

ILLINOIS POLLUTION CONTROL BOARD

April 21, 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)	Water)
PROTECTION AGENCY and VILLAGE)	
OF NEW LENOX,)	
)	
Respondents.)	

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

Today the Board decides a motion by the Village of New Lenox (Village) seeking a stay of a motion for summary judgment filed by the Des Plaines River Watershed Alliance, the Livable Communities Alliance, Prairie Rivers Network, and the Sierra Club (collectively, petitioners). The Board determines that a stay of the petitioners' motion for summary judgment in this proceeding is not appropriate. This order first provides the procedural history of this case. The order continues by summarizing the parties' arguments before stating the Board's analysis and resolution of the issue.

PROCEDURAL HISTORY

On December 2, 2003, petitioners filed a petition asking the Board to review an October 31, 2003 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(e) (2002). The Agency granted a National Pollutant Discharge Elimination System (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. On January 23, 2004, the Village waived its right to a decision until it elects to reinstate the decision period.

In the course of a status conference on March 2, 2003, the Board's Hearing Officer Bradley P. Halloran directed the parties to submit proposed discovery briefing 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.

On February 4, 2005, petitioners filed a Motion for Summary Judgment (Mot. SJ), Memorandum in Support of Summary Judgment (Memorandum), and Statement of Relevant Facts from the Agency Record. On March 1, 2005, the Village filed a Motion for Stay of Petitioner's Motion for Summary Judgment (Mot. Stay). Petitioners' Response to the New Lenox Motion for Stay of Petitioners' Motion for Summary Judgment (Pet. Resp.) 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 (Reply) accompanied for a Motion to File Reply *Instante* (Mot. File). The Board notes that petitioners have filed no response to the Village's motion to file a reply. *See* 35 Ill. Adm. Code 101.500(d). Accordingly, the Board grants the Village's Motion to File Reply *Instante* and accepts its Reply to Petitioners' Response to Motion for Stay of Petitioners' Motion for Summary Judgment.

ARGUMENTS

Village's Motion for Stay

The Village asks the Board to stay the petitioners' motion for summary judgment and briefing on that motion in order to allow the Board to decide whether to allow discovery in this case and, if so, to permit the Village to conduct it. Mot. Stay at 1. The Village states that the Agency joins the motion and authorizes the Village to represent that to the Board. *Id.* Citing to Supreme Court Rule 191 (b), the Village submitted with its motion for stay an affidavit (Aff.) of Sheila Deely in support of that motion. The affidavit notes that the parties disagree over the provisions of the Act as they regard discovery in third-party NPDES appeals. Aff. at 1. Ms.

Deely states that “[c]ertain facts material to this case have not yet been subject to discovery, specifically, allegations made by Petitioners at the informational hearing and unverified statements relied upon by petitioners in their Motion for Summary Judgment.” *Id.* Ms. Deely further states that the Village requires discovery in order to consider and respond to that motion. *Id.*

The Village argues that the petitioners’ Statement of Relevant Facts from the Agency Record consists solely of “unverified and unsworn comments submitted at the informational hearing before Illinois EPA.” Mot. Stay at 2. The Village characterizes the claims in the petitioners’ statement variously as “unverified statements and conclusions,” “unsworn statements,” “unverified claims,” “unverified and unsworn claims by various parties of uncertain credentials,” “purported conclusions,” “alleged confusion,” and “numerous other conclusory statements.” Mot. Stay at 2-3. The Village argues that the unverified nature of these claims “underline[s] the need for discovery.” Mot. Stay at 3.

The Village further states that its motion to stay “is not intended to nor does it address the administrative record or its contents.” Mot. Stay at 3. Rather, the Village seeks to establish “the extent to which Illinois EPA or a permittee may further inquire into the claims of a commenter at the public hearing that are as yet unsworn and not subject to cross examination.” *Id.* If the Board does not grant the motion to stay and permit discovery to proceed, the Village suggests that third parties would have an incentive to introduce large quantities of unverified evidence into the record, generating a large burden on the part of the permit applicant to respond to those claims. *Id.*

Generally, the Village argues that the petitioners’ motion for summary judgment as “flawed,” “premature,” and a “plunge[] forward.” Mot. Stay at 2. The Village further characterizes the motion as “an improper use of summary judgment procedure, and a waste of the time and resources of the Board, Illinois EPA, and Village.” *Id.* The Village argues that, because material facts have not yet been submitted to discovery, it requires discovery in order to respond to the motion for summary judgment. Mot. Stay at 4; Aff. at 2. Accordingly, the Village requests that the Board stay the petitioners’ motion for summary judgment pending the Board’s order on discovery. If the Board orders discovery, the Village requests the opportunity to conduct it. Mot. Stay at 4.

