

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JUN 29 2006

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

PCB 04-88

STATE OF ILLINOIS  
Pollution Control Board  
(Third party NPDES Permit Appeal Water)

Petitioners )

v. )

Illinois Environmental Protection )  
Agency and Village of New Lenox, )

Respondents )

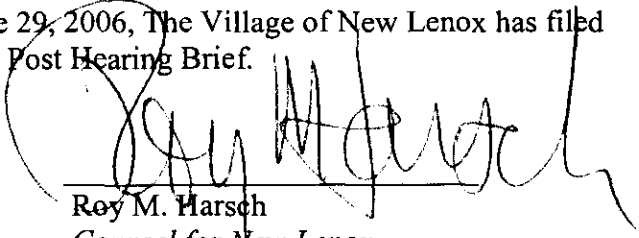
**NOTICE OF FILING**

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**PLEASE TAKE NOTICE** that on June 29, 2006, The Village of New Lenox has filed the attached Respondent Village of New Lenox Post Hearing Brief.

  
Roy M. Harsch  
Counsel for New Lenox

Dated: June 29, 2006

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Pollution Control Board

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**(Third party NPDES Permit Appeal Water)**

V.

## Respondents

NOW COMES the Respondent, the VILLAGE OF NEW LENOX ("Village"), by and through its attorney, Roy M. Harsch, of Gardner Carton & Douglas, and hereby files its post-hearing brief in the above-captioned matter.

Have Petitioners met their burden of proof that the permit as issued by the Illinois Environmental Protection Agency ("IEPA") to the Village for the expansion of the Village's existing wastewater treatment plant was issued in violation of the Illinois Environmental Protection Act ("Act") and the Illinois Pollution Control Board's ("Board") regulations such that an appeal from the IEPA's decision should be granted?

The Board should disregard Petitioners' arguments in this third party appeal of the National Discharge Elimination System Permit ("NPDES") issued to the Village and therefore, the Board should uphold the NPDES Permit as issued by IEPA on October 31, 2003 for the

following reasons. First, Petitioners bear the burden to prove that the permit as issued violates the Act or Board regulations. 415 ILCS 5/40(a)(1)(2004); 35 Ill. Adm. Code § 105.112 (a). Petitioners have failed to meet their burden, as was evidenced on November 17, 2005, when the Board denied Petitioners' Motion for Summary Judgment. Second, the record shows that the IEPA complied with the applicable statutes and regulations as set forth in the Act and Board regulations. The IEPA determined that the NPDES permit application and supporting information demonstrated that the Village was entitled to the issuance of the NPDES permit for the expansion of its wastewater treatment plant. Third, the IEPA considered Petitioners' comments to the Village's draft permit concerning nutrient treatment, offensive conditions, dissolved oxygen, pH and copper, as well as the Board's antidegradation regulations in issuing of the NPDES permit. In response to such comments, the IEPA changed the Village's draft permit to incorporate ammonia limits during the spring/fall months, total dissolved solids, and dissolved oxygen limits.

Finally, notwithstanding the above arguments, Respondent further submits that its due process rights have been violated. This is because Respondents' discovery requests were denied, and Petitioners did not make their witnesses available at the adjudicatory hearing before the Board. The Board has already determined that there are unresolved issues of material facts as was concluded when the Board denied Petitioners' Motion for Summary Judgment. Thus, if this Board renders a decision that Petitioners have met their burden of proof by relying upon the public comments at the IEPA public hearing, the Board would be relying upon unsworn comments made with no opportunity by Respondents to question the commentators, no ability to seek discovery to clarify such arguments, and no ability to examine such comments at the adjudicatory hearing. Such a determination made under these circumstances would contravene

the Board's procedural rules at 35 Ill. Adm. Code §§ 101.610 and 101.612, past Board decisions, the Illinois Administrative Procedure Act, Illinois Court decisions, and the Illinois Constitution. For these reasons, Petitioners appeal should be denied and the Board should defer to the permit as issued by the IEPA.

