ILLINOIS POLLUTION CONTROL BOARD
April 21, 2005

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 (Third-Party NPDES Permit Appeal – Water)

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

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

PERCY L. ANGELO OF MAYER, BROWN, ROWE, & MAW, LLP APPEARED ON BEHALF OF THE PETITIONERS IN PCB 05-55;

BONNIE MACFARLANE OF LAW OFFICES OF BONNIE MACFARLANE, P.C. APPEARED ON BEHALF OF SLOCUM DRAINAGE DISTRICT OF LAKE COUNTY, ILLINOIS;

JAY GLENN APPEARED ON BEHALF OF THE PETITIONERS IN PCB 05-59;

SANJAY K. SOFAT OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF RESPONDENT; and

WILLLIAM D. SEITH OF TOTAL ENVIRONMENTAL SOLUTIONS APPEARED ON BEHALF OF VILLAGE OF WAUCONDA.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

Multiple petitioners challenged the Illinois Environmental Protection Agency's (Agency) August 23, 2004 determination to grant a National Pollutant Discharge Elimination System (NPDES) permit to the Village of Wauconda (Wauconda). Some of the petitioners filed a stipulation and settlement reached with Wauconda, while the remaining petitioners continue to challenge the issuance of the NPDES permit. The Board will not adopt the stipulation and

settlement. The Board finds that the arguments challenging the issuance of the permit do not succeed and, therefore, the Agency properly issued the permit. The opinion will set forth the background, facts, and issues in this proceeding. The opinion will then summarize the arguments of the parties under each issue and explain the Board's decision on each of the issues.

PROCEDURAL BACKGROUND

On September 17, 2004, Village Of Lake Barrington, Cuba Township, Prairie Rivers Network, Sierra Club, Beth Wentzel and Cynthia Skrukrud (Municipal-Environmental petitioners) filed a petition asking the Board to review an August 23, 2004 determination by the Agency. On September 27, 2004, Slocum Lake Drainage District of Lake County, Illinois (Slocum) filed a petition for review of the Agency's decision. Also on September 27, 2004, Al Phillips, Vern Meyer, Gayle Demarco, Gabrielle Meyer, Lisa O'Dell, Joan Leslie, Michael Davey, Nancy Dobner, Mike Politio, Williams Park Improvement Association, Mat Schlueter, Mylith Park Lot Owners Association, Donald Krebs, Don Berkshire, Judy Brumme, Twin Pond Farms Homeowners Association, Julia Tudor, and Christine Deviney (Residents) filed a petition for review of the Agency's decision. (collectively, petitioners). On October 7, 2004, the Board accepted the petitions for hearing in a single order, thus consolidating the cases.

On January 11, 2005, the Municipal-Environmental petitioners along with Wauconda filed a stipulation. The stipulation notes that "upon the Pollution Control Board's acceptance and approval of the terms of this Stipulation" the Municipal-Environmental petitioners will ask the Board to dismiss the permit appeal in PCB 05-55. Stip. at 8. The stipulation further indicates that "if the Board does not approve and accept" the stipulation, the stipulation will remain binding on the parties to the stipulation. Stip. at 12. On February 3, 2005, the Board declined to accept the stipulation and settlement.

On February 10, 2005, hearing was held before Board Hearing Officer Bradley P. Halloran. The parties filed simultaneous briefs on February 25, 2005,[1] and simultaneous replies on March 7, 2005.

Wauconda's brief includes a motion to dismiss the petition in PCB 05-59 and a motion to dismiss or for summary judgment in PCB 05-59. WBr. At 1-9. Pursuant to the Board's rules both the motions have been filed untimely. *See* 35 Ill. Adm. Code 101.506 and 101.516(a). Furthermore, the case has now been fully briefed and is ripe for decision on the merits. Therefore, the Board denies the motions and will decide the case on the merits of the arguments.

On March 2, 2005, the Board received a public comment from David J. Suchor. Mr. Suchor indicated that the Mylith Park Lot Owners Association had not voted to become a part of

[1] The Municipal-Environmental petitioners brief will be cited as "05-55Br." and the reply will be cited as "05-55Reply". The Slocum brief will be cited as "05-58Br." and the reply will be cited as "05-58Reply". The Residents brief will be cited as "05-59Br." and the reply will be cited as "05-59Reply". The Wauconda brief will be cited as "WBr." and the reply will be cited as "WReply". The Agency brief will be cited as "Ag.Br." and the reply will be cited as "Ag.Reply".

the permit appeal and asked that the Mylith Park Lot Owners Association be removed from the proceeding. PC 1. On March 10, 2005, the Board received a public comment from Mike Politio. Mr. Politio indicated that Mr. Jay Glenn no longer represents either Mr. Politio or the Williams Park Improvement Association. PC 2. On March 28, 2005, the Williams Park Improvement Association filed an additional comment indicating that Mr. Glenn does represent the Williams Park Improvement Association. PC 3. Because the Board today decides this case, the Board finds that the Mylith Park Lot Owners Association and Mr. Politio's requests are moot.

FACTS

On March 24, 2003, the Agency received Wauconda's application for modification of Wauconda's NPDES permit. R. at 1608-69. Wauconda proposes to expand the existing wastewater treatment plant in two phases. R. at 1608. In phase one, Wauconda plans to expand from a design average flow of 1.4 million gallons per day (mgd) to 1.9 mgd with design maximums changing from 4.0 mgd to 5.963 mgd. R. at 1614, 2213. In phase two, Wauconda will expand the plant to a design average flow of 2.4 mgd and a design maximum flow of 7.93 mgd. *Id*.

Wauconda's treatment plant is located at 302 Slocum Lake Road and the effluent from the plant discharges into Fiddle Creek. R. at 2213. Fiddle Creek is classified as a general use stream, which ultimately discharges into the Fox River. *Id*. Wauconda has used this same discharge point since 1983. *Id*.

