten signature in black ink, appearing to read 'Albert F. Ettinger', written over a horizontal line.

Albert F. Ettinger (Reg. No. 3125045)

Counsel for Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network and Sierra Club

DATED: March 3, 2005

Environmental Law and Policy Center
35 E. Wacker Dr. Suite 1300
Chicago, Illinois 60601
312-795-3707

SERVICE LIST

Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601

Roy M. Harsch
Sheila H. Deely
Gardner Carton & Douglas LLP
191 N. Wacker Drive, Suite 3700
Chicago, IL 60606-1698

Sanjay K. Sofat
Illinois Environmental Protection Agency
1021 N. Grand Avenue East, Mail Code #21
Springfield, IL 62794-9276