Petitioners’ Response to Motion to Stay

Petitioners argue that the pending discovery issue relied upon by the Village in seeking a stay is not relevant to the issues raised in the motion for summary judgment. Pet. Resp. at 1-2. Petitioners emphasize that their motion for summary judgment is not based on a claim that the Village is causing or contributing to violations of water quality standards. Pet. Resp. at 2. “Petitioners’ argument is rather that the record shows that Illinois EPA failed to assure that all reasonable measures to minimize the new pollution be incorporated into the permits, failed to assure that New Lenox discharge would not cause or contribute to a violation of the ‘offensive condition’ and failed to assure that New Lenox would not violate the ‘copper’ water quality standard.” Pet. Resp. at 2-3 (emphasis in original) (citing Memorandum at 3).

Petitioners suggest that that the subjects considered appropriate by the Village for discovery fall into two categories: comments placed in the public record and conclusions drawn by petitioners from the Agency record. Pet. Resp. at 2. As to the first category, petitioners state that arguments in their motion for summary judgment “do not rely on the truth of anything said in the record by Petitioners or other members of the public.” Pet. Resp. at 3. Specifically, petitioners question whether discovery from any person testifying or submitting a public comment would reveal whether the Agency properly considered phosphorus limits in the Village’s permit. *Id.* Petitioners stress their belief that public comments were “practically ignored in the permit decision.” *Id.*

Petitioners likewise consider public comments irrelevant with regard to the issue of the potential of causing or contributing to violations of the offensive conditions water quality standard. Pet. Resp. at 4 (citing 35 Ill. Adm. Code 302.203). Petitioners state that the Agency did not apply a limit to prevent violation of the narrative water quality standard because the standard is “very difficult to apply.” Pet. Resp. at 4 (citing Hearing Record at 357). The petitioners thus argue that, even if discovery demonstrated that all of the hearing testimony is erroneous, “the fact would remain that Illinois EPA issued the permit without assuring that the offensive conditions standard would be protected.” *Id.*

Petitioners further believe that discovery is not necessary for the Village to respond to petitioners’ arguments regarding the copper water quality standard. Pet. Resp. at 4. Petitioners note that a laboratory report submitted by a contractor of the Village’s is the “basic document” (*Id.*) on this issue. Petitioners state that the Agency examined this data, determined that a copper limit was necessary, and then declined to include one in the permit. *Id.* (citing Hearing Record at 508). The petitioners suggest that discovery on the issue of that laboratory report cannot show that the Agency fulfilled its duty with regard to the copper standard. *Id.*

Finally, petitioners argue that the Village needs no discovery on the issue of conclusions reached by the petitioners from internal Agency deliberations and statements from the hearing. Pet. Resp. at 5. Petitioners indicate that they have not cited or relied upon anything with regard to the Agency’s deliberations that did not appear in the administrative record filed by the Agency. *Id.* They suggest that that record is available to the Village to challenge any conclusions the petitioners have reached. *Id.*

Finally, petitioners argue that the Village’s affidavit “does not comply with Supreme Court Rule 191(b). . . .” Pet. Resp. at 2. They state that it does not provide detail regarding the discovery it seeks to conduct or what that discovery would show. *Id.* They further state that the affidavit does not identify any specific witness and does not reveal what the Village expects any witness to prove. *Id.*

Village’s Reply to Petitioners’ Response

In its reply, the Village expresses the belief that the petitioners’ response “is a continued abuse of the rules of procedure” and is used inappropriately to argue the merits of their case. Reply at 1.

The Village specifically challenges the petitioners' claim that it "has not identified anything that could possibly be disclosed by discovery" and that would have any bearing on the three bases for summary judgment stated in the motion. Reply at 2 (citing Pet Resp. at 1). The Village refers to claims contained in the petitioner's memorandum in support of summary judgment and states that it "has the right to inquire into the basis for Petitioners' statements." Reply at 2.