Prior to using the current discharge point, Wauconda discharged effluent into the Bangs Lake Drain Creek, which flows into Slocum Lake. R. at 2213. Slocum Lake discharges into the Slocum Drainage ditch which joins the Fox River. *Id*. In 1977, Wauconda was granted a variance from the phosphorus standard. R. at 2213; *see also* Village of Wauconda v. IEPA, PCB 11-125 (Aug. 4, 1977). The discharge was move in 1983 based on another Board order. R. at 2213; *See also* Village of Wauconda v. IEPA, PCB 83-237 (Jan. 9, 1986).

Fiddle Creek is a part of a system that includes wetlands and man-made drainage ditches. R. at 2213. Fiddle Creek flows through a man-made silt trap and then joins into a wetlands complex that has been channelized. *Id*. The drainage ditch flows west for approximately 625 feet, south for approximately 1,500 feet, west for approximately 5,250 feet, south for approximately 1,250 feet and west for approximately 1,125 feet where the ditch joins the Slocum Lake Drain before entering the Fox River. R. at 236-38.

The land use surrounding Fiddle Creek has changed from farmland to highly populated residential. R. at 2213. Fiddle Creek passes through several subdivisions before discharging into the Fox River about 2.4 miles from Wauconda's outfall. *Id*.

After receiving the NPDES permit application, the Agency conducted a general review on April 9-10, 2003. R. at 1673-76. Starting on July 25, 2003, the Agency provided public notice in the *Wauconda Leader* of the draft NPDES permit. R. at 2212. On July 23, 2003, the Agency mailed public hearing notices to local legislators, county and municipal officials, environmental organizations, and interested citizens. *Id*. Prairie Rivers Network also provided

notice of the public hearing by sending the notice to the "listserv" to assist the Agency in notifying the public. *Id*. From August 1, 2003 through September 7, 2003, the Agency published notice of the public hearing in four separate newspapers. *Id*.

A public hearing was held after proper newspaper notice on September 9, 2003. R. at 2212. Approximately 200 participants attended the public hearing. *Id*. On October 8, 2003, the Agency posted the transcript of the public hearing on the Agency's website. The Agency accepted public comment until October 31, 2003. *Id*. On August 23, 2004, the Agency issued the NPDES permit. R. at 2251.

STATUTORY BACKGROUND

Section 40(e)(1) of the Environmental Protection Act (Act) (415 ILCS 5/40(e)(1) (2002)) allows certain third parties to appeal Agency determinations to grant NPDES permits. The third party's petition to the Board must contain:

> a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held; and
>
> a demonstration that the petitioner is so situated as to be affected by the permitted facility. 415 ILCS 5/40(e)(2) (2002).

Pursuant to Section 40(e)(3) of the Act (415 ILCS 5/40(e)(3) (2002)), petitioners have the burden of proof and hearings "will be based exclusively on the record before the Agency at the time the permit or decision was issued." 415 ILCS 5/40(e)(3) (2002).

Section 39(a) of the Act (415 ILCS 5/39(a) (2002)) provides that the Agency has a duty to issue a permit upon proof that the facility will not cause a violation of the Act or Board regulations. Section 39(a) further provides that "[i]n making determinations on permit applications . . . the Agency may consider prior adjudications of noncompliance" with the Act. 415 ILCS 4/39(a) (2002 State Bar Edition, 2003 Supp.)

STANDARD OF REVIEW

The Board's scope of review and standard of review are the same whether a permit applicant or a third party brings a petition for review of an NPDES permit. Prairie Rivers Network v. PCB *et al*., 335 Ill. App. 3d 391, 401; 781 N.E.2d 372, 380 (4th Dist. 2002) and Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E. 2d 189 (1st Dist. 1983). The distinction between the two types of NPDES permit appeals is which party bears the burden of proof. Under Section 40(e)(3) of the Act, in a third party NPDES permit appeal, the burden of proof is on the third party. 415 ILCS 5/40(e)(3) (2002); Prairie Rivers, 335 Ill. App. 3d 391, 401; 781 N.E.2d 372, 380. Under Section 40(a)(1) of the Act, if the permit applicant appeals the permit, the burden of proof is on the permit applicant. 415 ILCS 5/40(a)(1) (2002).

The question before the Board in permit appeal proceedings is: (1) whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would have occurred if the requested permit had been issued; or (2) whether the third party proves that the permit as issued will violate the Act or Board regulations. Joliet Sand & Gravel, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958; Prairie Rivers, 335 Ill. App. 3d at 401; 781 N.E.2d at 380. The Agency's denial letter frames the issues on appeal and the burden of proof is on the petitioner. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 676 N.E.2d 299 (3rd Dist. 1997).

The Board's review of permit appeals is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112 (Aug. 9, 2001) aff'd at 335 Ill. App. 3d 391, 401; 781 N.E.2d 372, 380 (4th Dist. 2002); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987).

ISSUES

The parties have raised several issues for Board decision in this proceeding. The first issue that the Board will address is whether or not the stipulation and settlement agreement entered into by Wauconda and the Municipal-Environmental petitioners should be accepted. The second issue is the sufficiency of the Agency's antidegradation analysis. The third issue is the lack of a pretreatment program included in the permit. The fourth issue is the Agency's evaluation of prior permit violations in determining to issue a permit. The fifth issue is whether the Agency denied due process to the Residents. The Board will address each issue in turn below.

DISCUSSION

The Board will first summarize the general arguments put forth by the Agency. Then the Board will organize the discussion by issue. Each issue will be set forth followed by the arguments of the parties. The Board will conclude each section with a discussion of the Board's findings on the particular issue raised.

