

ILLINOIS POLLUTION CONTROL BOARD
July 6, 2006

WESLEY BRAZAS, JR.,)	
)	
Petitioner,)	
)	
v.)	PCB 06-131
)	(Third-Party NPDES Permit
MR. JEFF MAGNUSSEN, president,)	Appeal – Water)
VILLAGE OF HAMPSHIRE, and the)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondents.)	

MR. WESLEY BRAZAS, JR. APPEARED *PRO SE*;

MR. MARK SCHUSTER APPEARED ON BEHALF OF THE RESPONDENT, MR. JEFF MAGNUSSEN, president, AND THE VILLAGE OF HAMPSHIRE; and

MR. JAMES ALLEN DAY APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

On January 13, 2006, Mr. Wesley Brazas, Jr. filed a petition asking the Board to review a December 9, 2005 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(e)(1) (2004); 35 Ill. Adm. Code 105.206(a). On December 9, 2005, the Agency issued a modified National Pollutant Discharge Elimination System (NPDES) permit (No. IL 0020281) to the Village of Hampshire for an expansion of its wastewater treatment plant located in Kane County. The Agency granted the Village of Hampshire’s request for an NPDES permit modification to allow an increase in the facility’s design average flow (DAF) and design maximum flow as a result of a plant expansion. Mr. Brazas submitted a public comment regarding the Village of Hampshire’s permit modification application during the Agency’s public notice period.

The sole issue remaining on appeal is Mr. Brazas’ assertion that the issued permit violates public notice requirements. The Board has accepted and considered the arguments on this one issue in all briefs filed. Today the Board finds the public notice sufficient and compliant with the Illinois Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2004)) and Board regulations. The Board upholds the Agency’s issuance of the Village of Hampshire’s permit modification.

Before discussing the Board’s findings, the Board sets forth the procedural background, factual background, and the parties’ arguments.

PROCEDURAL BACKGROUND

Mr. Brazas filed this petition for review on January 13, 2006. On February 2, 2006, the Board found the petition deficient and requested more information before the Board could accept the matter for hearing. On March 2, 2006 the Board dismissed the allegations of air and water pollution and accepted the remainder of Mr. Brazas' amended petition that concerned the December 9, 2005 NPDES permit modification for hearing.

Mr. Brazas appealed on the grounds that: (1) the issued permit violates public notice requirements; (2) the Agency and the Village of Hampshire failed to perform a study assuring that the increase in discharge will not cause a violation of any other applicable water quality standard as required by Special Condition 5; (3) the permit fails to require monitoring of radium in the effluent in violation of Special Condition 9; and (4) the modified permit "unnecessarily jeopardizes the water quality of Hampshire Creek." Am. Pet. at 6.

On April 14, 2006, the Agency filed a motion to dismiss. On May 4, 2006, the Board dismissed Mr. Brazas' second, third, and fourth grounds for appeal. The Board found that because Mr. Brazas had not raised the second, third, and fourth issues during the public comment period, the Board did not have jurisdiction to consider those claims on appeal. 415 ILCS 5/40(e)(2) (2004); *see also* 35 Ill. Adm. Code 105.210(d). The Board accepted for hearing the one remaining issue of Mr. Brazas's petition and directed the parties to hearing.

Hearing Officer Bradley Halloran held a hearing on May 17, 2006, at the Kane County Courthouse in Geneva, Kane County. Mr. Brazas was the only witness that testified at the hearing, and Hearing Officer Halloran found that his credibility was not at issue.

Mr. Jeff Magnussen, Village President, and the Village of Hampshire (the Village), filed a joint post-hearing brief on June 5, 2006 (Vill. Br.). Mr. Brazas filed a post-hearing brief on June 6, 2006. On June 6, 2006 the Agency filed a post-hearing brief (Ag. Br.). Also on June 6, 2006, Mr. Charles St. George moved for leave to file an *amicus curiae* brief (AC Br.). On June 13, 2006, respondents Mr. Magnussen and the Village of Hampshire moved to strike Mr. Brazas' brief and responded to the motion for leave to file an *amicus curiae* brief. Mr. St. George replied to the motion to strike the *amicus curiae* brief on June 15, 2006. The Board grants Mr. St. George's motion and accepts his *amicus* brief, but only as to the remaining issue of public notice.

