BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DES PLAINES RIVER WATERSHED ALLIANCE, LIVABLE COMMUNITIES ALLIANCE, PRAIRIE RIVERS NETWORK, and SIEERA CLUB,	)	
Petitioners,	)	
v.	)	PCB 04-88 (NPDES Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and VILLAGE OF NEW LENOX,	)	
Respondents.	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board an original and four (4) copies of the **POST HEARING BRIEF** of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: _____
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Dated: June 30, 2006
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POST HEARING BRIEF IN SUPPORT OF AGECNY'S RESPONSE TO PETITIONERS' THIRD-PARTY PERMIT APPEAL

NOW COMES the Respondent, Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") by and through its attorney, Sanjay K. Sofat, Assistant Counsel and Special Assistant Attorney General, pursuant to the Hearing Officer Order dated June 8, 2006, hereby submits this brief in response to Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and Sierra Club's (hereinafter "Petitioners") third party National Pollution Discharge Elimination System ("NPDES") permit appeal.

I. RELEVANT FACTS

Hickory Creek is a general use water. Agency Record (hereinafter "*Record*") *at 354*. Hickory Creek is a tributary of the Des Plaines River, which flows in Will County. *Record at 115*. Hickory Creek has a flow of 2.4 cubic feet per second ("cfs") during

critical 7Q10 flow, and is rated a "C" stream under the Agency's Biological Stream Characterization ("BCS") system. *Record at 5.* According to the Illinois National Survey publication *Biologically Significant Illinois Streams*, Hickory Creek does not support any threatened or endangered species. *Id. at 5.* Hickory Creek has fish populations that are not indicated of low dissolved oxygen concentrations. *Record at 361.*

In clarification of the Petitioners' brief, the Agency's 2002 Illinois 303(d) list did not list all of Hickory Creek as impaired. However, the lower 10.1 miles were listed as impaired based primarily on water quality data collected at Washington Street in Joliet at river mile 2.5. The upper 12 miles were rated as full aquatic life use based primarily on biological data collected at river mile 10.6, Marley Road. *Record at 5.* The potential causes of impairment at the time of listing were nutrients, phosphorus, nitrogen, salinity/TDS/Chlorides, TDS (chlorides), flow alterations, and suspended solids. The potential sources associated with the impairment are municipal point sources, combined sewer overflows, construction, land development, urban runoff/storm sewers, hydrological/habitat modification, and flow regulation/modification. *Record at 5.* The inclusion of pH as a potential cause of impairment in the 2002 Illinois 303(d) list was a mistake. The pH value that indicated noncompliance with the minimum pH standard of 6.5 was mistakenly entered into the database as 0.87 instead of 7.87.

The Agency conducted a facility related stream survey in 1991. This facility related stream survey is not representative of the current stream conditions as the facility has been expanded since the 1991 survey. *Record at 5.* To obtain more current information on the conditions of Hickory Creek below the plant's discharge, the

Agency's requested the Village to perform a macroinvertebrate survey of Hickory Creek. The survey performed in August 2002 found pollution intolerant organisms both upstream and downstream of the existing discharge from the plant. *Record at 5.* The presence of many tolerant species combined with the presence of many intolerant species generally suggests a balanced healthy assemblage, which is characteristic of high quality sites.

According to Northeastern Illinois Planning Commission (1981), land use upstream of Pilcher Park was primarily agricultural. Downstream land use was predominately residential and commercial with numerous sewers and combined sewers overflows ("CSOs") in the Joliet area. The Agency's water quality reports since 1986 have reported the upper 12 miles of Hickory Creek as fully meeting aquatic life use. The lower 10 miles were rated as partial support. The lower portion includes the Joliet metropolitan area. Rosyface shiner have recently (2003) been reported upstream and downstream of the Village's discharge. *Record at 371; 699.*

The record thus shows that existing conditions in Hickory Creek below the plant's discharge are fully supporting the aquatic life use as diverse organisms were found both upstream and downstream of the discharge point. The record also shows that conditions in Hickory Creek degrade as it approaches the Washington Street USGS station in Joliet. The degradation in lower 10.1 miles is brought about by several sources such as CSOs, urban runoff, storm sewers, land development and flow alterations.

Though Petitioners claim that phosphorus values are "high" in Hickory Creek, the record shows that these values are typical and consistent with values found in other effluent dominant streams across the State.

B. Information In The Record Regarding Hickory Creek and New Lenox Discharge

Plant- On June 10, 2002, the Agency received the Village of New Lenox's ("Village") application for expansion of its existing wastewater treatment plant ("plant" or "STP 1"). The Village's application concerns an existing source that was built in 1973 to treat wastewater. The Village is requesting expansion of the plant at 301 North Cedar Road based on projected growth in the community and also because the plant is operating at 85 percent capacity. *Record at 354.*

The treatment plant consists of a mechanical bar screen with a manual bypass bar screen, 3 primary clarifiers, 5 aeration tanks, 3 clarifiers, 4 sand filters, 2 traveling bridge filters, 2 chlorine contact tanks, aerated excess flow lagoon with chlorination, two sludge thickners, 4 aerobic digesters, sludge storage tank and effluent pumping station. The treatment plant has been meeting the effluent limits of its NPDES permit. *Record at 424-482.* The plant effluent had 2.76 milligrams per liter ("mg/L") of total phosphorus in the effluent in August of 2002, and the four downstream samples all showed phosphorus levels at values of 1.60 mg/L, 1.63 mg/L, 1.47 mg/L, and 1.52 mg/L. *Record at 545.* The plant effluent showed pH ranging from 6.67 to 8.21 in the vicinity of the plant discharge point.

The Village is proposing to expand the plant design average flow from 1.54 million gallons per day ("MGD") to 2.516 MGD; and the design maximum flow from 4.0 MGD to 5.963 MGD in Phase 1 and to 7.93 MGD in Phase 2. *Record at 424.* The facility is under construction for Phase I and Phase II improvements. Phase I improvements (Permit No.2002-AB-2121) include improvement to the waste activate

sludge system, new digested sludge belt thickener, 4 aerobic digesters , provide cover for existing and new sludge storage tanks, and order control system. Phase II improvements (Permit No.2003-AB-4997) include addition of one aeration tank, three blowers and one final clarifier. Phase II construction is near completion at this time. *Record at 424-82.*

In its NPDES permit application, the Village, based on 156 samples, provided the $CBOD_5$ concentrations in its effluent. *Record at 433.* The applicant reported actual $CBOD_5$ concentrations of 5 mg/L as daily maximum and 2 mg/L as monthly average. *Record at 404.* The dissolved oxygen concentrations reported in the application for outfall 001 are: 8.35 mg/L as maximum daily and 7.45 mg/L as average daily. *Record at 437.* Based on the 76 samples reported, the daily maximum dissolved oxygen concentration is 10.2 mg/L, whereas the daily average concentration is 7.43 mg/L. *Record at 626.*

The plant effluent is of high quality with respect to the concentrations of $CBOD_5$ and dissolved oxygen. Further, the above mentioned improvements will allow the expanded treatment plant to provide an equally high quality effluent to the receiving stream.

Internal Agency e-mail Discussions- To supplement the information available on physical, chemical, and biological conditions of Hickory Creek below the plant's discharge point and to conduct a meaningful antidegradation analysis that complies with the requirements of the Board regulations, the Agency requested the Village to conduct a biological study. The study showed no significant impact by the Village's discharge on the receiving stream as measured by macroinvertebrates. *Record at 368; 403-418; 512-521.* Petitioners claim that the conclusions made in the study are without explanation,

however, they fail to consider the underlying data that the Village considered in making those conclusions.

Petitioners next cite to several emails from Agency staff discussing the Earth Tech study, but mischaracterize the nature of discussion among the staff. These e-mails simply show that the Village's study was subject to extensive discussions among the Agency staff. The internal Agency discussions focused on the information provided in the Village's study and general discussions about the methodology used to perform the study.

The internal deliberations among various Agency staff were appropriate and necessary in determining the actual scope of the Earth Tech study. The Agency staff who reviewed the Earth Tech study are responsible for assessing the waters of the State consistent with the requirements of Section 305 of the Clean Water Act. The Agency staff's initial comments on the study were based on their understanding of the Agency's methodology used to assess waters for the Clean Water Act purposes. Also, the Agency's comments were influenced by the fact that the receiving stream in question is listed on the 2002 Illinois 303(d) list. The Agency's review of the study had a narrower purpose than the one intended in assessing the waters of the State. The review was specifically regarding whether the Village's study is adequate in determining the existing conditions of Hickory Creek below the plant's discharge and what the possible impact of the plant's existing discharge is on the aquatic life in the Hickory Creek segment below the discharge.