Agency's General Arguments

The Agency argues that the burden of proof is on the Residents and Slocum to establish that the permit as issued would violate the Act or Board regulations. Ag.Br. at 13. The Agency opines that "as long as there is substantial evidence in the record" the Agency's decision must be affirmed. Ag.Br. at 14. The Agency asserts that the Residents and Slocum have made no attempt to establish a lack of evidence in the record supporting issuance of the permit and in fact waived their right to present a case or cross-examine Agency staff. Ag.Br. at 15. The Agency notes that the Residents and Slocum also did not present expert witnesses or scientific evidence to establish shortcomings in the permit that would cause a violation of the Act or Board regulations. *Id.*

The Agency maintains that mere dislike of the NPDES permit and permit conditions or mere allegations of noncompliance with the law does not satisfy the burden of proof. Ag.Br. at 15. The Agency asserts that the petitions and the failure of Residents and Slocum to present any evidence at the Board's hearing demonstrate that Residents and Slocum mere belief is not based on any scientific findings that the water quality standard would not be met. Ag.Br. at 16.

Board Analysis

The Board agrees with the Agency that the petitioners in a third party NPDES permit appeal bear the burden of establishing that the permit as issued would violate the Act or Board regulations. The Board also agrees that mere dislike is not sufficient to satisfy that burden. In this case, the Board finds that petitioners must establish that the permit issued to Wauconda will violate the Act or Board regulations in order for the Board to find for the petitioners in this matter.

Stipulation and Settlement Agreement

The first issue the Board will examine is whether or not the stipulation and settlement agreement entered into by the Municipal-Environmental petitioners and Wauconda should be adopted by the Board. The following paragraphs summarize the positions of the parties. Then the Board will discuss the Board's decision on this issue.

The Municipal-Environmental Petitioners' Argument

The Municipal-Environmental petitioners believe that the settlement agreement reached "involves an appropriate resolution of the issues" raised in this proceeding. 05-55Br. at 5. The Municipal-Environmental petitioners ask that the Board "confirm that the resolution reached is appropriate" and that the Board use the resolution as the basis for the Board's decision in this proceeding. 05-55Br. at 5-6.

The Municipal-Environmental petitioners approached settlement of the issues between them and Wauconda by adopting intergovernmental agreements; however, there was concern as to how to include the environmental groups and individuals. 05-55Br. at 10. The Municipal-Environmental petitioners decided that a stipulation and settlement document could be used. *Id.* Further, the stipulation was a mechanism that would allow the agreement to be presented to the Board, according to Municipal-Environmental petitioners. *Id.*

The Municipal-Environmental petitioners ask that the Board review the issues raised in the proceeding and based on the record, exercise the Board's independent judgment to accept the conclusions and resolutions in the stipulation. 05-55Br. at 10. The Municipal-Environmental petitioners accept that the Board is not bound by the resolutions reached in the stipulation; however, they believe that the Board will find that the record in this proceeding supports the resolution of the issues set forth in the stipulation. *Id.* The Municipal-Environmental petitioners seek to have the Board accept the stipulation in the same manner as stipulations are accepted in enforcement cases. *Id.*

The Municipal-Environmental petitioners suggest that accepting stipulations in third-party NPDES permit appeals is a way of encouraging responsible settlements. 05-55Br. at 11. Settlement would involve the public as much as possible, but would not compromise the obligation of the Board to review permit appeals, argue the Municipal-Environmental petitioners. *Id*. The Municipal-Environmental petitioners also believe that it is significant that Wauconda has agreed "to accept a revised permit incorporating the additional limitations identified, insuring their incorporation in a permit document with appropriate public availability." *Id*.

Wauconda's Argument

Wauconda states that Wauconda "fully understands and accepts the Board's decision to decline acceptance of the stipulation" without the Board conducting a review. WBr. at 16. Wauconda is bound by the terms of the agreement and "is prepared to accept a Board order in this case that is consistent" with the stipulation. *Id*.

Agency's Argument

The Agency states that as the Municipal-Environmental petitioners and Wauconda have "expressed their desire to be bound by the terms of the stipulation" and the Agency does not address the issues raised by the Municipal-Environmental petitioners. Ag. Br. at 8.

Board Analysis

As the Board stated in the February 3, 2005 order, the Board is reluctant to accept settlement agreements in permit appeals. The Board has stated:

> The Board has difficulty in dealing with settlement in permit appeal cases which involve the Agency issuance of negotiated permit containing conditions for which no record exists "setting out sufficient technical fact and legal assertions to allow the Board to exercise its independent judgment and to make proper findings of fact and conclusion of law." Caterpillar Tractor Co. v. IEPA, PCB 79-180 (June 2, 1983) *slip op* at 1-2. The Board has not issued orders incorporating the terms of such stipulations as the Board does in enforcement cases. Meyer Steel Drum, Inc. v. IEPA, PCB 92-76 (Aug. 13, 1992); General Electric Company v. IEPA, PCB 90-65 (Sept. 12, 1991).

The Board is not persuaded that the Board should accept the stipulation filed in this proceeding. The Board is reluctant to adopt this procedure for several reasons. First, the settlement would have Wauconda seek modification of the NPDES permit (05-55Br. at Attach A pgs 7-8). Acceptance of a settlement wherein a modified permit must be sought might be interpreted as the Board approving the modifications Wauconda must seek by agreement, before the application is filed. In addition, the Agency, who is responsible for reviewing all permit applications, including any that the settlement agreement might require, is not a party to the stipulation. Finally, the stipulation represents an agreement between Wauconda and the Municipal-Environmental petitioners that would require modification of the permit at issue in this proceeding. The Board's acceptance of the settlement might also be viewed as agreement by

the Board that the permit at issue was somehow insufficient. Therefore, the Board declines to accept the stipulation and settlement.