### **III. BACKGROUND AND PROCEDURAL HISTORY**

In this matter, Petitioners seek to challenge the NPDES Permit issued to the Village by the IEPA for the expansion of the Village's existing wastewater treatment plant that will serve the growth in population occurring in the Village. The relevant case history is as follows.

On June 10, 2002, the IEPA received the Village's application for expansion of its existing waste water treatment plant built in 1973 from 1.54 million gallons per day ("MGD") design average flow to 2.516 MGD. This expansion was needed to provide sanitary waste treatment to service projected population growth and because the existing plant was operating at 85 percent capacity (Record at 354 and 424). The IEPA gave public notice of the draft NPDES permit on January 5, 2003 (Record at 598). At Petitioners' request, the IEPA held a public hearing on April 24, 2003 where Petitioners were provided the opportunity to comment on the draft NPDES permit (Record at 61-104). Following the public hearing, the Petitioners provided written comments (Record at 107-322). Thereafter, the IEPA prepared a responsiveness summary to these public comments (Record at 339-376). IEPA issued a final NPDES permit with changes in response to the Public Comments on October 31, 2003 (Record at 353).

On December 2, 2003, Petitioners filed this present appeal of the NPDES permit issued to the Village. On December 18, 2003, the Board accepted the third party NPDES permit appeal as required by 35 Ill. Adm. Code 105.210 and Section 40(e)(2) of the Act. On January 5, 2004

the IEPA filed the Record. On August 24, 2005, the Hearing Officer granted the IEPA's motion to amend the record and therefore, accepted the Second Amended Record.

On March 2, 2004 the Hearing Officer directed the parties to file a discovery schedule, and on March 11, 2004 the Village proposed a 240-day schedule. The IEPA proposed a discovery schedule closing on January 10, 2005 and a proposed hearing date of March 10, 2005.<sup>1</sup> Petitioners stated that they did not believe any discovery was necessary. As requested by the Hearing Officer's Order dated April 1, 2004, the parties submitted briefs addressing the need for and justification of the proposed discovery. The discovery issue was thoroughly briefed by the parties by the end of April of 2004. On November 17, 2005, the Board found that neither the IEPA nor the Village had justified the discovery sought and directed the Hearing Officer to proceed with holding a hearing consistent with the November 17, 2005 Board order.

During the pending of the discovery dispute, Petitioners filed a Motion for Summary Judgment on February 4, 2005. The Board rejected the Village's Motion to Stay the Motion for Summary Judgment, and the parties were ordered to file briefs regarding the Motion for Summary Judgment. On May 25, 2005, the Village filed its Memorandum of Law in Opposition to Petitioner's Motion for Summary Judgment and its Response to Petitioners Statement of Relevant Facts from the Agency Record. The IEPA filed its Agency's Response to Petitioners Motion for said Memorandum of Law in Support of Summary Judgment. Petitioners' Reply Regarding Relevant Facts in the Agency Record was filed on June 8, 2005.

On November 17, 2005, the Board found there were significant factual disputes and genuine issues of material fact with respect to each of the issues raised by Petitioners and

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<sup>1</sup> The actual hearing was held on March 30, 2006 which is more than one-year after a hearing would have been held pursuant to both discovery schedules.

therefore, denied the requested summary judgment with respect to each issue. In its conclusion (found on page 40 of the November 17, 2005 order), the Board directed the appeal to proceed to hearing. A hearing was held on March 30, 2006. Petitioners chose not to present any witnesses or evidence at the hearing. In response, neither the IEPA nor the Village presented any witnesses. On April 21, 2006, Petitioners filed their Post Hearing Memorandum. Pursuant to the extensions granted by the Hearing Officer, the Village files this Post Hearing Brief.