Specifically, most of the discussion cited by Petitioners was focused on various valid methodologies that could have been used for performing MBI analysis. *Record at*

665; 671; 674-675. Some of the tolerance values assigned to several species were not as the Agency would have assigned in assessing the waters of the State. *Record at 370.* At the Agency's request, the consultant made these changes and recalculated the MBI results. The difference between the two results was relatively minor. The overall conclusion of the study was that as there was very little difference between upstream and downstream MBI values and there was an insignificant or no adverse effect on the receiving stream from the effluent. *Record at 370; 562.* After these extensive deliberations, the Agency concluded that the Village's study is valid for its limited purpose to show that the existing discharge is not adversely impacting Hickory Creek. *Record at 370; 562.*

Petitioners cite to an internal Agency deliberation that concerns the procedures used by the Village's consultant were not exactly as the Agency would have used. The Agency staff discussion simply shows that there are alternative field sampling practices. Based on the information received from the Village's consultant during the Agency's review, the Agency concluded that the study was valid and an acceptable way of characterizing the current conditions of Hickory Creek. *Record at 370; 562.*

The Agency did not make its final decision solely based on the Earth Tech study, but rather utilized it as useful and important information for the purposes of its antidegradation assessment. Upon reviewing the basis for listing Hickory Creek as "partial impairment," the Agency concluded that the decision to list as partial impairment was based on violation of standards for total dissolved solids, rather than on biological information. To ensure that the Village's permit does not violate or contribute to the

violation of the total dissolved solids, the Agency incorporated a limitation for total dissolved solids in the final NPDES permit.

The e-mails cited by Petitioners are evidence that the Village's study was subject to extensive analysis and scrutiny by the Agency prior to accepting it for its limited purpose. The Agency believes that the internal discussions are necessary and routine in NPDES permitting decisions. Here, internal Agency deliberations were an integral part of the appropriate antidegradation analysis, and also lead the Agency to reach the legally sound final decision reflected in the final NPDES permit, Responsiveness Summary, and the antidegradation assessment. The Agency's conclusion that the plant's discharge is not adversely affecting the aquatic life in Hickory Creek below the discharge is also supported by the study's findings that pollution intolerant organisms were found both upstream and downstream of the Village's STP 1 existing discharge. *Record at 562.*

Phosphorus- Phosphorus levels in Hickory Creek are elevated from background levels both upstream and downstream of the Village's STP 1 discharge. There are at least 12 wastewater treatment plants that discharge into Hickory Creek and its tributaries. Nine of these facilities are located upstream of the Village's STP 1 discharge. The two stations sampled in 1997 that were used for the assessment of Hickory Creek for the 2002 Illinois Water Quality Report were located upstream (GG-06) and downstream (GG-02) of the Village's STP 1. Station GG-06 at Marley Road was assessed as full aquatic life use based on biological data. Station GG-02 at Washington Street, Joliet was assessed as partial support based on water chemistry data. Both stations had total phosphorus concentrations that exceeded the Agency's cause listing criteria of 0.61 mg/L. However, for the Agency to list phosphorus as a cause of impairment, other data such as biological

conditions in the receiving stream and or water quality numeric standards must indicate actual impairment in the stream. Phosphorus concentrations were similar at these two stations in 1997 with means of 0.58 mg/L at GG-06 and 0.53 mg/L at GG-02. *Record at 365.*

Petitioners attempt to show that the sampling conducted on August 20, 2002, showed 2.76 mg/L of total phosphorus in the plant effluent, almost twice the upstream concentration on that day, and six times the average over time for that particular stream. The comparison provided by Petitioners is misleading as the calculation does not consider the flows of the effluent and Hickory Creek below the discharge point. When the flow is considered for comparison purposes, total phosphorus from the plant effluent is only one fourth of the upstream total phosphorus, not twice as suggested by Petitioners. Also, when average concentrations are considered, total phosphorus from the plant effluent is one fourth of the upstream phosphorus , not six times as suggested by Petitioners.

Copper- The results of the two copper samples collected by the Village's STP 1 were 0.0141 mg/L and 0.0205 mg/L. The average of the copper samples was 0.0173 mg/L. As this value is less than the chronic water quality standard of 0.0206 mg/L, the Agency determined that there was no reason to incorporate permit limits for copper. Facilities such as the Village's STP 1 that have been identified through the pre-treatment program as having a low risk for high levels of metals are not a significant source of copper. As no known source of copper is discharging into the Village's STP 1, and the sample results were below the chronic water quality standard, the Agency determined that no permit conditions for copper are necessary.

The Agency uses the USEPA *Technical Support Document for Water Quality Based Toxics Control* (TSD) as technical guidance where underlying data, as recommended by the guidance, is available. However, the Agency limits its use of the TSD to a screening tool to determine if further analysis is necessary. In cases where a very small sample population exists, the USEPA procedure does not give a valid result. In such cases, the Agency decides if additional information is necessary to make the final determination regarding whether the contaminant in question has a reasonable potential to exceed applicable water quality standard. In this case, the Agency did not require this additional information as the Agency had determined that this facility has a lower risk for high levels of metals and other industrial pollutant in its treated domestic waste effluent. Also, the Agency determined that as there does not exist any known source of copper, there is no need for additional information.

C. Information In The Record In Response To Petitioners Comments Provided During the Public Comment Period

In their public comments, Petitioners commented that the draft permit allowed discharges of phosphorus and nitrogen that cause or have a reasonable potential to cause or contribute to violations of the water quality standards regarding offensive condition and that nutrients are likely the cause of algal blooms and other unnatural plant growth. Petitioners further commented that the permit allowed discharges that may cause or have a reasonable potential to cause or contribute to violations of water quality standards regarding dissolved oxygen, pH and copper. Petitioners comments are not supported by the facts present in the record.

Algal Bloom- There are several factors that can contribute to excessive algal growth including nutrients, stream flows, dams/impoundments, turbidity and sunlight/canopy cover. It is possible to have excessive algal growth even if nutrients are not substantially elevated. There is a dam located in Pilcher Park at river mile 4.6, which is about 3.8 miles downstream of the Village's STP 1. Furthermore, it is a known fact that algae is a vital part of the aquatic community and only excessive algal population is considered a problem. The best measure of determining if excessive algal conditions exist in a stream is by studying the local fish population. Only if the oxygen concentration dips to low levels, the fish population is adversely impacted. *Record at 361; 515; 639.*

Petitioners claim that the stream is covered from Pilcher Park almost all the way up to Cedar Street with Hydrodictyon and algae on the surface of it. Hydrodictyon is green algae commonly found in lakes, small ponds, and irrigation ditches. Petitioners fail to indicate that there is a dam located in Pilcher Park at about river mile 4.6. Further, the Petitioners' comment does not indicate where the bloom stopped. The Village's STP 1 discharge is located about 0.18 mile downstream of Cedar Street. If the Village's STP 1 was responsible for this condition, the green algae would not extend upstream of the discharge. *Record at 361; 515; 639.*

Also, Petitioners' above statement does not indicate where in relation to the Village's STP 1 discharge this green patch was seen. This statement is confusing as it tends to indicate that there was only a little patch of water down the center. Hickory Creek near Marley Road has fairly extensive areas of water willow that can make up a

large proportion of the stream channel during low flow stream conditions. *Record at 361; 515; 639.*

During the sampling done on August 20, 2002, the applicant documented that there was no visible signs of organic pollution or over-nitrification at the plant discharge site (heavy algal growth, turbid water, etc.). *Record at 633; 639.* The record shows that Hickory Creek does not have an "offensive conditions" situation, and that Hickory Creek is supporting a healthy and diverse aquatic life. Therefore, no permit limits are necessary with regard to offensive conditions. *Record at 361; 364.*

Contrary to Petitioners' assertions, the record does not show that the offensive conditions exist in Hickory Creek below the discharge point. Also the record does not show that conditions cited by Petitioners existed because of the Village's discharge. The Agency found that the conditions found in Hickory Creek below the discharge point were typically found in an effluent dominated stream.

Treatises: Petitioners cite to many treatises to denote that elevated levels of nutrients can cause impairment of streams. The Agency is aware of this phenomenon. The record, however, does not show that elevated levels of nutrients do exist in Hickory Creek below the Village's discharge point. Nor does the record show that the algal bloom in Hickory Creek below the Village's discharge point is causing adverse affects on dissolved oxygen levels and pH. In addition, these treatises are irrelevant as the discussion is directed at developing criteria for nutrients, and not at developing effluent limits for a discharge. Further, the water based effluent limit for dissolved oxygen in the Village's permit will help to improve the instream dissolved oxygen concentrations in

Hickory Creek, as the Creek is an effluent dominated stream during low flow conditions. *Record at 356.*

As part of their comments, Petitioners provided detailed calculations performed by Professor David Jenkins and Michael Lemke to show that it is likely that nutrient discharges from New Lenox are already adversely impacting Hickory Creek and reductions of nutrient discharges are needed to prevent further impact. The record belies Petitioners' position.

The Petitioners' calculation is inaccurate. First, they take the sample done on July 13, 2000, and compare it to the sample done at the same site on August 20, 2002. Instead of using actual or estimated flow in Hickory Creek, they used average August stream discharge from 1945 through 2001 and applied it to the August 20, 2002 for comparison purposes.

