ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VILLAGE OF LAKE BARRINGTON, CUBA TOWNSHIP, PRAIRIE RIVERS NETWORK, SIERRA CLUB, BETH WENTZEL and CYNTHIA SKRUKRUD,	)	
Petitioners,	)	
v.	)	PCB 05-55 (Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

SLOCUM LAKE DRAINAGE DISTRICT OF LAKE COUNTY, ILLINOIS,	)	
Petitioner,	)	
v.	)	PCB 05-58 (Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

AL PHILLIPS, VERN MEYER, GAYLE DEMARCO, GABRIELLE MEYER, LISA O'DELL, JOAN LESLIE, MICHAEL DAVEY, NANCY DOBNER, MIKE POLITO, WILLIAMS PARK IMPROVEMENT ASSOCIATION, MAT SCHLUETER, MYLITH PARK LOT OWNERS ASSOC., DONALD KREBS, DON BERKSHIRE, JUDY BRUMME, TWIN POND FARMS HOMEOWNERS ASSOC., JULIA TUDOR, CHRISTINE DEVINEY,	)	
Petitioners,	)	
v.	)	PCB 05-59
	)	(Permit Appeal-NPDES)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA,	)	
Respondents.	)	

NOTICE OF FILING

TO: See Attached Certificate of Service

Please take notice that on March 7, 2005, I filed with the Illinois Pollution Control Board an original and nine copies of this Notice of Filing and attached THE VILLAGE OF WAUCONDA'S REPLY BRIEF IN SUPPORT OF THE NPDES PERMIT DECISION OF THE AGENCY BELOW AND WAUCONDA'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT, which is hereby served upon you.

Dated: March 7, 2005

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

VILLAGE OF LAKE BARRINGTON, CUBA TOWNSHIP, PRAIRIE RIVERS NETWORK, SIERRA CLUB, BETH WENTZEL and CYNTHIA SKRUKRUD, Petitioners, **v.** ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA, Respondents.	)	PCB 05-55 (Permit Appeal-NPDES)

SLOCUM LAKE DRAINAGE DISTRICT OF LAKE COUNTY, ILLINOIS, Petitioner, **v.** ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF WAUCONDA, Respondents.	)	PCB 05-58 (Permit Appeal-NPDES)

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THE VILLAGE OF WAUCONDA'S REPLY BRIEF IN SUPPORT OF THE NPDES PERMIT DECISION OF THE AGENCY BELOW AND WAUCONDA'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

"In the State of Perfect, there exists a little village called Perfect that has the power to solve all of the pollution problems for the region. There also exists a state agency in the State of Perfect that has the power, with a single permit, to require the Village of Perfect to fix all of the pollution problems that exist. Money is no object for the little village, because in the Village of Perfect, money grows on trees."

Such should be the opening line of the Resident Group and Drainage District briefs, since only in such a fantasy-land could their petitions prevail. This case is not about landfills or flooding or drinking water wells or septic systems or past enforcement actions against any of the parties to this case. No, not even a Walgreen's commercial can save the Petitioners because this case is about one very narrow question: Will Wauconda's discharge, as proposed, meet the applicable water quality standards? The Agency answered that question in the affirmative when it issued the Modified Permit,

and that decision is well supported by the record in this case. See Wauconda's initial Brief.

I. THE NPDES PERMIT IS NARROWLY FOCUSED

The Resident Group and the Drainage District would have this Board believe that Wauconda and the Agency have the ability to solve all of the region's pollution issues with a single permit. As this Board well knows, there are separate environmental laws, policies, procedures and programs to deal with each of the issues raised by the Resident Group and the Drainage District. See 415 ILCS 5/1 *et seq.* (2004).

A. Landfills Are Separately Regulated

The construction, operation and closure of all landfills falls under Section 21 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/21 (2004), as well as a very comprehensive set of Board regulations. See 35 Ill. Adm. Code Parts 807-832. Older landfills that were constructed prior to the implementation of the design criteria set forth in 35 Ill. Adm. Code Part 811 are frequently the subject of actions by the state and federal environmental agencies. See, *e.g.*, Wilsonville vs. SCA Services, 86 Ill.2d 1 (1981); East Moline v. Pollution Control Board, 136 Ill. App. 3d 687 (1985); People v. Brockman, 148 Ill. 2d 260 (1992); EPA v. Pollution Control Board, 252 Ill. App. 3d 828 (1993); ESG Watts v. Pollution Control Board, 282 Ill. App. 3d 43 (1996).