The Municipal-Environmental petitioners did not present any argument in their closing brief except to argue for the adoption of the stipulation and settlement agreement. The Board finds that the Municipal-Environmental petitioners have waived any argument in opposition to the issuance of the permit. *See e.g.* People v. Economy Plating, PCB 97-69 (May 6, 2004); People v. Clark Refining & Marketing, Inc., PCB 95-163 (Sept. 17, 1998). Therefore, the Board finds that the Municipal-Environmental petitioners have not established that the permit as issued would violate the Act or Board regulations.

Agency's Antidegradation Analysis

The second issue raised concerns the sufficiency of the Agency's antidegradation analysis. The Board will summarize the arguments of the parties and then analyze the Board's findings.

Slocum's Argument

Slocum argues that the Agency's antidegradation assessment is insufficient and does not comply with relevant rules. 05-58Br. at 8. Slocum asserts that the Agency relied on water quality data from a stream survey conducted on September 15, 1993 (1993 Survey). *Id*. The 1993 survey found "fair environmental conditions in Wauconda Creek with minor impact from the Wauconda" discharge. R. at 995, 1677; 05-58Br. at 8-9. The 1993 survey identified levels of conductivity, nitrate plus nitrite, phosphorus, sodium, potassium, boron, strontium, and oil downstream of the Wauconda outfall, according to Slocum. R. at 928; 05-58Br. at 9. Slocum maintains that despite the findings of the 1993 Survey, none of the contaminants were evaluated by the Agency as a part of the antidegradation analysis performed in 2003. *Id*. Slocum further notes that the Agency's 2003 antidegradation assessment indicates that the stream will experience increase in loading over time, because of the discharge. R. at 995; 05-58Br. at 9. Slocum asserts that the relevant data basis date for the antidegradation assessment should be November 28, 1975. 05-58Br. at 9.

Slocum asserts that the water quality was not evaluated based on current data by the Agency and that the engineers hired by the Lake County Forest Preserve District, Lake Barrington and Cuba Township disagree with the Agency's analysis. 05-58Br. at 11. Lake County Forest Preserve hired Baetis Environmental Services, Inc. (Baetis) and Lake Barrington and Cuba Township hired Huff & Huff (Huff). 05-58Br. at 11 and 14. The report prepared by Baetis, which delineates the information used in his review, is located in the record at pages 314-36. The report from Huff is found in the record at pages 2106-7.

Baetis indicated that the effluent is causing downstream oxygen deficits and the proposed limit for dissolved oxygen will not likely be met. R. at 333; 05-58Br. at 12. Baetis attributed water quality violations for dissolved oxygen to the discharge from the Wauconda plant. R. at 321; 05-58Br. at 12. Baetis further indicated that the Agency's antidegradation assessment did not properly characterize the affected water body. *Id*. Baetis opined that the additional

biochemical oxygen demand wasteloads will degrade the dissolved oxygen resources in the creek beyond existing conditions. *Id.*

Huff found the same results as Baetis noting that their analysis had found dissolved oxygen levels of 5.0mg/L below the Wauconda outfall and the entire Fiddle Creek. R. at 2106; 05-58Br. at 14. Huff also measured total phosphorus at an average of 3.9mg/L and nitrates were 18.0 mg/L in Fiddle Creek. *Id*. Huff concludes that the current levels of dissolved oxygen, phosphorus, and nitrates are sufficient to list Fiddle Creek as an impaired stream. R. at 2106-07; 05-58Br. at 14.

Slocum argues that the Agency utilized data that was over ten years old in making the antidegradation assessment. 05-58Br. at 15. Further, Slocum asserts the Agency defers issues on nitrogen and phosphorus because state standards will be adopted in the future. *Id*. Slocum maintains that the Agency's antidegradation assessment does not comply with the Board's rules. *Id*. Slocum opines that the Board should scrutinize the insufficient data and require the Agency to conduct additional evaluations of recent data to comply with the antidegradation rules. 05-58Br. at 16.

Slocum asserts that the antidegradation assessment conducted by the Agency was inadequate and inconsistent with the findings and conclusions of other professionals. 05-58Br. at 22. Slocum opines that because of the more recent data reviewed and analyzed, from more current sources, the Board can require the Agency to reinvestigate and to use more current data. *Id*.

Residents' Arguments

The Residents argue that where an existing use is established, that use must be protected even if the use is not listed in the water quality standards as a designated use. 05-59Br. at 26, 28. Residents assert that in no case may water quality be lowered to a level which would interfere with an existing use. 05-59Br. at 28. Residents maintain that the antidegradation analysis was insufficient because the analysis failed to address baseline requirements from November 28, 1975. *Id*. Further, Residents argue that the antidegradation analysis failed to evaluate anticipated benefits to the residents in the Fiddle Creek wetlands, if any. 05-59Br. at 29.

The Residents also take issue with the Agency's use of water quality data from the 1993 Survey. 05-59Br. at 29. The Residents note that the 1993 Survey found fair conductivity, nitrate plus nitrite, phosphorus, sodium, potassium, boron, strontium, and oil downstream of the Wauconda outfall. R. at 995-1001; 05-59Br. at 29. Yet, the Agency did not evaluate any of these contaminants, according to the Residents. 05-59Br. at 29.

The Residents argue that a wetland specialist with the Illinois Department of Natural Resources (IDNR) advised the Agency that the amount of additional water volume added to the wetland from the increased discharge would be detrimental to the wetland. R. at 1990; 05-59Br. at 30. The Residents assert that the Agency then sought another opinion from a non-IDNR wetland specialist who was "skeptical" of the IDNR assessment. 05-59Br. at 30. According to

the Residents, IDNR thought Fiddle Creek Wetlands had threatened and endangered species. R. at 1990; 05-59Br. at 30.