For August 20, 2002, the USGS station registered the flow in Hickory Creek to be 24 cfs. The flow at New Lenox can be estimated as 11 cfs using the ratio of the drainage areas. Petitioners on the other hand used a flow of 35.3 cfs. This added a factor of three to the comparison. When proper flow is applied, there is no difference in the nutrient loading.

In their public comments, Petitioners made several statements regarding how there is a reasonable potential that instream nutrient concentrations would cause violation of the offensive conditions standard, however, when the Agency considered all relevant information in the record, it could not agree with Petitioners' statements. The Agency's review of the record showed that Hickory Creek below the discharge point is supporting a

balanced aquatic life, typical levels of nutrients, high levels of dissolved oxygen, pH, and there were no sign of algal bloom present due to excessive nutrient levels.

D. The Information In The Record Prior To Issuing The Final NPDES permit and Responsiveness Summary

1. The Agency did consider All Alternatives to minimize pollution

Petitioners comment that the final permit did not contain any limits on discharge of phosphorus, nitrogen or copper.

The Agency's decision to not incorporate permit limits for phosphorus and nitrogen is supported by the facts in the record. Neither the stream conditions regarding algal bloom nor concentrations of dissolved oxygen and pH indicate that a limit is required under the Act or Board regulations. The Agency would have appropriately incorporated limits for these two parameters had the record indicated that offensive conditions exist in Hickory Creek below the discharge point and are being cause by the Village's effluent. Further, the limit for copper was not necessary as the record shows that there does not exist a known source of copper discharging into the Village's treatment plant. Without a source of copper discharging into the wastewater stream, a permit limit serves no purpose but to waste public resources. As the record does not show that algal bloom exist in the vicinity of the Village's discharge, a permit limit for pH at the water quality standard ensures that this water quality standard is not violated.

Petitioners are incorrect in stating that the Agency did not require limits for nutrients because narrative standards are difficult to apply to a permit. This was not the Agency's legal reasoning to not incorporate permit limits for nutrients. The Agency staff

who made these comments was simply stating the fact that narrative standards are difficult to apply in a permit situation.

2. The Agency did incorporated all limits necessary to prevent violation of water quality standards

To ensure that all limits necessary to prevent violation of the applicable water quality standards are incorporated in the Village's NPDES permit, the Agency considered all available information including the permit application, public comments, and the relevant information within the Agency. As part of this review, the Agency considered two whole effluent toxicity testing reports and a biosurvey performed by the Earth Tech. *See Record at 377-401; 484-507.*

The data contained in these reports also helped the Agency to determine the existing conditions in Hickory Creek below the plant discharge and also the quality of the plant effluent and its likely impact on the aquatic life in the receiving stream. The following discussion details the Agency's findings from these three reports.

NPDES permit holders are required to perform the whole effluent toxicity ("WET") testing. Currently, four rounds of testing using two species, *Ceriodaphnia* and fathead minnow, are required in NPDES permits for major (1 MGD or greater DAF) municipal dischargers. Usually this is done at about a year and a half before permit renewal. The WET testing performed in 2001 and 2002 coincided with the discharger-sponsored testing and served to corroborate discharger data.

The purpose of the WET tests is to detect toxicity caused by any toxicant that may be present in the effluent. For the WET testing purposes, effluent samples collected on July 10, 2001, and May 28-29, 2002, show that there was no acute toxicity to either

species. Thus indicating that no substance was present in the effluent that exceeded the tolerance threshold for these species. This includes copper and any other metal along with numerous other toxic substances, including salts, pesticides, surfactants, etc., that may be found in effluents. Had there been toxicity in the samples, the Agency would have had to look for the cause, a process that may include additional testing and a process called, toxicity reduction evaluation ("TRE").

Effluent biochemical oxygen demand ("BOD") can cause dissolved oxygen to be depressed in the toxicity test chambers (beakers). If necessary, the testing laboratory will aerate the test chambers to preserve the organisms through the duration of the tests. The testing laboratory must indicate this fact in the test report. In the case of the two rounds of testing for New Lennox, this was not necessary as there is no indication that aeration was provided. Dissolved oxygen was naturally maintained at least 8 mg/L throughout the tests for both effluent samples, indicating that effluent BOD was very low. Effluent pH was also normal throughout the tests, which last 48 hours for *Ceriodaphnia* and 96 hours for fathead minnow.

Based on the two WET testing reports, the Agency concluded that the Village's effluent would have no direct adverse effects on stream dissolved oxygen. As protective dissolved oxygen levels existed in the laboratory over the duration of the WET tests, this indicates that the flowing stream receiving the plant's effluent would also have no problem maintaining dissolved oxygen despite presence of biochemical oxygen demand in the effluent. Initial pH is within normal range in the laboratory test chambers and nothing intrinsic to the effluent exists to make pH higher or lower than normal levels.

Thus, no direct impact on receiving stream pH is apparent. Moreover, no acutely toxic effect will occur in the receiving stream from this effluent.

3. The Village's Earth Tech stream survey chemical water quality data

The Agency requested that the Village conduct a stream biosurvey on Hickory Creek for purposes of documenting existing stream conditions. *See Record at 522-536; 540-555*. Biosurveys involve chemical and physical characterization of water quality and well as biological characterization. Sampling stations were established to facilitate an understanding of stream water quality relative to the plant discharge. The plant effluent was also tested. Sampling was conducted on August 20, 2002. One Hickory Creek station was sampled just upstream of the plant effluent outfall while four stations were sampled downstream. The exact locations of the sampling stations are illustrated on a map supplied with the Earth Tech report.

The water quality analysis facilitated by this study enables the Agency to determine the water quality in Hickory Creek, the quality of the effluent on that day, and any influences the effluent may have on the water quality of the stream. Laboratory measurements were performed by Suburban Laboratories while field measurements were performed by Earth Tech.

The sampling station upstream of Hickory Creek showed a hardness value of 380 mg/L, which equates to very hard water, typical of many Northern Illinois streams. Copper, chromium, lead, nickel and zinc are hardness based metals. No detection of these metals was reported. The laboratory testing these samples used adequately low reporting limits, thus, indicating that the concentrations of these metals are well within the acute water quality standards. These concentrations are also below the level of the

chronic standards when the default conversion factors is used to convert dissolved metals water quality standards to total metal concentrations equivalent to the standards. The metals that are not hardness based, silver, manganese, boron and barium, are all either not detected or well within the water quality standards. Phosphorus (total) is 1.49 mg/L, typical for a suburban stream receiving both point and nonpoint sources of phosphorus. Nitrate/nitrite concentration is also typical. Ammonia is somewhat elevated over what would be expected in an unimpacted stream at 0.420 mg/L. Conductivity is also elevated over an unimpacted stream at 2,200 umhos/cm. BOD and suspended solids are low. Of the field parameters, temperature and pH are well within water quality standards as is dissolved oxygen with a reading of 8.33 mg/L. All measurements indicate that water quality standards are met.

The plant effluent quality is very similar to the upstream water in many ways. The concentrations of BOD and suspended solids in the plant effluent are the same or lower than the concentrations found in the receiving stream. Most metals concentrations are the same or lower than the concentrations seen in the receiving stream. Conductivity is much lower indicating that the effluent is lower in salts than the stream. The much lower sodium concentration of the effluent supports that finding. Field pH is lower than upstream, still within water quality standards, but this is typical for a biologically treated effluent. Dissolved oxygen is slightly higher than the upstream station. The effluent concentrations for ammonia (lower), zinc and copper (higher) and nutrients (phosphorus and nitrate/nitrite, both higher) differ from the concentrations of these constituents in the receiving stream. Zinc and all hardness influenced metals are evaluated using the hardness of the receiving stream rather than the effluent. Organisms live in the receiving

stream under ambient hardness and metals concentrations, not effluent concentrations. In this case, the zinc and copper concentration of the effluent is well within the acute and chronic water quality standard applicable in the receiving stream. Phosphorus and nitrate/nitrite concentrations in the effluent are typical of municipal treatment plant effluents. Thus, this data indicates that the effluent at New Lennox is of very good quality, meeting all water quality standards and in fact for some parameters, it is in better condition than the receiving stream.

Data from the downstream stations is very consistent, indicating that no significant dilution is encountered within the study zone. The data shows no impact of the effluent on the downstream receiving stream. The concentrations of various parameters in downstream waters resemble more closely with the upstream Hickory Creek concentrations, than they do the effluent concentrations. Any elevated levels of these parameters found upstream are at similar concentrations downstream, e.g., phosphorus, conductivity, sodium and hardness. The concentration of zinc shows a slight increase downstream as a result of the influence of the effluent, but well within acute and chronic water quality standards. Dissolved oxygen is found at similar or higher concentrations downstream, indicating no impact from the effluent. BOD and suspended solids values downstream are low, indicating the lack of impact of the plant effluent. Therefore, the date supports that there is simply no indication of any water quality problem in the creek that is exacerbated by the effluent, nor does the effluent appear to create any new problems. The physical and chemical data show no indication of violation of water quality standards or any other problem in the stream, except for elevated nutrient concentrations that are typical of all streams of this nature.