As Petitioners have discussed in their Petitions and briefs, the issues related to the Wauconda Sand & Gravel and Tarkowski landfills already have been or are being addressed in other proceedings. Resident Group Brief, pp.10-13. Drainage District Petition, Section F. That the Wauconda Sand & Gravel and Tarkowski landfills may

have an adverse impact on ground water in the vicinity of those sites, bears absolutely NO relevance to the issuance of an NPDES permit to discharge to surface water.

Petitioners' attempts to make a relevant connection to the Wauconda WWTP fail since both Wauconda and the Agency tested Wauconda's influent and effluent for industrial contaminants. R. 829-1022, 1522-1579, 1597-1598, 1608-1676, 1774-1776, 1950-1953, 2015-2027, 2045-2048, 2054-2099, 2168-2171. The only industrial contaminant that was found in any quanity was copper. The Agency dealt with this finding by including a limit for copper in the Modified Permit. R. 2252-2254.

Since the procedures and mechanisms already in place for dealing with issues relating to the Wauconda Sand & Gravel and Tarkowski Superfund sites are being utilized, Petitioners' attempts to raise those issues in the context of an unrelated wastewater discharge permit are duplicative and frivolous and should be dismissed as such.

B. The NPDES Permit Is Not an Enforcement Tool

As this Board and the Illinois Courts have made very clear, an Agency permit decision may not be used as a substitute for an enforcement action for violations of the Act. As the Appellate Court stated in EPA v. Pollution Control Board, 252 Ill. App. 3d 828, 830 (1993),

> The Board heard evidence and reasonably determined that the Agency had denied the requested permits solely on the basis of alleged violations of the Act. Additionally, the Board was correct in noting in its written order that the procedures for permit denial and enforcement of the Act are separate and distinct. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1039(a) (permit denial); Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1031 (enforcement).) Therefore, we conclude the Board properly drew the inference that the Agency improperly used the permit denial process as a substitute for the enforcement procedure.

(Emphasis added.) Much is made in Petitioners' briefs about past violations of the Act and regulations by Wauconda. Resident Group Brief, pp. 17-24; Drainage Ditch Brief,

Section V. As the Petitioners point out, however, those issues have been dealt with through appropriate enforcement actions by the Agency and the Illinois Attorney General's Office.

Petitioners rely heavily upon new language in Section 39(a) of the Act, which states:

> In making its determinations on permit applications under this Section the Agency may consider prior adjudications of noncompliance with this Act by the applicant that involved a release of a contaminant into the environment. In granting permits, the Agency may impose reasonable conditions specifically related to the applicant's past compliance history with this Act as necessary to correct, detect, or prevent noncompliance.

(415 ILCS 5/39(a) (2004), emphasis added.) Importantly, this new language is permissive and not mandatory. Secondly, it only allows the Agency to consider adjudicated violations of the Act, *i.e.*, ones which have been resolved through Court or Board Order. When viewed in the context of cases like ESG Watts v. Pollution Control Board, 286 Ill. App. 3d 325, 335 (1997), the reason for this qualifier becomes clear. (Citing Martell v. Mauzy, 511 F. Supp. 729 (N.D. Ill. 1981), for the proposition that an Agency permit reviewer's reliance upon violations that are only alleged and not adjudicated, violates applicant's due process rights.) Finally, to the extent the Agency may consider past adjudicated violations, its authority is limited to imposing reasonable conditions specifically related to the violations.

Importantly, this language does not authorize the Agency to deny the permit entirely, but rather to simply impose reasonable conditions. Since Wauconda's past violations had already been resolved through the construction of certain improvements at the WWTP (see R. 2271-2285), the Agency saw no need to impose additional conditions in the permit. Further, Petitioners' suggestion to the contrary notwithstanding, it would have been inappropriate for the Agency to consider allegations

regarding the plant "foam out" that were pending, but not yet adjudicated. Nevertheless, the Agency did add Special Condition 8 to the permit, requiring Wauconda to update its industrial user survey annually. R. 2257. Well after the permit was issued, the Agency and the Attorney General's Office resolved the pending allegations with Wauconda in the form of a Consent Order. See Petitioners' Group Exhibit G. Among other things, the Order requires Wauconda to "implement and enforce a pretreatment program." Accordingly, to the extent Petitioners have raised legitimate concerns regarding industrial discharges to Wauconda's WWTP, they have all now been resolved through appropriate means.

Petitioners' attempts to re-raise issues here that already have been dealt with in other proceedings are therefore duplicative and frivolous and should be dismissed as such.