Mr. Brazas responded to the motion to strike on July 5, 2006. The Board accepts the untimely response. Mr. Brazas' response raises no new issues in the response. Nonetheless, the Board denies the motion to strike and accepts Mr. Brazas' brief.

FACTUAL BACKGROUND

The Hampshire wastewater treatment facility has an average flow of 0.75 million gallons of water per day. R. at 17. After the expansion, the facility expects to have an increase of capacity to 1.5 million gallons per day (mgd). *Id.* The facility discharges into Hampshire Creek. R. at 215, 597. Hampshire Creek is impaired for ammonia nitrogen, dissolved oxygen, and total

phosphorus. R. at 101, 103, 120. On May 12, 2005, the Agency issued a draft permit and fact sheet for the Village of Hampshire's wastewater treatment facility. The draft permit contained the same load limits and concentration limits as the final permit. The Agency computed the load limits contained in the draft and final permits based on a DAF of both 0.75 mgd and 1.5 mgd (after completion of the expansion). R. at 215, 216. The antidegradation assessment attached to the draft permit and fact sheet stated that increases in loading of biological oxygen demand (BOD),¹ total suspended solids (TSS), and ammonia was prohibited, and for that reason, very low concentrations of those constituents will result. R. at 218. The cover letter to the final issued NPDES permit states:

This Modified NPDES Permit increases the facility's design average flow and design maximum flow upon completion of the plant expansion but keeps the concentration limits and load limits at their current levels. R. at 596.

The final NPDES permit issued to the Village of Hampshire on December 9, 2005, contained a Carbonaceous Biochemical Oxygen Demand (CBOD₅) concentration limit of 10 milligrams per liter (mg/L), a TSS limit of 12 mg/L, and an ammonia limit of 1.5-1.8 mg/L. R. at 598. Mr. Brazas submitted a public comment during the public notice period identifying the proposed concentration limits as a fatal error. R. at 320. On December 9, 2005, the Agency specifically responded to Mr. Brazas' concern that the permitted concentration and mass loading limits do not correspond to the standard formula. R. at 545. The Agency stated:

The concentration of a pollutant in the treatment plant effluent will vary constantly depending on the amount of flow being discharged and the mass of the pollutant being discharged. Federal regulations do not require mass limits to convert exactly to concentration limits.

40 CFR 122.45 (f)(2) states; Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations. R. at 546.

THIRD PARTY NPDES PERMIT APPEAL

The Act and the Board's rules allow for third-party appeals in an NPDES permit proceeding. 415 ILCS 5/40(e)(1); 35 Ill. Adm. Code 105.102. Mr. Brazas has demonstrated that he participated at the hearing held by the Agency on the NPDES permit application. Therefore, pursuant to the Act and Board procedural rules, Mr. Brazas has standing to appeal the Agency's decision. But, Section 40(e)(2)(a) limits the issues to those Mr. Brazas raised during the public comment period.

MR. BRAZAS' ARGUMENTS

¹ The Agency also refers to CBOD₅ as biological oxygen demand (BOD) in the public notice fact sheet, antidegradation analysis, and other communications. *See e.g.*, R. at 218.

In Mr. Brazas' amended petition for review, he argues that the issued permit deviates from the formula included in the public notice that the Village of Hampshire is supposed use to calculate the appropriate load limits. Mr. Brazas stated in his public comment that the proposed concentrations should be cut in half to correspond to required mass limits. Mr. Brazas states that the public notice provides the following standard formula to calculate load limits: "8.34 x (Design Average and/or Maximum flow in MGD) x (Applicable Concentration in mg/L)." Am. Pet. at 6; *see also* R. at 269. Using that formula, Mr. Brazas states that for a load limit of 63 pounds per day (lbs/day) for CBOD₅ at a flow of 1.5 mgd DAF, the concentration limit should be 5.0 mg/L, not 10 mg/L as stated in the permit.

Mr. Brazas argues that the Agency does require lower load limits and concentration limits for discharges into Lake Michigan, so the higher load limits and higher concentration limits found in this permit are inappropriate. Tr. at 14.