#### **IV. STATEMENT OF FACTS**

In order to facilitate and coordinate the Board's review of the record, the Village requests that the Village of New Lenox's Memorandum of Law in Opposition to Petitioner's Motion for Summary Judgment and Response of Village of New Lenox to Petitioners' Statement of Relevant Facts from the Agency Record filed on May 25, 2005 and the IEPA's Agency's Response to Petitioners' Motion for and Memorandum of Law in Support of Summary Judgment filed on May 25, 2005 be incorporated into this Post Hearing Brief as though fully set forth herein. The Board has previously reviewed and relied upon these pleadings which contain extensive references to the record as part of its basis for denying the Petitioners' Motion for Summary Judgment in its November 17, 2005 order.

#### **V. ARGUMENT**

##### **A. PETITIONERS HAVE NOT MET THEIR BURDEN AND THEREFORE, THE BOARD SHOULD UPHOLD THE PERMIT AS ISSUED BY IEPA**

In this case, Petitioners, as third party appellants, bear "the burden of proving that the permit, as issued to the Village, would violate the act or Board regulations." *Prairie Rivers Network v. IPCB*, 269 Ill. Dec. 575, 582, 335 Ill. App. 3d 391, 400-401 (Ill. App. 4th 2002) appeal denied 273 Ill. Dec. 143, 203 Ill.2d 569 (Ill. App. 4<sup>th</sup> 2002). As set forth in the

November 17, 2005 order, “the Board has previously concluded that Section 40(e)(3) of the Act unequivocally places the burden of proof on Petitioner, regardless of whether the Petitioner is a permit applicant, an applicant or a third party.” *Prairie Rivers Network v. IEPA and Black Beauty Coal Co.*, PCB 01-112, Slip Op. at 8 (August 9, 2001), (citing 415 ILCS 5/40(e)(3) (2000)). The Board then stated that “IEPA’s decision to issue the permit in this instance must be supported by substantial evidence. This does not, however, shift the burden away from Petitioner, who alone bears the burden of proof in this matter.” *Prairie Rivers Network v. IEPA and Black Beauty Coal Co.*, PCB 01-112, Slip Op. at 9, (August 9, 2001), (citing *Waste Management v. IEPA*, PCB 84-45, PCB 84-61, PCB 84-68 (consolidated) Slip Op. at 3-10 (November 26, 1984)).

Arguments raised by Petitioners that the Village has failed to show that its requested permit would not violate the Act or Board regulations, should be rejected by the Board as an improper attempt to shift what is clearly Petitioners’ burden.

While the Village respectfully disagrees with certain of the Board’s rulings in this proceeding, as set forth below in Section B, the November 17, 2005 decision of the Board denying Petitioners’ Motion for Summary Judgment, coupled with Petitioners decision not to present any case at the hearing held on March 30, 2006, should be dispositive of this appeal. The Board’s November 17, 2005 order provides a thorough examination of the arguments raised by Petitioners in their Motion for Summary Judgment concerning all of the issues raised in this NPDES Permit appeal: nutrient loadings, offensive water conditions standard and copper water quality standard. Before denying the Motion for Summary Judgment, the Board examined on an issue-by-issue basis the arguments presented by Petitioners in support of their Motion for Summary Judgment, followed by an analysis of the IEPA’s responses, and then the

Village's response which was then followed by Petitioners' reply. (November 17, 2005 Board Order, 8-40).

As set forth in page 8 of the November 17, 2005 order, "The Board will then conclude each section with an analysis of findings on that issue before reaching its conclusion on the Motion for Summary Judgment and issuing its order." With respect to each issue presented by Petitioners the Board found that it "cannot conclude that there is no genuine issue of material fact" and concluded that "significant factual issues remain unresolved with regard to the matters" and therefore, the Board denied Petitioners' Motion for Summary Judgment on each of the three issues. (November 17, 2005 Board Order, 40)

The Board has found that there exists in the record facts that support the IEPA's decision to issue the permit in question with respect to each of the issues raised by Petitioner in its appeal. The denial of the Motion for Summary Judgment put Petitioners on notice of the Board's recognition that such material facts supporting the issuance of the permit exist in the record. Nevertheless, Petitioners chose not to present any case at the hearing and relied solely on the record before the IEPA. Having lost its Motion for Summary Judgment and electing not to proceed with any additional testimony at the hearing in this matter, Petitioners have not met their burden to show that IEPA's decision to issue the permit in question is not supported. The very facts that the Board has cited and relied upon in denying Petitioners' Motion for Summary Judgment are controlling. Petitioners have not met their burden of showing that the NPDES permit as issued, violates the Act or Board's regulations. Therefore, the Board should defer to the IEPA decision in issuing the NPDES permit and uphold the permit as issued on October 2003.