C. The NPDES Permit is Not a Watershed Management Tool

Petitioners have argued that the NPDES Permit should be used as a mechanism for dealing with all of the flooding problems in the Fiddle Creek watershed. Resident Group Brief, p. 31; Drainage District Brief, Section C. As the Agency correctly notes in its Responsiveness Summary, however, it is the Lake County Stormwater Management Commission ("SMC") and not the Agency that has the authority to deal with watershed management issues. R. 2226-2228. See Lake County Watershed Development Ordinance, Article I, Section A. Prior to submitting its application to the Agency, Wauconda sought the approval of the SMC to increase its discharge from 1.4 MGD to 2.4 MGD. R. 3. SMC noted that, "At the appropriate time, the Village will apply to SMC for a Watershed Development Permit, due to the proposed additional effluent discharge

and floodplain construction within Fiddle Creek, a flood prone area." R. 3. Further, SMC noted that, "The Village would work with SMC's Wetland Specialist, Joe Hmieleski, on the design of the outfall so that the additional effluent discharge could potentially improve the functionality of the receiving (and presently degraded) wetlands." Waconda also submitted technical reports to the Agency in response to the flooding concern that demonstrated that the increase flow from the WWTP would have no adverse impact on the receiving stream. R. 829-1022.

Neither the NPDES Permit nor this appeal is the appropriate mechanism for challenging SMC's review of Wauconda's Modified Permit. See Lake County Watershed Development Ordinance, Article V, Section B. Accordingly, Petitioners' attempts to collaterally attack the SMC's determination here are duplicative and frivolous and should be dismissed as such.

D. This Is Not A Permit Revocation Proceeding

Petitioners would have us believe that they are allowed to use this proceeding as a means of revoking Wauconda's existing NPDES Permit. As the Board is well aware, however, there is only one procedure set out in the Act for that purpose, and this is not it. See 415 ILCS 5/33(b) (2004). As Section 33(b) of the Act makes clear, the Board has the authority to revoke a permit as a form of relief in an enforcement action for violations of the Act. (415 ILCS 5/33(b) (2004)) That same authority does not exist, however, in permit appeal proceedings. See 415 ILCS 5/40 (2004). If and when Petitioners are able to develop an enforcement case that is not duplicative and frivolous nor merely based upon scare tactics and innuendo, then and only then may Petitioners seek to have Wauconda's NPDES Permit revoked.

E. This is Not a 303(d) Proceeding

Both the Resident Group and Drainage District seek to have the receiving stream in this case, Fiddle Creek, declared an impaired water. Resident Group Petition, pp. 28-32; Drainage District Petition, Sections III and IV. By making such a request in this proceeding, however, Petitioners ignore the fact that there is a well settled process for identifying and listing impaired waters, and this is not it. As the Agency notes on its webpage:

> Section 303(d) of the federal Clean Water Act requires states to identify waters that do not meet applicable water quality standards or do not fully support their designated uses. States are required to submit a prioritized list of impaired waters, known as the 303(d) List, to the U.S. Environmental Protection Agency for review and approval. The CWA also requires that a TMDL be developed for each pollutant of an impaired water body. Illinois EPA is responsible for carrying out the mandates of the Clean Water Act for the state of Illinois.
>
> The establishment of a Total Maximum Daily Load sets the pollutant reduction goal necessary to improve impaired waters. It determines the load, or quantity, of any given pollutant that can be allowed in a particular water body. A TMDL must consider all potential sources of pollutants, whether point or nonpoint. It also takes into account a margin of safety, which reflects scientific uncertainty, as well as the effects of seasonal variation.
>
> Developing TMDLs in a watershed begins with the collection of vast amounts of data on factors including water quality, point source discharge, precipitation, soils, geology, topography, and land use (construction, agriculture, mining, etc.) within that specific watershed. All impaired water-body segments within the watershed are identified, along with the potential pollutants causing the impairments.
>
> Next, Illinois EPA determines the tools necessary to develop the TMDL. In most cases, computer models are used to calculate pollutant loads. The appropriate model or models are selected based on the pollutants of concern, the amount of data available, and the type of water body. Once the model is selected, the data collected for the watershed are entered, and the model is calibrated and verified so that the computed values match those of known field data. The model can then be used to develop different scenarios, by first determining the amount of specific pollutants each source contributes, then calculating the amount each pollutant needs to be reduced, and finally specifying how the reduced pollutant load would be allocated among the different sources.
>
> After the reduced pollutant loads have been determined, an implementation plan is developed for the watershed spelling out the actions necessary to achieve the goals. The plan specifies limits for point source discharges and recommends best management practices (BMPs) for nonpoint sources. It also estimates associated costs and lays out a schedule for implementation. Commitment to the implementation plan by the citizens who live and work in the watershed is essential to success in reducing the pollutant loads and improving water quality.