4. The Final Permit and Responsiveness Document

In response to the public's comments including Petitioners', the Agency made the following changes to the draft permit:

i. The Village's discharge is subjected to ammonia limits for spring/fall months;
ii. Total dissolved solids from the discharge are limited to a daily maximum concentration of 1000 milligram per liter ("mg/L"); and
iii. The Village's discharge is subjected to the dissolved oxygen limit of 6 mg/L.
Record at 353.

5. The Agency did ensure that existing uses are protected

Contrary to the Petitioners' belief, neither the Act nor the Board regulations require the Agency to protect existing conditions. The antidegradation regulations at 35 Ill. Adm. Code 302.105(a), rather require that the existing uses must be protected. The Board's water quality standards are considered protective of existing uses. *See* Revisions to Antidegradation Rule, R01-13 (June 21, 2001). As long as there is substantial evidence in the record to show that the final permit complies with all applicable water quality standards, the Agency has ensured that the existing uses of Hickory Creek are fully protected.

II. APPLICABLE STAUTORITY AND REGULAOTRY PROVISIONS

Statutory Authority

Petitioners bring the permit appeal pursuant to Section 40(e) of the Act. This section allows the third parties to appeal the Agency's decision of an NPDES permit to the Board. Section 40(e) of the Act provides:

1. If the Agency grants or denies a permit under subsection (b) of Section 39 of this Act, a third party, other than the permit applicant or Agency, may petition the Board within 35 days from the date of issuance of the Agency's decision, for a hearing to contest the decision of the Agency.
2. A petitioner shall include the following within a petition submitted under subdivision (1) of this subsection:
   a. 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
   b. A demonstration that the petitioner is so situated as to be affected by the permitted facility.
3. If the Board determines that the petition is not duplicitous or frivolous and contains a satisfactory demonstration under subdivision (2) of this subsection, the Board shall hear the petition (i) in accordance with the terms of subsection (a) of this Section and its procedural rules governing permit denial appeals and (ii) exclusively on the basis of the record before the Agency. The burden of proof shall be on the petitioner. The Agency and permit applicant shall be named co-respondents. 415 ILCS 5/40(e) (2004) (*emphasis added*)

Section 39(a) of the Act 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. *See* 415 ILCS 5/39(a) (2004).

(a) When the Board has by regulation require a permit for the construction, installation, or operation of any type of facility, equipment, vehicle, vessel, or aircraft, the applicant shall apply to the Agency for such permit and is shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of the Act or of regulations hereunder.... 415 ILCS 5/39(a) (2004) (*Emphasis added*)

Applicable Board Regulations

The Board regulations at 35 Ill. Adm. Code 302.105 set forth in detail the requirements that apply to the Agency's antidegradation analysis. Section 302.105 provides:

The purpose of this 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.

a) Existing Uses

Uses actually attained in a surface water body or water body segment on or after November 28, 1975, whether or not they are included in the water quality standards, must be maintained and protected. Examples of degradation of existing uses of the waters of the State include:

1) an action that would result in the deterioration of the existing aquatic community, such as a shift from a community of predominantly pollutant-sensitive species to pollutant-tolerant species or a loss of species diversity;

2) an action that would result in a loss of a resident or indigenous species whose presence is necessary to sustain commercial or recreational activities; or

3) an action that would preclude continued use of a surface water body or water body segment for a public water supply or for recreational or commercial fishing, swimming, paddling or boating.

c) High Quality Waters

1) Except as otherwise provided in subsection (d) of this Section, 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.

2) The Agency must assess any proposed increase in pollutant loading that necessitates a new, renewed or modified NPDES permit or any activity requiring a CWA Section 401 certification to determine compliance with this Section. The assessment to determine compliance with this Section must be made on a case-by-case basis. In making this assessment, the Agency must:

A) Consider the fate and effect of any parameters proposed for an increased pollutant loading.

B) Assure the following:

i) The applicable numeric or narrative water quality standard will not be exceeded as a result of the proposed activity;

ii) All existing uses will be fully protected;

iii) All technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading have been incorporated into the proposed activity; and

iv) The activity that results in an increased pollutant loading will benefit the community at large.

C) Utilize the following information sources, when available:

i) Information, data or reports available to the Agency from its own sources;

ii) Information, data or reports supplied by the applicant;

iii) Agency experience with factually similar permitting scenarios; and

iv) Any other valid information available to the Agency.

f) Antidegradation Assessments

In conducting an antidegradation assessment pursuant to this Section, the Agency must comply with the following procedures.

1) A permit application for any proposed increase in pollutant loading that necessitates the issuance of a new, renewed, or modified NPDES permit or a CWA Section 401 certification must include, to the extent necessary for the Agency to determine that the permit application meets the requirements of this Section, the following information:

A) Identification and characterization of the water body affected by the proposed load increase or proposed activity and the existing water body's uses. Characterization must

address physical, biological and chemical conditions of the water body.

B) Identification and quantification of the proposed load increases for the applicable parameters and of the potential impacts of the proposed activity on the affected waters.

C) The purpose and anticipated benefits of the proposed activity. Such benefits may include:

i) Providing a centralized wastewater collection and treatment system for a previously unsewered community;

ii) Expansion to provide service for anticipated residential or industrial growth consistent with a community's long range urban planning;

iii) Addition of a new product line or production increase or modification at an industrial facility; or

iv) An increase or the retention of current employment levels at a facility.

D) Assessments of alternatives to proposed increases in pollutant loading or activities subject to Agency certification pursuant to Section 401 of the CWA that result in less of a load increase, no load increase or minimal environmental degradation. Such alternatives may include:

i) Additional treatment levels, including no discharge alternatives;

ii) Discharge of waste to alternate locations, including publicly-owned treatment works and streams with greater assimilative capacity; or

iii) Manufacturing practices that incorporate pollution prevention techniques.

E) Any additional information the Agency may request.

F) Proof that a copy of the application has been provided to the Illinois Department of Natural Resources.

Section 302.203 Offensive Conditions

Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. The allowed mixing provisions of Section 302.102 shall not be used to comply with the provisions of this Section.

(Source: Amended at 14 Ill. Reg. 2899, effective February 13, 1990)

Section 304.105 Violation of Water Quality Standards

In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard. When the Agency finds that a discharge which would comply with effluent standards contained in this Part would cause or is causing a violation of water quality standards, the Agency shall take appropriate action under Section 31 or Section 39 of the Act to require the discharge to meet whatever effluent limits are necessary to ensure compliance with the water quality standards. When such a violation is caused by the cumulative effect of more than one source, several sources may be joined in an enforcement or variance proceeding, and measures for necessary effluent reductions will be determined on the basis of technical feasibility, economic reasonableness and fairness to all dischargers.

Section 309.141 Terms and Conditions of NPDES Permits

In establishing the terms and conditions of each issued NPDES Permit, the Agency shall apply and ensure compliance with all of the following, whenever applicable:

a) Effluent limitations under Sections 301 and 302 of the CWA;

b) Standards of performance for new sources under Section 306 of the CWA;

c) Effluent standards, effluent prohibitions, and pretreatment standards under Section 307 of the CWA;

d) Any more stringent limitation, including those:

1) necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any Illinois statute or regulation (under authority preserved by Section 510 of the CWA),

2) necessary to meet any other federal law or regulation, or

3) required to implement any applicable water quality standards, such limitations to include any legally applicable requirements necessary to implement total maximum daily loads established pursuant to Section 303(d) of the CWA and incorporated in the continuing planning process approved under Section 303(e) of the CWA and any regulations or guidelines issued pursuant thereto;

III. STANDARD AND SCOPE OF REVIEW

A. Under Section 40(e) Of The Act, Petitioners Have The Burden Of Proof And The Act Does Not Allow Petitioners To Shift That Burden

Petitioners brought this third party NPDES permit appeal under Section 40(e) of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/40(e)(1) (2004). Section 40(e)(3) of the Act specifically states that the burden of proof shall be on the petitioner. *See* 415 ILCS 5/40(e)(3) (*emphasis added*).

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 the Agency's final action on an NPDES permit. *Prairie Rivers Network v. PCB et al.*, 335 Ill. App. 3d 391, 401, 781 N.E. 2d 372 (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).

In *Village of Lake Barrington et al., v. Illinois EPA and Village of Wauconda*, PCB 05-55 (April 21, 2005), the Board addressed the burden of proof issue in a third-party NPDES permit appeal. The Board noted that, "[t]he distinction between the two types of NPDES permit appeals is which party bears the burden of proof." *Id.* at 5. Under Section 40(a)(1) of the Act, if the permittee appeals the permit, the burden of proof

is on the permit applicant. *Id.* The Board, consistent with the holding of the court in *Prairie Rivers*, held that, "[u]nder Section 40(e)(3) of the Act, in a third party NPDES permit appeal, the burden of proof is on the third party." *Id.* at 5; *Prairie Rivers*, 781 N.E. 2d 372, 380 (*emphasis added*).