Wauconda's Arguments

Wauconda argues that the Agency revised the permit in response to concerns about the antidegradation analysis that were raised during the hearing and public comment before the Agency. R. at 2186-2262;WBr. at 11-14. Specifically Wauconda points out that the Agency modified the permit by: (1) adding phosphorus removal as a permit condition; (2) adding a permit condition that Wauconda conduct a study of dissolved oxygen nutrients in Fiddle Creek; and (3) adding dissolved oxygen limits as a permit condition. *Id*. Furthermore, Wauconda asserts that the Agency correctly noted that the technical reports submitted by Wauconda adequately demonstrate that the NPDES discharge has not had an adverse impact on the downstream wetlands. R. at 2232; WBr. at 12. Wauconda points out that the Agency also concluded that the discharge will not impact the Fox River. R. at 2240; WBr. at 13.

Agency's Argument

The Agency agrees that the existing uses of Fiddle Creek, as of November 28, 1975, must be protected pursuant to the Board's regulations on antidegradation. Ag.Br. at 22. However, the Agency asserts that the Board regulations do not require the Agency to compare physical, chemical, or biological data that existed on or after November 28, 1975. *Id*. The Agency claims that the regulations mandate that the uses actually attained on or after November 28, 1975, must be maintained and protected, not that the physical, chemical, or biological data be identical. *Id*. Thus, the Agency maintains that Residents and Slocum must prove that the Wauconda effluent, as permitted, would impair the existing uses of Fiddle Creek and Residents and Slocum have not done so. Ag.Br. at 22-23.

As to the claim that the permitted discharge from the Wauconda plant will impair the existing uses of Fiddle Creek, the Agency asserts that the Residents and Slocum did not delineate how this conclusion was made. Ag.Br. at 22. Furthermore, the Agency notes that the Residents and Slocum rely on the KOT Environmental Consulting, Inc. report (KOT report) (R. at 470-78); however, according to the Agency that report also does not list any assumptions or calculations leading to the conclusion in the report. *Id*.

The Agency believes that the loss of wetlands discussed by the Residents, Slocum, and in the KOT report is more likely a result of restoration of the drainage canal in 1997. Ag.Br. at 23. The drainage canal was restored to allow for better drainage of the wetlands, according to the Agency. *Id*. Therefore, the Agency argues that the loss of 180 acres of wetlands is more probably the result of the drainage canal than any discharge by Wauconda. *Id*. The Agency also consulted with IDNR and an independent wetlands specialist to explore other possible impacts of the discharge pertaining to nutrient loading and hydraulic flow, and determined an ecological risk assessment was not warranted. R. at 1433-34.

The Agency, in performing the antidegradation analysis, used as much data as was available within the Agency, provided by the applicant or the public. Ag.Br. at 23. The Agency

states that at no point did the Agency use the 1993 Survey as "the statutory benchmark" for the antidegradation analysis. *Id*. The Agency notes that the Residents and Slocum point to findings in the 1993 Survey concerning several parameters; however, the Residents and Slocum do not demonstrate that the parameters violated the applicable water quality standards. *Id*. Thus, even given the existence of those parameters, the Agency asserts that the Residents and Slocum have not met their burden of proof and established that the permit would violate the Act or Board regulations. *Id*. Furthermore, the Agency argues that the concentrations of the parameters are typical of domestic wastewater plants throughout the State and the concentrations of the parameters do not violate the water quality standards. Ag.Br. at 24.

The Agency next addresses the issue of dissolved oxygen levels. Ag.Br. at 24. The Agency states that the Agency reviewed the data in the record and concluded that the low dissolved oxygen levels in the receiving stream were caused by algae. *Id*. The Agency states that the findings concerning the levels of dissolved oxygen are consistent with streams that pass through wetlands. *Id*. The Agency added conditions to the permit setting a phosphorus limit and requiring that the dissolved oxygen water quality standard be met at the discharge point. *Id*. The Agency also added conditions to study dissolved oxygen and nutrient effects downstream from the outfall. The study condition enables the Agency to reopen the permit and add additional controls if warranted. R. at 2189. The Agency asserts that the Residents and Slocum have failed to prove that the discharge from the Wauconda plant will cause or contribute to the violation of the dissolved oxygen water quality standard. Ag.Br. at 25.

Board Analysis

The Board's rules require the Agency to perform an antidegradation review for modified permits. 35 Ill. Adm. Code 302.105(f). The purpose of the antidegradation section is:

> to protect existing uses of all waters of the State of Illinois, maintain the quality of waters with quality that is better than water quality standards, and prevent unnecessary deterioration of waters of the State. 35 Ill. Adm. Code 302.105.

The Board's rules further state that:

> waters of the State whose existing quality is better than any of the established standards of this Part must be maintained in their present high quality, unless the lowering of water quality is necessary to accommodate important economic or social development. 35 Ill. Adm. Code 302.105(c)(1).

Thus, the antidegradation assessment performed by the Agency assures that the existing uses of the receiving stream are protected and water quality that is better than the existing standards is not lowered unless necessary for economic or social development.

As discussed above, in this proceeding the burden is on the Residents and Slocum to establish that the issuance of the NPDES permit will result in a violation of the Act or Board regulations. Thus, to prevail on this issue, Residents and Slocum must demonstrate that the Agency's antidegradation assessment was insufficient and as a result the permitted discharge will

not protect the existing uses of the receiving stream. The Board finds that Residents and Slocum have not demonstrated that the permitted discharge will detrimentally affect the existing uses of the receiving waters.

Although the record contains reports from engineers who expressed concerns about the Agency's antidegradation analysis, those concerns were mainly focused on dissolved oxygen and phosphorus. *See* R. at 333 and 2106. The Agency considered those reports and addressed those issues in the final permit. *See* R. at 2211. Although the Residents and Slocum also raised concerns about nitrate plus nitrite, phosphorus, sodium, potassium, boron, strontium, and oil downstream of the Wauconda outfall, the levels of these constituents do not exceed water quality standards. The levels in the Wauconda discharge are consistent with domestic wastewater throughout the State, and the permitted discharge will not increase the concentration of these parameters above water quality standards. R. at 2222. The Board's water quality standards are considered protective of existing uses. Revisions to Antidegradation Rules, R01-13 (June 21, 2001). Finally, Residents and Slocum have presented no evidence and the Board finds nothing in the record that establishes that the existence of these constituents will adversely impact existing uses.