See Agency website at: http://www.epa.state.il.us/water/tmdl/tmdl-process.html.

The procedure for seeking to have a water body declared "impaired" is clearly set forth in Section 303(d) of the Clean Water Act and regulations thereunder. 33 USC 1251 *et seq.* and 40 CFR Part 130. As explained above, through an elaborate process of collecting and analyzing data on various surface water segments, the Agency determines whether the segments are "impaired" and therefore require the establishment of Total Maximum Daily Loads ("TMDLs"). After the initial submittal to USEPA, the Agency is required to update the list every two years. See 40 CFR 130.7(b). The Agency has established a process for accepting surface water data from the general public and will review and analyze the data if it meets the requirements set forth in 40 CFR Part 130. See Agency web page at: http://www.epa.state.il.us/water/tmdl/tmdl-process.html.

If Petitioners feel the Agency should be listing Fiddle Creek as an impaired water, they should Petition the Agency directly and provide sufficient technical data to support their claim. Further, if Petitioners feel that the Agency is not responding appropriately to their request, the appropriate forum in which to pursue their appeal is the Regional Administrator for USEPA Region 5. See 40 CFR 130.7(d).

Similarly, the Board regulations set forth a very specific process for designating a surface water as an "Outstanding Water Resource". See 35 Ill. Adm. Code 102.800, *et seq.* Notably, that process begins with a petition before the Board. See 35 Ill. Adm. Code 102.810. The Board rules are also specific as to the contents of the Petition and the required supporting documentation. See 35 Ill. Adm. Code 102.820. The instant proceeding is clearly not an OWR Petition, and even if it were, Petitioners' petitions fail to meet the bare minimum requirements set forth in 35 Ill. Adm. Code 102.820.

II. PROCEDURAL DUE PROCESS HAS BEEN SATISFIED

As Wauconda's and the Agency's initial briefs make clear, to the extent that procedural due process applies to this type of proceeding, it has been satisfied by the opportunity to test the sufficiency of Wauconda's application and of the Agency's conclusions during a hearing before the Board. See Illinois Environmental Protection Agency v. Pollution Control Board, 115 Ill. 2d 65, 70 (1986):

> Unlike the procedures required under sections 39.2 and 40.1, the permit process under sections 39(a) and 40(a)(1) does not require the Agency to conduct any hearing. Consequently, no procedures, such as cross-examination, are available for the applicant to test the validity of the information the Agency relies upon in denying its application. As the appellate court noted, the procedure before the Agency has none of the characteristics of an adversary proceeding. The safeguards of a due process hearing are absent until the hearing before the Board. We therefore agree with the appellate court's holding that the Board is not required to apply the manifest-weight test to its review of the Agency's decision denying a permit.

(Emphasis added.) Regrettably, Petitioners chose to waive their rights to a contested hearing in this case, so they cannot now be heard to complain that due process was not afforded them.

Furthermore, if and when Petitioners are able to actually support their hysterical claims with defensible data, they will have their day in court upon the filing of a citizen's suit for violations of the Act. See Landfill, Inc. v. Pollution Control Board, 72 Ill.2d 541, 559-560 (1978).

III. THE DECISION OF THE AGENCY IS AMPLY SUPPORTED BY THE RECORD

Nothing in the Petitioners' briefs is any more persuasive than their unsupported and unsubstantiated ramblings in the record before the Agency. All of the legitimate

substantive concerns raised below were adequately addressed with either permit limits or special conditions in the Modified Permit. See R. 2210-2262. Accordingly, Wauconda stands by its and the Agency's initial briefs.

Wherefore, for all of the foregoing reasons, Wauconda respectfully requests that the Board affirm the decision of the Agency.

IV. ORAL ARGUMENT

Should the Board desire it and should there be enough time for same, Wauconda welcomes the opportunity for oral argument in this case pursuant to 35 Ill. Adm. Code 101.700.

February 28, 2005

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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing THE VILLAGE OF WAUCONDA'S REPLY BRIEF IN SUPPORT OF THE NPDES PERMIT DECISION OF THE AGENCY BELOW AND WAUCONDA'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT were hand delivered or faxed and mailed by overnight mail, on March 7, 2005 to each of the following persons:

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