According to the Board in *Village of Lake Barrington*, the question before the Board in permit appeal proceedings depends on who is filing the petition for review of the Agency's final action. In the case of an applicant challenging the Agency's final decision, the question becomes, "whether the applicant proves that the application, as submitted to the Agency, demonstrates that no violation of the Act would have occurred if the requested permit had been issued." *Id.* at 5. Whereas in the case of a challenge brought by a third party, the question becomes, "whether the third party proves that the permit as issued will violate the Act or Board regulations." *Id.* (*emphasis added*), citing to *Joliet Sand & Gravel Co. v. PCB*, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist., 1987); *Prairie Rivers*, 335 Ill. App. 3d at 401; 781 N.E.2d at 380.

On the burden of proof issue, the Board in *Des Plaines River Watershed Alliance v. Illinois EPA*, PCB 04-88 (2005), held 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 the petitioner, who alone bears the burden of proof in this matter." *Des Plaines River Watershed Alliance* at 7 (*emphasis added*).

Thus, in a third party permit appeal the burden never shifts away from Petitioners. Here, since Petitioners challenged the Agency's final decision, pursuant to Section 40(e)(3) of the Act and the Board's ruling in *Village of Lake Barrington* and *Des Plaines River Watershed Alliance* , Petitioners must come forward with the evidence to show that

the permit as issued by the Agency would cause a violation of the Act or the regulations. Petitioners may not meet this burden by simply asserting that the permit may or might cause a violation of the Act or Board regulations. This conclusion would shift the burden of proof set forth in Section 40(e) of the Act.

B. Petitioners Must Show Solely Based On The Entire Record That the Permit As Issued Would Violate The Act or Board Regulations

As long as there is substantial evidence in the record, the Agency's decision to issue the permit must be upheld. Consequently, Petitioners must identify the lack of substantial evidence in the record to prove that the issued permit would violate the Act and/or the applicable regulations. The following cases illustrate the kind of substantial evidence that must be missing in the record. The court in *Ex Parte Fowl River Protective Association, Inc.*, 572 So.2d 446, 461 (Ala. 1990) found the following to be the substantial evidence that was missing from the record in that case: that Mobile Bay was determined to be too complex an environment to be simulated and the court found numerous factors that could affect water quality but cannot be analyzed. Also, in *Miners Advocacy Council, Inc. v. Department of Environmental Conservation*, 778 P.2d 1126, 1139-40 (Alaska 1989), the substantial evidence that was not in the record was that the mine in question may not have had the assumed level of dilution present for its discharge due to numerous mines discharging into the same waterbody.

Mere dislike of the permit conditions or mere allegations of noncompliance with the law without any proof to support those allegations or mere allegations that the additional permit limits could have been incorporated into the permit, is not the kind of

burden of proof required by Section 40(e)(3) of the Act. *See Village of Lake Barrington at 7.* Petitioners must establish that the permit issued to the Village will violate the Act or Board regulations in order for the Board to find for the petitioners in this matter. *Id.*

In this case, Petitioners made no attempt to establish lack of substantial evidence in the record through testimony at the Board hearing. In fact, Petitioners chose to waive their right[1] to present its case-in-chief or cross-examine the Agency staff responsible for making the permitting decision. Also, at the Board hearing, Petitioners chose not to present any expert witness or scientific evidence to establish how the alleged shortcomings in the permit would cause violation of the Act or the applicable Board regulations. Petitioners thus have agreed to meet its burden under Section 40(e) solely based on the information in the record. In other words, Petitioners must show that the evidence in the record demonstrate that the permit as issued would cause the violation of the Act or Board regulations.

As Petitioners did not present additional testimony or evidence at the Board hearing, pursuant to Section 40(e) of the Act they must meet their burden of proof solely based on the record that is filed with the Board. Petitioners can not meet this burden as

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[1] Petitioners may read the Board's November 17, 2005 decision more broadly and argue that Section 40(e) of the Act prohibits any additional testimony at the Board hearings as the Agency's review should be strictly based on the record that was before the Agency at the time of making the decision. However, the Agency does not believe that the Board's November 17, 2005 decision in R04-88 stands for this position. The Board held that, "[t]he Board cannot conclude under the circumstances of this case that the respondents have persuasively identified any additional discoverable evidence." The Board decision does not speak to the issue of whether Section 40(e) limits the parties' ability to present witness at a third party NPDES permit Board hearing.

The Agency's reading of the Board's November 17, 2005 decision is consistent with the Board's action where the third party was allowed to present witness at the Board hearing. *See Wesley Brazas v. Village of Hampshire and IEPA*, PCB 06-131. The petitioner was allowed to testify in that case.

Further, Petitioners' reading would be contrary to the holding of the Appellate court in *Borg-Warner v. IEPA*, 100 Ill.App.3d 862, 427 N.E.2d 415, 56 Ill.Dec. 335 (3rd. Dist., 1981). The court noted that, "an

the Board in its November 17, 2005, decision held that there is a "genuine issue of material fact" with regard to the issue of nutrient loadings, offensive conditions standard, and the copper water quality standard. As there remain unresolved factual issues, Petitioners cannot, as required by Section 40(e) of the Act, prove that the permit as issued would violate the Act or the Board regulations.

Specifically the Board in November 17, 2005 decision provides the following:

Regarding nutrient loadings issue, the Board held that, "the Board cannot conclude that there is no genuine issue of material fact with regard to the issue of nutrient loadings. Although the disputes listed in the preceding two paragraphs are not intended to be exhaustive, they nonetheless indicate that significant factual issues remain unresolved with regard to matters such as the present quality of Hickory Creek, the effects of the Village's proposed discharge on the creek, and the Agency's consideration of alternatives to that discharge." *Board's November 17, 2005 opinion at 22.*

Regarding the narrative offensive conditions standard issue, the Board held that, "the Board cannot conclude that there is no genuine issue of material fact with regard to the issue of narrative offensive conditions standard. Although the disputes listed in the preceding two paragraphs are not intended to be exhaustive, they nonetheless indicate that significant factual issues remain unresolved with regard to matters such as the source of algae in Hickory Creek, the extent and location of algae in the creek, any effects of algae on the creek, and the Agency's consideration of those effects." *Board's November 17, 2005 opinion at 29.*

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appeal to the PCB [Board] includes a right to an adjudicatory hearing before the PCB. That hearing is conducted under rules for adjudicatory cases." *Borg*, 427 N.E.2d 415, 420.

Regarding the copper water quality standard issue, the Board held that, "the Board cannot conclude that there is no genuine issue of material fact with regard to the issue of the copper water quality standard. Although the disputes listed in the preceding two paragraphs are not intended to be exhaustive, they nonetheless indicate that significant factual issues remain unresolved with regard to matters such as the analysis of the Village's samples, and the Agency's consideration of copper limits." *Board's November 17, 2005 opinion at 33.*

C. Only Evidence In Record At The Time Agency Issued The Village's Permit is Relevant

In *Prairie Rivers Network* and *Village of Lake Barrington*, the Board addressed the issue concerning the scope of the Board's review of the Agency's decision. Section 40(e)(3) of the Act directs the Board to consider the petition "exclusively on the basis of the record before the Agency." 415 ILCS 5/40(e)(3) (2004). The Board has long held that in permit appeals, its review is limited to the record that was before the Agency at the time the permitting decision was made. *See Community Landfill Company v. IEPA*, PCB 01-48, PCB 01-49 (consolidated) (April 5, 2001); *Panhandle Eastern Pipe Line Company v. IEPA*, PCB 98-102 (January 21, 1999). In *Prairie Rivers Network*, the Board held that, "Section 40 of the Act (415 ILCS 5/40 (2000)) does not differentiate between the scope of the review in permit appeals brought by permit holders and those brought by third parties." *Prairie Rivers Network at 10.*

Petitioners argue that, "IEPA's decision to issue the permit must be supported and justified in the Responsiveness Summary and the facts and documents cited in the

Responsiveness Summary." Petitioners, however fail to cite any applicable Board regulation in support of its position. Petitioners' contention is contrary to the specific language of Section 40(e) of the Act, which requires that the Board shall review the Agency decision based on the entire record, not based on a particular document.

Contrary to Petitioners' assertion, 35 Ill. Adm. Code 166.192 does not state that the Agency's decision should be exclusively based on the rationale and facts referenced in the Responsiveness Summary document. Nowhere in Section 166.192 or Part 166, is it stated that the Agency's decision should be based on the rationale presented in the Responsiveness Summary document. *See* 35 Ill. Adm. Code Part 166.

Part 166 does not require that the Agency's decision be fully based on the Responsiveness Summary document, rather it is intended to set forth the practice and procedures to be followed by the Agency in conducting informational hearings. *See* 35 Ill. Adm. Code 166.101(a). It states that if an informational hearing is held in a case, the Agency must respond to all significant comments criticisms, and suggestions. Part 166 simply requires that the Responsiveness Summary document must be made part of the hearing record. *See* 35 Ill. Adm. Code 166.180.