**B. THE BOARD HAS VIOLATED RESPONDENTS DUE PROCESS RIGHTS AND CONTRAVENED ITS OWN REGULATIONS BY DENYING RESPONDENTS DISCOVERY REQUESTS**

**1. Discovery is consistent with Board's rules and purpose**

The Village respectfully disagrees with the Board's November 17, 2005 decision to deny the Village's and IEPA's request for discovery. The purpose of an adjudicatory hearing is to provide the Board with all the evidence necessary to make an informed decision in the specific case before it, subject to the Act's limits to the kind of information the Board can consider.<sup>2</sup> As argued by the IEPA and the Village in their briefs in support of their request discovery and as noted in pages 36 and 37 of the November 17, 2005 Board Opinion, discovery is authorized by the Board's procedural rules pursuant to 35 Ill. Adm. Code §105.100 and is consistent with past Board NPDES Permit appeal cases, (including third party permit appeal cases), where discovery has been allowed (*See Prairie Rivers Network v. IEPA and Black Beauty Coal Co.*, PCB 01-112, (August 9, 2001)). The IEPA and the Village presented arguments and examples of where discovery could be useful in attempting to resolve the material issues of fact that were found by the Board in reviewing Petitioners' Motion for Summary Judgment. (November 17, 2005 Board Order, 33-40). Thereby, providing the necessary evidence to effectuate an informed decision by this Board.

In presenting this position, the Village readily admits and understands that the appeal is based upon the record amassed before the IEPA at the time of final permit decision pursuant to Section 40(e)(3) of the Act. The Board's statement on page 38 of its November 17, 2005 order that discovery was inappropriate because the Board review is limited to the record before IEPA at

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<sup>2</sup> See "Citizens Guide to the Illinois Pollution Control Board- Adjudicatory Hearings." Available at: <<http://www.ipcb.state.il.us/AboutTheBoard/CitizensGuidetotheBoard.asp?Section=Hearings>>. See also, 35 Ill. Adm. Code § 101.610.

the time of permitting decision and is not based on information developed by the permit applicant, or the IEPA after the IEPA's decision, misses the point made by the IEPA and the Village.

As acknowledged by IEPA, the public hearing on a proposed NPDES Permit decision is a legislative informal hearing to inform the public of the proposed agency decision and to garner public comments prior to the IEPA's final decision. (IEPA Brief at 7 citing 35 Ill. Adm. Code § 166.120). In agreeing with Petitioners that discovery is not allowed in this third party NPDES Permit Appeal, the Board is in effect rewriting its procedural rules. The appropriate reading of the requirements of the Act is set forth in IEPA and the Village's pleadings. The review before the Board is based upon the record before the IEPA at the time of permit issuance. However, factual issues presented in the record may be, and should be, subject to discovery to assist the Board in making its determination. Discovery therefore serves the purpose of allowing any party to the proceeding to present clarifying testimony, including expert testimony, regarding such facts raised before the IEPA and included in the record.

At the time of the original adoption in of the NPDES rules, IEPA told the Board that its resources did not allow for holding two contested adjudicatory hearings, one at the Board and another before the IEPA. Harsch, Roy M. and Gail C. Ginsberg, *The National Pollutant Discharge Elimination System in Illinois*, 27 DePaul L.Rev. 739, 747-750 (1978). The Board concurred and provided that the hearing at the IEPA would be an uncontested public informational hearing with the opportunity for a contested formal adjudicatory hearing at the Board on appeal, as provided in sections 32 and 33(a) of the Act. *Id.* ILL. REV. STAT. ch. 111 ½ §§ 1032, 1033(a) (1975). This decision was in accordance with the then current USEPA regulations mandating what must be in a State program to support delegation of the NPDES

permit program. While the USEPA has since changed its rules to reflect its current system of uniform appeals to the Environmental Appeals Board (“EAB”)(See 65 Fed. Reg. 30,886 (May 15, 2000)), no changes to the Board’s procedural rules have been made that alter the nature of informal IEPA hearing and the Board’s Adjudicatory hearing.