As to the argument that Fiddle Creek should be listed as an impaired water, the Board appreciates the concerns expressed by Residents and Slocum. However, a permit appeal proceeding is not the proper forum to address this issue.

The Board finds that the Agency's antidegradation assessment was sufficient to ensure that that existing uses of the receiving waters were protected. Therefore, the Agency issuance of the NPDES permit was appropriate.

Pretreatment Program

The third issue is the lack of a pretreatment program included in the permit. The Board will summarize the arguments of the parties and then analyze the Board's findings.

Slocum's Argument

Slocum argues that the NPDES permit issued by the Agency to Wauconda should include provisions implementing a pretreatment program. 05-58Br. at 17. Slocum points to an ordinance adopted by Wauconda that a pretreatment program should be established and to a consent decree requiring Wauconda to implement the pretreatment program. 05-58Br. at 16 and 18. Slocum notes that the Illinois Attorney General's Office (AG) in a letter dated October 30, 2003, indicated: (1) that Wauconda had not implemented a pretreatment program, and (2) that the proposed NPDES permit should include provisions that would require Wauconda to demonstrate compliance with the pretreatment program. R. at 1033; 05-58Br. at 17. Slocum concedes that the Agency's record demonstrates that the Unites States Environmental Protection Agency (USEPA) has not required a pretreatment program. R. at 1766; 05-58Br. at 17.

Slocum asserts that the AG filed a complaint against Wauconda on August 17, 2004, alleging violations of the Board's regulations. 05-58Br. at 18. On December 10, 2004, a consent order was entered which requires Wauconda to implement a pretreatment program. *Id*.

Slocum argues in the reply that Slocum is seeking to have Wauconda's pretreatment ordinance enforced. 05-58Reply at 2. Slocum asserts that the Agency is attempting to shift the Board's focus from the required ordinance. *Id*.

Residents' Arguments

The Residents express concern with the possibility of contamination of wells due to the existence of a Superfund site and the leachate from that site being processed by the Wauconda plant. 05-59Br. at 12-13. Residents argue that most members are in daily, intimate contact with the Fiddle Creek Wetlands and many of the wells in the area use a very shallow aquifer. 05-59Br. at 12. The Residents maintain that the discharge from the Wauconda plant is a "clear and present danger to health and safety of downstream Residents, their families, their wells and the environment." 05-59Br. at 13.

The Residents assert that the NPDES permit application submitted by Wauconda included false information and the Agency was aware of the falsehoods. 05-59Br. at 14. Specifically, the Residents maintain that the NPDES permit application did not include the Superfund site even though Wauconda receives wastewater from the Superfund site. 05-59Br. at 17.

Wauconda's Arguments

Wauconda concedes that the NPDES permit does not include a pretreatment program for Wauconda's industrial dischargers; however, the Agency did include a requirement for an annual industrial user survey. WBr. at 14-15. The annual industrial user survey will allow the need for a pretreatment program to be reevaluated, according to Wauconda. WBr. at 15. Wauconda further points out that the Residents and Slocum' concern about groundwater is irrelevant to the issuance of a NPDES permit allowing discharge to surface water. WReply at 3.

Wauconda also concedes that the application for the NPDES permit did not recognize that Wauconda received leachate from a Superfund site. WBr. at 15. However, Wauconda argues that the record establishes that the Agency was aware of the fact, because other documents submitted by Wauconda indicated the acceptance of leachate from a Superfund site. *Id*. Thus, Wauconda maintains that the oversight was not intentional nor was the oversight material. *Id*.

Agency's Arguments

Before addressing the specific issue of pretreatment, the Agency notes that the Residents and Slocum believe that Wauconda should monitor for every contaminant found at the Superfund site. Ag.Br. at 28. The Residents and Slocum included in their briefs reports that four volatile compounds were found in the discharge from the Wauconda plant. Ag.Br. at 28. The

Agency asserts that the Residents did not provide the results of the analysis to the Agency during the comment period or any other time before the permit was issued and thus the Board should not consider the information in making the Board's decision. *Id*. In any event, the Agency argues the data does not establish a violation of the Act or Board regulations as none of the four volatile compounds detected exceed the acute water quality standards for the compounds. *Id*. And only one compound exceeded the chronic water quality criteria and the Agency asserts that this is not a violation of the Act or Board regulations. Ag.Br. at 28-29.

The Agency states that the determination to monitor for contaminants was based on the analysis of whether or not the effluent had a reasonable potential to exceed water quality standards. Ag.Br. at 29. The Agency performed additional testing after these same concerns were raised at public hearings and the Agency determined that only copper had a reasonable potential to exceed the water quality standard. *Id*. Therefore, the Agency points out a copper limit was included in the final permit. *Id*.

As to the argument that the Agency failed to require a pretreatment program, the Agency maintains that the Agency does not have delegated authority to operate a pretreatment program. Ag.Br. at 31. Therefore, the Agency asserts that the USEPA operates the pretreatment program and USEPA has determined that Wauconda in not required to maintain a pretreatment program at this time. *Id*. The Agency has modified the permit to require submission of an industrial user survey on an annual basis, which will allow the USEPA to review and reconsider the need for a pretreatment program. *Id*.

The Agency argues that the Agency is not required under the Act to report false answers on the application and the Agency had no reason to believe that Wauconda lied on the application. Ag.Br. at 30. The Agency asserts that the Board rules do not require the applicant or the Agency to correct or amend applications as long as all pertinent information is before the Agency when the permit decision is made. *Id*.