In support of its position, Petitioners cite to *In Re: Washington Aqueduct Water Supply System*, NPDES Appeal No. 03-06 (July 29, 2004), 2004 WL 3214486. However, this case is inapplicable here because 40 C.F.R. §124.17 does not apply to the case at hand. Further, contrary to Petitioners assertions, the federal Environmental Appeals Board's ("EAB") review was based on the entire administrative record and not just a document similar to that of an Responsiveness Summary. ("Upon review of the administrative record and applicable federal law and Agency guidance, the Board holds

that Region III clearly erred by failing to respond, adequately or in some cases at all, to significant comments NWI submitted on the Washington Aqueduct's draft NPDES permits." *In Re: Washington at 3-4.*) Basing its decision on the entire record, the EAB stated that, "the record contains virtually nothing explaining the Region's decision to proceed as it did." *In Re: Washington at 4.*

Petitioners also argue that, "IEPA and applicant cannot develop new rationales for what IEPA did with the matter in its current posture and the permit can be upheld only on the basis of theories clearly articulated in the Responsiveness Summary." Petitioners cite *Federal Power Commission v. Texaco Inc.*, 5 P.U.R. 4th 320, 417 U.S. 380, 94 S.Ct. 2315 (1974), and *Reservation Telephone Cooperative v. Federal Communication Commission*, 826 F.2d 1129, 264 U.S.App.D.C. 113, 63 Rad. Reg. 2d (P & F) 1132 (1987) in support of this assertion. Both of these cases are distinguishable here.

In *Federal Power Commission*, the court interpreted an order that was ambiguous regarding the applicable standard. *Federal Power Commission at* 398-99. The court held that, "[h]ad the order unambiguously provided what the commission now asserts it was intended to provide, we would have a far different case to decide. But as it is, we cannot 'accept appellate counsel's post hoc rationalizations for agency action, for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" *Id.*

In *Reservation Telephone Cooperative*, the court was reviewing the Federal Communication Commission's order. When the Commission attempted to offer an explanation that was contrary to its 1983 opinion, the court held that, "we cannot affirm

an agency's decision on any rationale other than the one it offers to explain its actions." *Reservation Telephone Cooperative at 1134.*

Contrary to the situations in *Federal Power Commission* and *Reservation Telephone Cooperative*, the case at hand involves an administrative review of the Agency's final action under Section 40(e) of the Act. The Act specifically mandates that the review be based on the entire record that was before the Agency prior to issuing the permit, not just based on the Responsiveness Summary document. Petitioners are now coining a new requirement that is neither based on the Act nor the Board regulations. Petitioners would want the Agency to summarize its entire rationale to issue a permit on a piece of paper or in a document. The law does not require the Agency to do so. Further, it would make no sense to file the entire record with the Board if the Board's review is to be based on a single document. Further, in this brief, the Agency is not providing any rationale that is not supported by the entirety of the record.

The fundamental purpose of the Responsiveness Summary document is to provide response to the comments received during the comment period. This document alone can not constitute the Agency's rational to issue or not issue a permit as the Agency's responses are dependent on the type of questions received during the comment period. How would Petitioners deal with a situation where no public hearing was held or no public comments were received? In these two cases the Agency would not have the Responsiveness Summary document. For the purposes of Section 39(a) and 40(e), the Agency must create a record that includes all the relevant information supporting the Agency's final action to issue or deny an NPDES permit. The Agency must meet this statutory burden irrespective of the nature and extent of questions asked by the public

during the comment period. Thus, the appropriate inquiry for reviewing the Agency's final action is whether the Agency's final action is supported by the data and information contained in the record.

Petitioners next argue that the Agency's statements must be supported by facts or logic. To support their argument, Petitioners cite to *Reinhardt v. Board of Education of Alton Community Unit School District No. 11*, 61 Ill.2d 101, 329 N.E.2d 218 (1975); *District 1199P, National Union of Hospital and Health Care Employees, AFL-CIO v. National Labor Relations Board*, 864 F.2d 1096, 110 Lab.Cas. P 10,886, 130 L.R.R.M. (BNA) 2201 (US Court of Appeals, 3rd Circuit, 1989); and *Harris v. Cropmate Company*, 302 Ill.App.3d 364, 706 N.E.2d 55, 235 Ill.Dec. 795 (4th Dist., 1999). These cases are distinguishable as they do not apply to the Section 40(e) situation, which is the case here.

In *Reinhardt*, the court reviewed the Board's order that was entered without any findings by the Board. The Board by its vote said there were 'reasons or causes' for the plaintiff's dismissal. The record however did not include what evidence the Board accepted or rejected. The court held that, "[t]here can be no judging whether a ground relied on by the Board was constitutionally proper or not, for there were no findings. In short, there can be no judicial review on the record before us." *Reinhardt at 220.*

In *District 1199P*, the case involved the NLRB's interpretation of the Act. As the NLRB failed to state what law it applied in that case or why, the court held that a reviewing court can only assess the rationality of the agency's interpretation if "the agency provides a reasoned explanation of its actions." *District 1199P at 1098.*

In *Harris*, the court was addressing the issue whether the proffered witness has sufficient information to render a reliable opinion? *Harris at 64-65.* The court noted that, "[c]ourts should remember that they need not and should not accept an expert's opinion on the basis of *ipse dixit*, i.e., such a thing is so because I say it is so." *Id. at 65.*

Petitioners provide a general discussion of several legal theories, but fail to show how these theories are applicable to the case at hand. The Petitioners' burden under Section 40(e) of the Act is to come forward with specific evidence, not general discussion of legal theories, to show that the Agency's decision to issue the Village's permit is not supported by the facts in the record. Mere allegations of noncompliance with the law without any proof to support those allegations, is not the kind of burden of proof required by Section 40(e)(3) of the Act. *See Village of Lake Barrington at 7.*

As long as the Agency's decision is supported by substantial evidence in the record, it should be upheld. The Agency's final decision to issue the Village's NPDES permit is fully supported by the facts in the record. Further, the Agency staff involved in making decisions have extensive experience and knowledge in reviewing the permit application. Further, the Agency staff's statements are based on the information in the record, and are not *ipse dixit.*

The Agency, like any other administrative agency, is bound by rule that "[a]dministrative agencies are required to apply their rules as written, without making *ad hoc* exceptions in adjudications of particular cases." *Panhandle Eastern Pipe Line v. Illinois EPA*, 314 Ill. App. 3d 296, 734 N.E. 2d 18, 24 (4th Dist., 2000). In this case, upon receiving information from the applicant, and the general public through the public hearing process, including Petitioners in this case, the Agency determined that the

applicant has met the Section 39(a) burden of proof requirement and therefore, an NPDES permit must be issued to the Village.

There is no reasonable basis to argue that the discharge from the Village's treatment plant would violate any applicable water quality standard, and there is no reasonable basis to conclude that the Agency in any way failed in its duty to ensure that the permit, as issued, does not violate any provisions of the Act or the regulations.

Here, Petitioners failed to meet the requisite burden of proof, that the permit, as issued by the Agency, would violate the Act or the applicable regulations.

THEREFORE, Petitioners' request for relief must be **DENIED.**

In the alternative, assuming the Board determines that the Petitioners have met the burden of proof outlined in Section 40(e)(3) of the Act, the Agency asserts that the permit, as issued, would not cause a violation of the Act or the applicable regulations: There is substantial evidence in the Agency record to support its decision to issue the Village's NPDES permit.

In the following subsections, the Agency will address the substantive issues raised by Petitioners.

IV. ARGUMENTS

I. PETITIONERS CANNOT MEET THE SECTION 40(e) BURDEN AND THE PERMIT ASS ISSUED WOULD NOT VIOLATE THE ACT OR THE BOARD REGULATIONS

A. The Permit As Issued Complies With The Applicable Requirements Of Antidegradation Regulations

Petitioners argue that the permit as issued does not comply with 35 Ill. Adm. Code 302.105(c) as the Agency did not assure that the permit incorporated all reasonable measures to avoid or minimize the extent of the new pollution loading. Specifically, Petitioners argue that the Agency failed to assure that reasonable controls were put on nutrients. In support of their argument, Petitioners claim that the Village's plant is a major source of phosphorus to Hickory Creek. Petitioners further argue that Section 302.105(c) language is plainly mandatory and requires that the Agency *must* assure that *all* reasonable measures to minimize the extent of the pollution have been incorporated.

Petitioners' interpretation to require the Agency to incorporate nutrient treatment controls in the Village's permit is contrary to the meaning and intent of Section 302.105(c)(2)(B)(iii) language. As per Petitioners' reading, anytime there is an increased pollutant loading from a proposed activity, and a technology to treat that pollutant is available, the Agency must incorporate such controls in the permit. Petitioners' reading of Section 302.105(c)(2)(B)(iii) is clearly erroneous.