In not allowing for discovery in this third party NPDES appeal, where the Board has found material issues of fact exist in the record, the Board has ignored its own rules, the Illinois Administrative Review Act, and Illinois case law, and the Illinois Constitution. In this case, there was no forum to cross-examine or even question those who spoke at the IEPA’s public hearing. Moreover, with the Board’s decision denying Respondents request for discovery and Petitioners choosing not to present these people to testify at the Board’s formal hearing, the IEPA and the Village were not afforded the opportunity to explore the basis for and validity of public comments that are set forth in the record and what the Board may possibly will rely upon in making its determination.

If the Board chooses to rely upon these public comments made at the uncontested IEPA informal hearing prior to the permit issuance, the Board will have determined that these “facts” outweigh the facts supported in the record notwithstanding the Board’s analysis when it denied Petitioners’ Motion for Summary Judgment. Given that the Appellate Court defers to the Board’s finding of facts, such Board action effectively denies Respondent the opportunity to seek meaningful review of such public comments either before the Board or at the Appellate Court.

**2. The Board has infringed upon the Respondents’ Due Process rights because discovery is necessary to effectuate an accurate determination of the facts in the record.**

The Village raises this issue in order to preserve this argument for purposes of appeal and as a means to convey to the Board the importance of allowing discovery before the Board in

future proceedings as is permitted in Board rules found at 35 Ill. Adm. Code § 105.100 and consistent with Illinois law as found in *Prairie Rivers Network v. IEPA and Black Beauty Coal Co.*, PCB 01-112, Slip Op. at 8 (August 9, 2001). In the event that the Board agrees to uphold the permit as issued by IEPA, this issue is moot.

The Illinois Supreme Court has recognized and this Board has confirmed that “The safeguards of a due process hearing are absent until the Hearing before the Board.” *Village of Lake Barrington et. al v. IEPA and Village of Wauconda*, PCB 05-55, slip op. at 18 (April 21, 2005) (citing *IEPA v. PCB*, 115 Ill. 2d 65, 70 (1986)). Moreover, the Illinois Supreme Court has stated that when government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use procedures which have traditionally been associated with the judicial process. *Village of Lake Barrington*, slip op. at 19 (citing *Klaeren II v. Village of Lisle*, 202 Ill. 2d 164, 184 (2002)). The process before the IEPA is a fact-finding investigation, while the process before the Board is an adjudication that directly affects the legal rights of an individual. *Id.*

The Illinois Administrative Procedure Act supports the same conclusion. In *Borg-Warner Corporation v. Mauzy*, 100 Ill. App. 3d 862, 872 (Ill. App. 3<sup>rd</sup> 1981), the court held that under the Illinois Administrative Procedures Act, no adjudication was required for the NPDES permit applicant under either State or Federal law, prior to the time the IEPA makes its determination to issue or deny a NPDES permit. However, once the IEPA issues the NPDES permit as occurred in the present case, an applicant or third party is afforded an adjudicatory hearing before the Board as provided under sections 16 (a) and (c) of the Illinois Administrative

Procedure Act. *Id.* at 872.<sup>3</sup> Moreover, the hearing before the IPCB is conducted under the Rules for adjudicatory cases. *Id.* at 868. Applying such law to this case, the Village, while not entitled to an adjudicatory-type hearing before the IEPA issued the Village's Permit, is entitled to an adjudicatory hearing that comports to the due process requirements as incorporated into rules for adjudicatory cases once the Village was before the IPCB.