As to the issue of groundwater contamination, the Agency argues that the contamination in unlikely to be a result of Wauconda's discharge. Ag.Br. at 32. Also, the Agency asserts, the information from the Residents on well contamination was not provided to the Agency prior to the issuance of the permit and, in fact, the well was tested nine days after the permit issued. *Id*.

Board Analysis

The Residents and Slocum have failed to demonstrate that the lack of a pretreatment program as a part of this NPDES permit violates the Act or Board regulations. The record establishes that the USEPA has determined that at this time a pretreatment program is not required. R. at 1559; 2221. The Agency, to ensure that the USEPA remains appraised of industrial users, has required annual submission of an industrial user survey. Thus, if a need should develop for a pretreatment program, the USEPA will have the information needed to establish the program.

As to the ordinance adopted by Wauconda requiring a pretreatment program, the Board finds that a condition in a permit is not necessary to ensure that the Act or Board regulations will

not be violated. Wauconda may adopt ordinance that Wauconda believes appropriate; however, that does not mean that the ordinance should be included in a permit. Furthermore, the fact that the AG filed an enforcement after the issuance of the permit that resulted in a consent order requiring pretreatment is not relevant in this proceeding. The August 17, 2004 complaint was filed after the close of this record and therefore is not appropriate information for Board consideration. *See* Prairie Rivers Network PCB 01-112; Alton Packaging, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280.

Finally, the Board shares the concerns expressed about potential groundwater contamination. However, the record is devoid of any indication that the discharge by Wauconda affects the groundwater in the area. Rather, the record establishes that the Agency carefully examined this concern, but found that the wells would not be affected by the discharge. *See* R. at 2189; 2216-17; 2236-37

Prior Permit Violations

The fourth issue raised is the Agency's evaluation of prior permit violations in determining to issue a permit. The Board will summarize the arguments of the parties and then analyze the Board's findings.

Slocum's Argument

Slocum asserts that the Agency has knowledge of "many violations of the current NPDES permit" by Wauconda; however, the Agency did not consider those past violations when issuing the modified NPDES permit. 05-58Br. at 22. Slocum argues that if there are violations when the permit allowed for less wasteload to enter the watershed, the violations should be considered with the increased wasteload. *Id*. Slocum maintains that in response to prior violations a consent order was entered which prohibited further violations of the Act and Board regulations. 05-58Br. at 23. However, Slocum maintains that a review of public records available from USEPA establishes that Wauconda's effluent continues to violate the Act and Board regulations. 05-58Br. at 23-24.

Slocum argues that the Board has the authority to "devise additional methods and conditions to ensure" Wauconda's compliance. 05-58Br. at 26. Slocum asks the Board to deny the issuance of the permit until additional data is compiled. *Id*.

Residents' Arguments

The Residents argue that the Agency issued the NPDES permit to Wauconda even though there had been a prior enforcement action. 05-59Br. at 21-22. Furthermore, the Residents assert that the Agency issued the permit at issue seven days after another enforcement action was filed against Wauconda. *Id*. The Residents maintain that the Agency records show that Wauconda

"constantly violates" the Wauconda ordinance[2] for boron and total dissolved solids. R. at 1766; 05-59Br. at 23.

Wauconda's Arguments

Wauconda argues that an Agency permit decision cannot be used as a substitute for an enforcement action under the Act. WReply at 3, citing IEPA v. PCB, 252 Ill. App. 3d 828, 830 624 N.E.2d 402, 404 (1993). Wauconda notes that the Residents and Slocum rely on Section 39(a) of the Act (415 ILCS 5/39(a) (2002)) to support the argument that the Agency should have considered prior and current enforcement actions brought against Wauconda. Wauconda asserts that the language of Section 39(a) of the Act (415 ILCS 5/39(a) (2002)) actually provides that the Agency *may* consider *prior adjudications* of noncompliance and impose reasonable conditions related to the past history. WReply at 4. Wauconda argues that the past violations were already resolved by improvements to the Wauconda plant and Agency consideration of the complaint that had not yet been filed would have been inappropriate. WReply at 4-5.

Agency's Argument

The Agency argues that Section 39(a) of the Act (415 ILCS 5/39(a) (2002)) does not impose a mandatory duty on the Agency to consider prior adjudicated violations. Ag.Br. at 33. The Agency asserts that the Act requires the Agency to consider prior violations so that, if necessary, conditions can be imposed on a permit. *Id*. Furthermore, the Agency claims that Wauconda's prior adjudication of noncompliance was considered. *Id*. The Agency determined that the planned expansion of the plant would address the issues that led to the violations of the Act covered by the December 13, 2000 consent order. *Id*.

Board Analysis

First as discussed above, the complaint filed on August 17, 2004, is not relevant in this proceeding. As to the Agency's review of the prior adjudicated violations, the Board agrees with Wauconda and the Agency that the Act does not *require* the Agency to consider the violations. However, the Agency did consider the prior violations and determined that the proposed modifications to the Wauconda plant would address those violations. Thus, a condition is not necessary to address the prior adjudicated violations. Therefore, the Board finds that the Agency did properly consider the prior adjudicated violations against Wauconda.

The Board notes that the permit process cannot be used in lieu of an enforcement action for past violations of the Act or Board regulations. *See* Panhandle Eastern Pipe Line Co. v. IEPA and PCB, 314 Ill. App. 3d 296, 303; 734 N.E.2d 18, 24 (4th Dist. 2000), citing IEPA v. PCB, 252 Ill. App. 3d 828, 830 624 N.E.2d 402, 404. The Residents and Slocum have provided no evidence that the permit as issued will cause a violation of the Act or Board regulations. Therefore, the Residents and Slocum have not met their burden of proof.

[2] The Village of Wauconda has adopted an ordinance (2000-0-31, adopted Sept. 19, 2000) requiring a pretreatment program be developed for the Wauconda plant. R. at 1766; 05-59Br. at 23.