The basic directive of Section 302.105(c)(2) is that the Agency must consider all non-degrading or less-degrading alternatives that are technically and economically available in a given situation. This assessment must be done on a case-by-case basis. The real objective of this assessment is to reduce the pollutant loading from a proposed activity if it is reasonable to do so. Petitioners clearly ignore the balancing test required by the antidegradation rules. For example, in case of Tier II waters, water quality cannot be lowered below the level necessary to protect the fishable/swimmable uses and other existing uses. However, maintaining a level of water quality above the "fishable/swimmable" level is not always required and water quality may be lowered if

necessary to accomplish important economic or social development in the area in which the waters are located. *In The Matter Of: Revisions To Antidegradation Rules*, 35 Ill. Adm. Code 302.105, 303.205, 303.206, AND 102.800-102.830, 2001 WL 34084035, R01-13, June 21, 2001, page 3. (*emphasis added*).

Section 302.105(c)(2)(B)(iii)does not require the Agency to consider technology controls as reasonable measures to avoid or minimize the proposed increase in pollutant loading. Thus, no nutrient controls were incorporated in the Village's NPDES permit, pursuant to Section 302.105(c)(2)(B)(iii).

Petitioners assert that the record does not contain any evidence to show that additional nutrient loading was "necessary" in this case. Contrary to Petitioners' assertion, the record reflects that expansion was necessary to accommodate the future growth of the area. In 2000, the Agency approved the Water Quality Management Plan ("WQMP") to ensure that the future expansion in the New Lenox area occurs in a planned manner. This expansion was also supported by NIPC in 1999. *Record at 601.* The expanded plant would provide waste treatment services to a population equivalent of 25,000. *Record at 78-79.* Thus, the lowering of water quality was necessary in this case to accommodate an important social need. *See* 35 Ill. Adm. Code 302.105(c)(1).

Under Section 40(e) of the Act, Petitioners bear the burden to prove that the permit as issued would cause the violation of the Act or the Board regulations. The Act does not allow Petitioners to shift this burden. To satisfy the Section 40(e) burden, Petitioners must come forward with undisputed facts to show that the Agency's antidegradation assessment was insufficient, and as a result the permitted discharge from the Village's wastewater treatment plant would cause the violation of Section 302.105(c).

Petitioners can not meet this burden as the Board in its November 17, 2005 opinion held that, "it can not conclude that there is no genuine issue of material fact with regard to the issue of nutrient loadings." *Board's November 17, 2005 opinion at 22.* Specifically, without providing an exhaustive list of disputed facts, the Board found that, "significant factual issues remain unresolved with regard to matters such as the present quality of Hickory Creek, the effects of the Village's proposed discharge on the creek, and the Agency's consideration of alternatives to that discharge." *Id.* Consequently, Petitioners fail to meet the requisite burden under Section 40(e) of the Act.

There is substantial evidence in the record to show that the Agency complied with all three requirements of Section 302.105(c). Pursuant to Section 302.105(f)(1)(D), the Agency conducted its assessment of alternatives to the Village's proposed increase in pollutant loading. *Record at 5-7; 372-374.* The Agency in its Responsiveness Summary discusses in detail the various alternatives considered in this case. The Village considered land application of its effluent as an alternative but found the alternative to be economically unreasonable. The Village's consultant estimates that 425 acres of land is required for irrigation alternative, out of which 269.9 acres is required for irrigation purposes and the rest of the land for treatment and buffer zone. The supplement information provided by the Village's consultant shows that the Village contacted a neighboring golf course to find if the golf course would be interested in spraying its effluent. The golf course did not consider the offer due to high groundwater and artesian wells that feed the ponds. Further, the Agency and NIPC require communities to explore other alternatives for wastewater treatment such as land application and regionalization of plants when possible and cost effective. Contrary to the Petitioners' assertion, the

Agency did consider all technically and economically reasonable alternatives to minimize the pollution loading from the Village's plant.

Contrary to Petitioners' claim, the Village's plant is not a major source of phosphorus to Hickory Creek and there is no evidence in the record to assert that phosphorus from the plant is already causing an adverse impact on the stream. Along with the non-point sources of phosphorus, there are at least 12 wastewater treatment plants that discharge into Hickory Creek. Nine of these facilities are located upstream of the Village's plant discharge. Thus, contrary to Petitioners' claim, the Agency did consider all technically and economically reasonable alternatives to the proposed increase in pollutant loading.

The Agency's antidegradation analysis ensures that the discharge from the Village's plant meet the applicable general use water quality standards, thus protecting the existing uses. Further, the analysis considered all reasonable alternatives available in this case to meet the Section 302.105(C)(2)(B)(iii)requirement. Thus, the Agency's decision to issue the Village's NPDES permit on the antidegradation assessment issue be upheld, as there exist, substantial evidence in the record to show that the permit as issued would not cause violation of the Act or the Board regulations.

B. The Permit As Issued Would Not Cause a Violation Of Section 302.203, 304.105, Or 309.141

Petitioners assert that the Agency failed to ensure under Section 302.105(c) that permit would not result in violation of the narrative standard. In addition, Petitioners argue that pursuant to Section 304.105 and 309.141(d), the Agency failed to ensure that

the total discharge from the plant would not cause or contribute to the violation of the narrative standard against algal blooms.

Petitioners' argument lacks the reasonable interpretation of the law and is not supported by the undisputed facts. Section 303.203, in part, provides that, "[w]aters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. 35 Ill. Adm. Code 302.203 (*emphasis added*). The Agency contends that 'unnatural' is the operative word in determining the violation of Section 302.203. Therefore, a Section 302.203 violation can only occur if plant or algal growth of unnatural origin is found in receiving waters. The record lacks any evidence to suggest that unnatural algal growth exists because of the Village's discharge. Petitioners have made no attempt to prove otherwise. Petitioners' statements, at the best, suggest that algae was witnessed in the stream. These statements do not establish that algal bloom of unnatural growth was found in Hickory Creek below the Village's discharge point.

If Petitioners are arguing that Section 302.203 strictly prohibits the discharge of any levels of phosphorus in the receiving waters, then this argument must be rejected. Under such construction, discharge of even a small amount of phosphorus is a violation of Section 302.203. Nitrogen and phosphorus are the primary nutrient required for virtually all plant life, both terrestrial and aquatic. These nutrients are available to water bodies naturally as well as anthropogenically. Phosphorus is generally believed to be the nutrient in shortest supply in the freshwater ecosystems, and therefore, its concentrations may often limit plant growth. Sometimes a waterbody receiving nutrients may have algae that is not limited by phosphorus but rather by another nutrient or by water quality

factors. Phosphorus is an essential nutrient for the health of aquatic life. The Agency objects to Petitioners' narrow and literal interpretation as Section 302.203 does not stand for a total prohibition of discharge of small amounts of phosphorus in the receiving stream. The general principle is that the Board regulations are construed and applied to avoid absurd and unfair results. *See Village of Fox River Grove v. Pollution Control Board*, 299 Ill. App. 3d 869, 880, 234 Ill. Dec. 316, 702 N.E. 2d 656, 664 (1998). Therefore, the Petitioners' interpretation must be rejected as it produces impractical and absurd results.

In *City of East Moline v. Illinois EPA*, 1989 WL 144768, PCB 87-127 (Nov. 15, 1989), the petitioner had asked for a variance from the water quality standards of 35 Ill. Adm. Code 302.203 relating to unnatural sludge for its discharge to an unnamed tributary of the Mississippi River. The Board denied the petitioner's request for relief and concluded that the petitioner's discharge violated both Section 302.203 and Section 304.106. The Board's conclusion was in part based on the Agency's findings that "the quality of the water changed from clear to brown and turbid; sludge was up to 14-20 inches deep; no fish were found below the discharge point in the tributary, but were found upstream; and benthic organisms were reduced substantially." 1989 WL 144768, *6. Petitioners have failed to meet the burden of proof required under the *City of East Moline.*

Under Section 40(e) of the Act, Petitioners bear the burden to prove that the permit as issued would cause the violation of the Act or the Board regulations. The Act does not allow Petitioners to shift this burden. To satisfy the Section 40(e) burden, Petitioners must come forward with undisputed facts to show that the permitted discharge

from the Village's wastewater treatment plant would cause the violation of Section 302.105(c), 304.105, and 309.141. Petitioners can not meet this burden as the Board in its November 17, 2005 opinion held that, "it can not conclude that there is no genuine issue of material fact with regard to the issue of narrative offensive conditions standard." *Board's November 17, 2005 opinion at 29.* Specifically, without providing an exhaustive list of disputed facts, the Board found that, "significant factual issues remain unresolved with regard to matters such as the source of algal in Hickory Creek, the extent and location of algal in the creek, and the Agency's consideration of alternatives to that discharge." *Id.* These disputed facts are the same facts Petitioners need to meet the Section 40(e) burden that the permit as issued would violate the narrative offensive condition standard of the Board regulations.