AND **THE VILLAGE'S ARGUMENTS**

The Village urges the Board to uphold the Agency's issuance of the NPDES permit modification. The Village states that if Mr. Brazas means to say that the draft permit and fact sheet provided notice to the public that pollutant load limits would be determined only pursuant to a specific formulaic calculation, then his assertion is incorrect. The Village states that Hampshire Creek is an impaired water of the State, and consequently, the formula for load limits contained in the permit is a fixed mass-based standard.

The Village states that Mr. Brazas attempts to arrive at his recommended concentration limit by going "backwards through the formula (from the absolute limit required by the Section 303(d) listing) to establish a new concentration limit." Vill. Br. at 8. The Village states that where a stream is impaired, however, there may be no increase in any load limit.

The Village states that under the modified permit, the permitted limits for the wastewater treatment facility account for the future expansion. When the flow reaches 1.5 mgd, the concentration limit will be less than 10 mg/L to reach the 63 lb/day load limit, states the Village. When the facility is at current capacity, however, it will not be necessary to have a concentration limit of 5 mg/L. The Village concludes, therefore, that under the formula, and depending on the limit on loading, the concentration limit will vary depending on flow. The record makes it clear beyond a doubt, contends the Village, that the Agency properly assigned the Village of Hampshire's concentration limits.

THE AGENCY'S ARGUMENTS

The Agency contends that Mr. Brazas has failed to show that the public notice for the NPDES permit IL 0020281 was deficient due to errors relating to the calculation of concentration and load limits. The Agency argues that pursuant to Section 40(a)(1) (2004), Mr. Brazas has the burden of proof in this permit appeal. Ag. Br. at 1; citing 415 ILCS 5/40(a)(1) (2004). Further, the Agency asserts that Mr. Brazas has failed to cite any support for the proposition that permit limits must correspond to the typical mathematical equation. According

to the Agency, there is no State or Federal statute or regulation that includes such a requirement. For this reason, argues the Agency, Mr. Brazas' appeal must fail.

The Agency states that Hampshire sought a permit modification to double the capacity of its wastewater treatment plant from 0.75 mgd to 1.5 mgd. In response to the application, the Agency issued a draft permit and fact sheet. The fact sheet indicated that increases in BOD and TSS loading were not allowed due to documented dissolved oxygen problems in Hampshire Creek. Ammonia was also listed as a cause of impairment in Hampshire Creek. The fact sheet indicated that for these reasons the proposed permit could allow no increase in loading for BOD, TSS, or ammonia from previously permitted levels even though the plant expansion would double capacity from 0.75 to 1.5 mgd. R. at 218, 271.

The Agency explained that with the increased flow, no loading increase would result in lower effluent concentrations. Post Hearing Br. at 2. The Agency asserts the fact sheet concluded: "[t]he result will be a high quality effluent that will bring about positive changes in both the biological and chemical condition of Hampshire Creek." Ag. Br. at 2; citing R. at 271.

Applying the standard formula using the permitted effluent limits for BOD, TSS and ammonia, asserts the Agency, would result in higher mass load limits. Post Hearing Br. at 3. The Agency states that higher loadings, would improperly contribute to the degradation of a 303(d)-listed water (a water that does not meet water quality standards). Ag. Br. at 2; 33 U.S.C. 1313(d). The Agency states that the concentration in mass limits does not correspond to the standard formula, but that the deviation was explained in the public notice and in various communications found in the record. Tr. at 7; citing R. at 271, 447, 528, and 546. For these reasons, argues the Agency, the Board must uphold the Agency's issuance of the modified permit number IL 0020281 to the Village of Hampshire.

AMICUS CURIAE BRIEF

Mr. St. George filed an *amicus curiae* brief on June 6, 2006, setting forth three major arguments. First, Mr. St. George argues that the neither the Board nor the Agency has provided the public adequate due process and meaningful public participation. Second, Mr. St. George argues that the Board is allowing more relaxed standards in the December 9, 2005 NPDES permit than in the February 20, 2001 NPDES permit, without a demonstration that the increased flow will "meet the antidegradation test." Am. Cur. at 3. Third, Mr. St. George claims that the Board's approval of the modified permit would violate the Clean Water Act, the Public Trust Doctrine, and Board rules.