Due Process

A fifth issue raised by the Residents concerns whether the Agency denied due process to the Residents. The Board will summarize the arguments of the parties and then analyze the Board's findings.

Residents' Argument

The Residents argue that the Agency has "institutionalized practices and procedures" that result in the "systematic denial" of due process. 05-59Br. at 5, citing People *ex rel* Robert J. Klaeren II *et al*. v. Village of Lisle *et al*., 202 Ill. 2d 164; 781 N.E.2d 223, (2002). The Residents assert that the issuance of the permit will result in a wasteload that will contribute to the reduction of the Fiddle Creek Wetlands. 05-59Br. at 6. This will result in the loss of riparian rights, according to the Residents. *Id*. The Residents also assert that the Agency failed to comply with public participation requirements. 05-59Br. at 28.

Wauconda' Arguments

Wauconda argues that the Residents rely on a local zoning case (Klaeren II) in challenging the procedural sufficiency of the Agency proceeding. WBr. at 6. Wauconda asserts that reliance is misplaced. *Id*. Wauconda asserts that the procedural sufficiency of the NPDES permit application process is well established. *Id*. Wauconda cites to several cases that Wauconda believes establish that the Agency's procedures are sufficient. WBr. at 6-7.

Agency's Arguments

The Agency agrees with Wauconda that reliance on Klaeren II is misplaced. Ag.Br. at 16-17, 18. The Agency notes that the issue before the Illinois Supreme Court in Klaeren II was whether a landowner could cross-examine witnesses at a public hearing on rezoning. Ag.Br. at 17. The Agency asserts that the hearing in Klaeren II was held under the Illinois Municipal Code (65 ILCS 5/1-1-1 *et seq*. (2002)). Ag.Br. at 17. The Agency argues that due process is a flexible concept and requires only such protections as fundamental principles of justice and a situation demand. Ag.Br. at 17, citing Abrahamson v. Illinois Department of Professional Regulation, 153 Ill. 2d 76, 92; 606 N.E.2d 1111 (1992). The Agency contends that the permit process before the Agency has none of the characteristics of an adversarial process and the Agency fully complied with the requirements of the Act. Ag.Br. at 19-20.

Board Analysis

The Illinois Supreme Court noted that procedures under Sections 39(a) and 40(a)(1) of the Act 415 ILCS 5/39(a) and 40(a)(1) (2002)) do not require the Agency to conduct a hearing. The court further noted:

> 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. IEPA v. PCB, 115 Ill. 2d 65, 70; 503 N.E.2d 343, 345 (1986).

Thus, the Illinois Supreme Court has found that the safeguards of due process, in the permitting process, are found before the Board.

The Residents relied on Klaeren II to support their argument. However, Klaeren II is clearly not applicable. The issue in Klaeren II involved a landowner whose property abutted land subject to annexation and rezoning. Klaeren II 202 Ill. 2d at 167; 781 N.E.2d at 224. The court found that property rights of the interested parties were at issue in the zoning hearing and the parties must be afforded due process. Klaeren II 202 Ill. 2d at 184; 781 N.E.2d at 234. However, the Illinois Supreme Court also noted that:

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associate with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Klaeren II 202 Ill. 2d at 1184; 781 N.E.2d at 234.

The Board has reviewed Klaeren II and the court's reasoning is consistent with IEPA v. PCB, 115 Ill. 2d 65, 70; 503 N.E.2d 343, 345. The process before the Agency is fact-finding investigation, while the process before the Board is an adjudication that directly affects the legal rights of an individual. Thus, the court's decision in IEPA v. PCB, 115 Ill. 2d 65, 70; 503 N.E.2d 343, 345, that the safeguards of a due process hearing are absent until the hearing before the Board, is consistent with the court's decision in Klaeren II, that a zoning hearing can affect the rights of interested parties and due process must be afforded. Therefore, the Board finds that the Residents' arguments that the Agency denied the Residents due process are without merit.

Residents also argue that the issuance of the permit will result in a loss of riparian rights. The Board is not persuaded by this argument. The Illinois Supreme Court in Landfill, Inc. v. PCB, 74 Ill. 2d 541; 387 N.E.2d 258 (1978) noted that the constitutional argument lacked merit "in light of the statutorily established mechanism for persons not directly involved in the permit-application process to protect their interests." Landfill, Inc. 74 Ill. 2d at 559; 387 N.E.2d at 265. The Appellate Court followed that reasoning in Prairie Rivers, finding that Prairie Rivers' constitutional arguments lacked merit in light of 35 Ill. Adm. Code 309. Prairie Rivers, 335 Ill. App. 3d at 405; 781 N.E.2d at 383. The Board finds that reasoning also applies in this case. Residents have been given ample opportunity to participate in this proceeding and actually chose not to exercise their right to call witnesses and cross-examine the Agency before the Board. Therefore, the Board finds the constitutional arguments of Residents are without merit.

CONCLUSION

The Board finds that the petitioners have failed to establish that the permit as issued would violate the Act and Board regulations. Also, the Board finds that acceptance of a stipulation and settlement is not appropriate in this proceeding. The Board further finds that the Agency's antidegradation assessment was sufficient and the Agency's evaluation of prior adjudicated violations was adequate. The Board agrees that a pretreatment program is unnecessary to ensure that the permit will not violate the Act or Board regulations. The Board finds the arguments that petitioners were not afforded due process are without merit. Therefore, the Board finds that the Agency appropriately issued the NPDES permit to Wauconda and the Board affirms the Agency's decision.

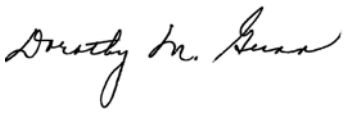
ORDER

The Board affirms the Illinois Environmental Protection Agency's issuance of a National Pollutant Discharge Elimination System permit to the Village of Wauconda.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/31(a) (2002)); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

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



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board