To prevail under Section 40(e), Petitioners must present undisputed facts to show that because of the Village's plant, algal growth of unnatural origin exist in Hickory Creek. Mere presence of algal growth that is of natural origin is not prohibited by Section 302.203. Further, the Agency's discussion in the Relevant Facts section of this brief shows that there is substantial evidence in the record to support the Agency's finding that the permit as issued does not violate the narrative offensive condition standard, the Agency's decision to issue the Agency's permit must be upheld.

Petitioners next argue that the Agency failed to assure that the plant discharges would not cause violations of the standards for dissolved oxygen and pH. Petitioners' argument is premised on their erroneous belief that extra loading of nutrients from the Village's plant would impair the existing uses and would cause violation of the water quality standards for pH and dissolved oxygen.

As Petitioners argument is premised on the belief that violations of these standards is closely related to nutrient control, the Agency's reasoning in the nutrient loading issue also applies here. See *Board's November 17, 2005 opinion at 8.*

Under Section 40(e) of the Act, Petitioners bear the burden to prove that the permit as issued would cause the violation of the Act or the Board regulations. The Act does not allow Petitioners to shift this burden. To satisfy the Section 40(e) burden, Petitioners must come forward with undisputed facts to show that the permitted discharge from the Village's wastewater treatment plant would cause the violation of water quality standards for pH and dissolved oxygen. Petitioners can not meet this burden as the Board in its November 17, 2005 opinion held that, "it can not conclude that there is no genuine issue of material fact with regard to the issue of narrative offensive conditions standard." *Board's November 17, 2005 opinion at 29.* Specifically, without providing an exhaustive list of disputed facts, the Board found that, "significant factual issues remain unresolved with regard to matters such as the source of algal in Hickory Creek, the extent and location of algal in the creek, and the Agency's consideration of alternatives to that discharge." *Id.* These disputed facts are the same facts Petitioners need to meet the Section 40(e) burden that the permit as issued would violate the pH and dissolved oxygen water quality standards of the Board regulations. Consequently, Petitioners fail to meet the requisite burden under Section 40(e) of the Act.

To prevail under Section 40(e), Petitioners must present undisputed facts to show that because of the Village's plant there is a violation of pH and dissolved oxygen water quality standard in Hickory Creek. As the Village's permit has a water quality based effluent limit for dissolved oxygen and pH, Petitioners' assertion is without any merit.

Also, the Agency's discussion in the Relevant Facts section of this brief shows that there is substantial evidence in the record to support the Agency's finding that the permit as issued would fully support the existing uses and would not violate the water quality standards for pH and dissolved oxygen. Thus, the Agency's decision to issue the Village's NPDES permit must be upheld.

C. The Permit As Issued Would Not Violate The Water Quality Standard For Copper

Petitioners argue that the permit does not comply with 35 Ill. Adm. Code 302.105 or 309.141 as it does not limit all pollutants that may cause or contribute to a violation of the copper standard.

On December 19, 2002, the Board adopted changes to General Use water quality standards for most metals from total metal to dissolved metal. The impetus for this change came from USEPA after experiments with aquatic life in the laboratory concluded that the dissolved form of metals is the toxic component whereas copper in an un-dissolved or suspended form is not harmful. Total metal is suspended form plus dissolved forms of a given metal. Copper was included in the change, which in this case consisted of adding a "default conversion factor" to the previously existing hardness based formula for determining the copper acute and chronic standards.

Petitioners' argument is flawed in that it assumes that copper limit was necessary in this case. All municipal sewage treatment plants are expected to discharge measurable concentrations of copper given the presence of copper in food and other domestic substances. The results seen so far show that copper metal translator values have been close to a factor of 0.5. The Agency considers 10 to 20 ppb of copper in a sewage plant's

effluent as average concentrations. In the Agency's opinion, different chemistries in the drinking water of communities dictate the severity of copper pipe erosion or even if erosion occurs at all. In the Agency's experience, copper levels over 30 ppb are what may be considered 'elevated' levels, and depending upon on local stream hardness, may or may not exceed water quality standards. The copper levels reported by the applicant do not display the elevated levels seen in other approximately ten sewage treatment plants with copper NPDES permit limits. The Agency suspects that the low copper levels in the Village's plant discharge are from erosion of pipes within homes and businesses.

The following discussion shows that the record contains substantial evidence to support the Agency's decision to issue the Village's NPDES permit without a copper limit.

The Agency uses the USEPA *Technical Support Document for Water Quality Based Toxics Control* ("TSD") as a technical guidance document. Using the TSD, the Agency determines whether further analysis is necessary. The Agency does not believe that the USEPA's procedure described in the TDS is valid when a small sample size exists because the TDS recommends the application of higher multiplier. In cases where limited data exist, the Agency evaluates these substances against the water quality standards applicable to the receiving stream. This approach is especially appropriate in cases where facilities have been previously identified through the pre-treatment program as having a low risk of high levels of metals and other industrial pollutants in treated domestic waste effluents. In this case, the Agency determined that the Village's STP 1 is one of such facilities.

The Village reported results of copper samples collected on January 9, 2001 and June 15, 2001 as 0.0141 mg/L and 0.0205 mg/L respectively. The average of copper samples was 0.0173 mg/L. Since this value is less than the chronic water quality standard of 0.0206 mg/L, the Agency determined that there permit limit for copper was not warranted in this case. If one of the samples would have exceeded the acute water quality standard, the Agency would have incorporate copper limits into the permit or would have required six (6) months of monitoring. Also, if the average of the samples would have exceeded the chronic water quality standard, the Agency would have incorporated copper limits into the permit or would have required six (6) months of monitoring. If there seems to have been an outlier or more data is necessary, the Agency would have required more sampling. This decision was also based on the fact that no known source of copper is discharging into the Village's waste stream.

The copper levels reported by the Village's STP 1 are not elevated concentrations. The average of three copper samples (0.0205, 0.0141, and 0.0165 mg/L total copper) reported by the applicant is 0.0170 mg/L. If the Agency had believed there exist a chance of exceeding the chronic copper water quality standard, it would have expected a site-specific metals translator study to demonstrate that only about half is present in the dissolved form. Adjusting the allowable effluent concentrations accordingly yields an effluent limit of 0.0394 mg/L that would be protective of the chronic dissolved standard at the end of pipe. Further, the available dilution in the Hickory Creek would ensure that the New Lenox effluent would have no potential to exceed water quality standard for copper.

The Agency did not include copper limits in the Village's permit as it has no reasonable potential to exceed the chronic water quality standard. Also, the Agency data does not show that Hickory Creek contains significant amounts of metals. Further, the land use in the area or the effluent itself are not significant sources of copper. *Record at 361.*

Under Section 40(e) of the Act, Petitioners bear the burden to prove that the permit as issued would cause the violation of the Act or the Board regulations. The Act does not allow Petitioners to shift this burden. To satisfy the Section 40(e) burden, Petitioners must come forward with undisputed facts to show that the permitted discharge from the Village's wastewater treatment plant would cause the violation of the copper water quality standard. Petitioners can not meet this burden as the Board in its November 17, 2005 opinion held that, "it can not conclude that there is no genuine issue of material fact with regard to the issue of the copper water quality standard." *Board's November 17, 2005 opinion at 33.* Specifically, without providing an exhaustive list of disputed facts, the Board found that, "significant factual issues remain unresolved with regard to matters such as the analysis of Village's samples, the Agency's consideration of copper limits." *Id.* These disputed facts are the same facts Petitioners need to meet the Section 40(e) burden that the permit as issued would violate the copper water quality standard of the Board regulations. Consequently, Petitioners fail to meet the requisite burden under Section 40(e) of the Act.

To prevail under Section 40(e), Petitioners must present undisputed facts to show that the Village's plant would cause the violation of the copper standard in Hickory Creek. Also, the Agency's discussion in the Relevant Facts section of this brief shows

that there is substantial evidence in the record to support the Agency's finding that the permit as issued does not violate the copper water quality. Thus, the Agency's decision to issue the Agency's permit must be upheld.

CONCLUSION

As Petitioners clearly failed to meet the requisite burden under Section 40(e) and as there exist substantial evidence in the Record to support the Agency' final decision, the Agency respectfully requests that the Board **DENY** the Petitioners' request for relief regarding additional permit limits to reduce nutrient loading from the Village's plant or permit limits for offensive conditions, dissolved oxygen, pH or copper.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: _____

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STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached the **POST HEARING BRIEF** upon the persons to whom it is directed, by placing a copy in an envelope addressed to:

Dorothy Gunn, Clerk
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and mailing it from Springfield, Illinois on June 30, 2006, by U.S. Mail with sufficient postage affixed.

Meredith Kelly

SUBSCRIBED AND SWORN BEFORE ME
THIS 30th DAY OF JUNE, 2006.

Brenda Boehner

OFFICIAL SEAL
BRENDA BOEHNER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-3-2009

THIS FILING PRINTED ON RECYCLED PAPER