Finally, the Village disputes the petitioners' statement that its affidavit does not comply with Supreme Court Rule 191(b). The Village states that the areas in which it seeks discovery are "plain enough." Reply at 3.

BOARD ANALYSIS

The Board's procedural rules provide that, "any time after the opposing party has appeared . . . but no fewer than 30 days prior to the regularly scheduled Board meeting before the noticed hearing date, a party may move the Board for summary judgment for all or any part of the relief sought." 35 Ill. Adm. Code 101.516(a). The record in this proceeding indicates that Sanjay K. Sofat appeared January 5, 2004 for the Agency and also indicates that Roy M. Harsch and Sheila H. Deely appeared for the Village on January 21, 2004. Since no hearing date has been set in this proceeding, the Board finds that petitioners' motion for summary judgment was not untimely filed.

The Board finds that the Village has cited to no Board case or procedural rule persuasively demonstrating that the Board must or should grant a stay of the motion for summary judgment. While the hearing officer has suspended deadlines in order for the Board to consider the motion for a stay, the rules allow the non-moving party to confront the arguments in a motion for summary judgment by filing a response within 14 days of service. *See* 35 Ill. Adm. Code 101.516(a). While the Village may characterize the petitioners' motion for summary judgment as "premature" or a "plunge[] forward," (Mot. Stay at 2), the Board is not persuaded that the Village's time to respond to that motion should now be stayed.

An examination of the Village's affidavit supports the Board's finding. Citing to Supreme Court Rule 191(b), the Village submitted an affidavit concerning its need for discovery and supporting its motion for a stay. Mot. Stay at 4; Aff. at 1-2. The Board has indicated that, if discovery is considered necessary to respond to a motion for summary judgment, then a party should demonstrate that need through an affidavit that meets the requirements of Illinois Supreme Court Rule 191(b). White & Brewer Trucking, Inc. v. IEPA, PCB 96-250, slip op at 6 n.2 (Nov. 21, 1996). That rule permits the court to grant a continuance for discovery if the affidavit names persons whose affidavits cannot be procured and "what affiant believes they would testify to if sworn." Ill. Sup. Ct. R. 191(b) (2005).

While this affidavit refers to "allegations made by Petitioners at the informational hearing and unverified statements relied upon by Petitioners in their Motion for Summary Judgment" (Aff. at 2), it does not name a single person from whom discovery is sought. *See* Aff. at 1-2. The affidavit also provides no specific indication of the sworn testimony it seeks to elicit. *Id.* While the Village states that discovery is necessary, the Board finds that the affidavit does not

comply with Rule 191(b). The Board will not stay the motion for summary judgment and finds no valid reason to direct the parties to conduct discovery before the Village responds to that motion. *See, e.g., Schultz v. Hennessy Industries, Inc.*, 584 N.E.2d 235, 243 (1st Dist. 1991) (upholding denial of request for discovery where affidavit did not comply with rule).

The Board finds additional support for this conclusion in the procedural posture of this case. As the parties have acknowledged (Mot SJ at 4-5, Mot. Stay at 1), the Board now has under advisement submissions from the parties on issues relating to the scope of discovery. Today's order does not address and should in no way be construed as resolving those issues. The Board will not resolve discovery issues in the narrower context of a motion for a stay and will analyze and decide those issues separately.

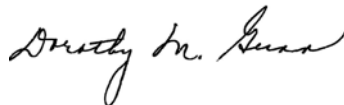
CONCLUSION

The Board finds that a stay of the petitioners' motion for summary judgment in this proceeding is not appropriate. Thus, the Board directs the hearing officer to establish a briefing schedule regarding the motion for summary judgment.

In summary, the Board grants the Village's Motion to File Reply *Instante* and accepts its Reply to Petitioners' Response to Motion for Stay of Petitioners' Motion for Summary Judgment. The Board denies the Village's motion for stay of petitioner's motion for summary judgment. At the status conference now scheduled for April 28, 2005, the Board directs the hearing officer to establish a briefing schedule with regard to the underlying motion for summary judgment.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 21, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board