DISCUSSION

The Parties' Arguments

In light of the Board's May 4, 2006 order limiting the scope of this appeal, the Board will only consider those portions of Mr. Brazas' post-hearing brief and hearing transcripts that concern whether the issued permit violated public notice requirements. For the reasons set forth below, the Board finds that the public notice for the NPDES permit IL0020281 was not deficient.

In his public comment, Mr. Brazas argued the public notice was deficient because it was not accurate in its math. R. at 446. On December 9, 2005, the Agency specifically responded to Mr. Brazas' concern that the permitted concentration and mass loading limits do not correspond to the standard formula. R. at 545. The Agency stated:

The concentration of a pollutant in the treatment plant effluent will vary constantly depending on the amount of flow being discharged and the mass of the pollutant being discharged. Federal regulations do not require mass limits to convert exactly to concentration limits.

40 CFR 122.45 (f)(2) states; Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations. R. at 546.

As this response explains, Mr. Brazas used the standard formula provided in the public notice to arrive at his conclusion that to account for the increase in flow, the permit should apply a 5mg/L concentration limit instead of the 10mg/L limit. As indicated in the record, the Agency did not apply the standard formula because Hampshire Creek is an impaired water body and, therefore, mass loadings cannot increase. R. at 546.

In this case, the Village of Hampshire's modified permit IL0020281 limits CBOD₅, TSS and ammonia by either the mass loading, or the concentration limit, but the mass limit need not convert exactly to the concentration limit. These limits apply to both the facility's current flow as well as the expected increase in flow. The permitted concentration limits for these substances comply with the regulatory concentration limits for CBOD₅, dissolved oxygen, TSS, and ammonia found at 35 Ill. Adm. Code 302, 304.120, and 355. The mass loading limits allow the actual effluent concentrations to vary within the permitted concentration limits, but not exceed the mass loading limits.

The Board finds that the Agency provided the public, including Mr. Brazas, adequate notice of why the permit increases the facility's DAF and design maximum flow in anticipation of the plant expansion, but keeps the concentration limits and load limits at their current levels. For these reasons, the Board finds that the public notice was not deficient and affirms the Agency's issuance of NPDES permit IL0020281.

Amicus Curiae Brief

As previously stated, the Board cannot consider Mr. St. George's arguments not relating to whether the issued permit violated public notice requirements. The Board will only address whether the Board has provided the public due process. On May 4, 2006, the Board granted the Agency's motion to dismiss Mr. Brazas' second, third, and fourth issues. The Board found that the Board did not have jurisdiction to consider those issues on appeal because Mr. Brazas had not raised them during the NPDES permit public comment period. 415 ILCS 5/40(e)(2) (2004); 35 Ill. Adm. Code 105.210(d). Mr. St. George asserts that even though Mr. Brazas did not raise

those issues himself, many community residents raised the same issues “in writing and in public forums.” Further, Mr. St. George claims that the Agency’s motion was untimely and the Agency should not be allowed to dismiss issues that are not novel, and would, therefore, not prejudice any party at hearing.

On the issue of timeliness, the Board found on May 4, 2006 that both the parties and the Board would be prejudiced by proceeding to hearing on issues not within the Board’s jurisdiction. The Act simply does not allow the Board to decide any issues except as the Act provides in Section 40(e). 415 ILCS 5/40(e) (2004). In the May 4, 2006 order, the Board stated that a “demonstration that the petitioner raised the issues contained within the petition during the public notice period” is all that is required to confer standing to a third party under Section 40(e)(2). 415 ILCS 5/40(c)(2) (2004). Mr. Brazas did not raise the stricken issues during the public notice period, and no one else filed a timely appeal raising those issues. Consequently, the Board has no jurisdiction to hear those issues. The Board finds that the issues were properly struck on May 4, 2006.

This opinion constitutes the Board’s findings of fact and conclusions of law.

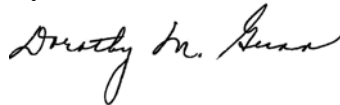
ORDER

The Board affirms the Agency’s December 9, 2005 grant of the NPDES permit modification No. IL 0020281 to the Village of Hampshire.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2004); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board’s procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 6, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board