In this NPDES permit appeal, as noted above, the Board's decision as to whether Petitioners have met their burden of proof directly affects whether and in what manner the Village will expand its wastewater treatment plant as allowed in the permit issued by IEPA. Therefore, as stated by the Illinois Supreme Court and this Board, the Village must be afforded due process in this present adjudication.

Petitioners have made assertions in their Post-Hearing Memorandum pages 10-14, based upon statements presented at the public hearing held on April 24, 2003. These public comments are now in the record before the Board and are cited as support in the briefs and memorandum that Petitioners have submitted since its request for third party NDPEs permit appeal was granted. The Village respectfully submits that the Board must proceed with caution in relying on these statements because these statements were never subject to cross-examination by the Village or IEPA and nor were these statements given under oath. Furthermore, this Board has determined that there are unresolved issues of material fact as cited when they denied Petitioners' Motion for Summary Judgment. The Village's rights are directly affected by this proceeding, and to permit the requested discovery would provide the Board with a more complete and clarifying record of the evidence. However, this request was denied by the Board. As a result,

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<sup>3</sup> In *Borg-Warner*, the court cited to what was then the Illinois Administrative Procedure Act as Ill.Rev.Stat.1977, ch.127, par. 1016. However, since then the cited Illinois Administrative Procedure Act provisions have been codified under 5 ILCS 100/10-65 (a), (d), and (e).

the Village's rights may be impinged by the Board's use of these public statements that were not subject to the due process requirements that this Board and the Illinois courts have recognized should exist in adjudicatory cases before the Board.

Consequently, if this Board makes its final determination based upon the record by relying specifically on these public comments as facts, the Board will have erred by not affording Respondents the protections of an adjudicatory hearing as required by the Board's rules, previous Board decisions, Illinois Case law, the Illinois Administrative Procedure Act, and the Illinois Constitution.

## **VI. CONCLUSION**

The Petitioners have the burden of proof in this third-party NPDES appeals. The Board in denying its Motion for Summary Judgment on all of the issues has found facts that support the IEPA's decision on each factual issue contained in the appeal. The November 17, 2005 Board order put Petitioners on notice that the Board had found facts in the Record that support the permit issued by IEPA. At the hearing, Petitioners were given the opportunity to present evidence to support what the Board already found questionable in their arguments. Yet, Petitioners made the decision not to present any case at the hearing. Petitioners have therefore not met their burden of proof. Both IEPA and Petitioners have provided the Board with references to facts in the record in their respective pleadings in opposition to the Motion for Summary Judgment. These facts show that IEPA properly considered the comments of Petitioners' and revised the NPDES permit in response to those comments. Finally, the permit as issued by IEPA is consistent with the law and therefore, the Board should defer to the expertise of the IEPA and reject the Petitioners' appeal of a permit that was clearly issued in conformance with the Act and Board regulations. A decision in favor of Petitioners where Respondents

request for discovery was denied would be a decision in violation of the Boards procedural rules, past Board decisions, the Illinois Administrative Procedure Act, Illinois case law, the Illinois Constitution, and Respondent's due process rights.

Respectfully Submitted,

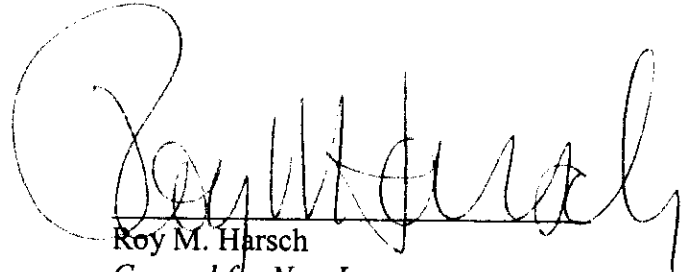
VILLAGE OF NEW LENOX

By: 

One of its attorneys

**CERTIFICATE OF SERVICE**

I, Roy M. Harsch, certify that on June 29, 2006, filed the attached **NOTICE OF FILING FOR THE VILLAGE OF NEW LENOX** an original was filed, on recycled paper, with the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, Illinois 60601, and copies were served via United States Mail to those individuals on the included service list.



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Dated: June 29, 2006

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