BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

PLEASE TAKE NOTICE that the Des Plaines River Watershed Alliance, the Livable Communities Alliance, Prairie Rivers Network, and the Sierra Club have filed the attached PETITIONERS' POST HEARING REPLY MEMORANDUM.

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

DATED: July 21, 2006

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July 21, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

PETITIONERS' POST HEARING REPLY MEMORANDUM

Petitioners in their initial Post Hearing Memorandum ("Pet. Post Hearing Mem.") demonstrated, first, that the permit as issued violated the antidegradation regulations because the record did not contain substantial evidence showing that the Illinois Environmental Protection Agency ("IEPA") had assured that the increased phosphorus and nitrogen loadings allowed by the permit were necessary and did not consider ways to minimize those loadings through phosphorus or nitrogen treatment. (Pet. Post Hearing Mem. at 29-33)

IEPA's Response does not point to any place in the record where it considered phosphorus or nitrogen removal at the plant and does not identify any substantial evidence showing that it assured that phosphorus or nitrogen removal is infeasible. Instead, IEPA pretends that the antidegradation requirement that new pollutant loadings be allowed only if they are "necessary," 35 Ill. Adm. Code 302.105(c)(1), does not exist and attempts to write out of the code the requirement that IEPA "assure" that "all technically and economically reasonable measures for minimizing the new loading be incorporated." 35 Ill. Adm. Code 302.105(c)(2)(B)(iii).

The Petitioners further showed that the permit as issued violated the Environmental Protection Act and the Board regulations because the record does not contain substantial evidence showing that the applicant proved and IEPA ensured that discharges allowed by the permit would not cause or contribute to the violation of the offensive conditions, dissolved oxygen, or copper water quality standards. (Pet. Post Hearing Mem. at 33-9)

IEPA's Response consists mainly of repeated accusations that Petitioners are trying to "shift the burden of proof" and then arguing that the permit should be upheld unless Petitioners

proved by "undisputed facts" that discharges from the plant will be the sole cause of violations of the water quality standards. IEPA's arguments ignore the fact that this is a permit appeal, not an enforcement case, and so Petitioners' burden is only to show that IEPA failed to do what it must do to issue a permit under the regulations. IEPA can only issue a permit if it has ensured that discharges under the permit will not cause violations of any water quality standards. Petitioners' victory in this case would not be to penalize New Lenox but to get IEPA to do what it should have done before issuing the permit. Further, the "undisputed fact" standard is only applicable to motions for summary judgment.

While discussing some (very weak) evidence that suggests that the New Lenox discharges, as they existed in 2002, were not then the sole cause of water quality problems in Hickory Creek, IEPA identifies nothing in the record showing that it ensured that the new loadings it permitted would not contribute to violations of water quality standards. Indeed, IEPA now admits that the study it relied on to show that the increased discharge would not cause violations of water quality standards does not go that far. (IEPA Br. at 7) Unlike Village of Lake Barrington v. IEPA, PCB Nos. 05-55, 05-58, 05-59, 2005 Ill. Env. LEXIS 341, at *28 (April 21, 2005), where a phosphorus limit was put into the permit to address problems raised by experts and others in public comments, IEPA did not place any limit on nutrients in the New Lenox permit. IEPA offers nothing to refute Petitioners' showing that IEPA did not assure that the expanded discharge would not contribute to a violation of the offensive conditions standard.

Petitioners also showed that IEPA did not assure that existing uses would be protected as it was required to do under 35 Ill. Adm. Code 302.105(a) and 302.105(c)(2)(B)(ii). (Pet. Post Hearing Mem. at 39-40)

As to this point, IEPA argues essentially that all of 35 Ill. Adm. Code 302.105(a) and 302.105(c)(2)(B)(ii) are redundant and inoperative by claiming that if is good enough if IEPA issues permits that comply with other water quality standards. IEPA further tries to explain away the internal IEPA emails showing that the agency officials who studied Hickory Creek knew full well that they had not ensured protection of the existing uses and claims to have fulfilled its responsibilities by pointing to raw conclusory statements unsupported by any evidence in the record.

In addition, IEPA makes arguments that conflict with the basic principles of law regarding agency decision-making and review of administrative decisions.

The Village of New Lenox ("New Lenox") in its response endorses IEPA's fallacies and adds its own argument that it has a constitutional right to take discovery. (New Lenox Br. at 10-12)[1] There is no merit to New Lenox's constitutional argument. Because the Act unambiguously requires permit challenges to be heard "exclusively on the basis of the record before the Agency," 415 ILCS 5/40(e)(3), New Lenox is claiming that the statute is unconstitutional because it deprives New Lenox of property without due process. In fact, NPDES permits convey no property rights, 40 C.F.R. § 122.41(g), and even if they did, the Board's existing rules would provide all the process that is "due."

I. Respondents misunderstand the proper application of the burden of proof and the fundamental principles applicable to review permit decisions.

Respondents' theory of this case is characterized by a fundamental misunderstanding that

[1] New Lenox also reargues its position that it must be allowed discovery because the Board rules allow for discovery although the statute makes plain that only the materials in the agency record are relevant. Petitioners will not repeat here the law, already applied by the Board in its November 17, 2005 Order, that there is no right to discovery in cases where anything discovered would be inadmissible.

carries through the entirety of their briefs and renders the majority of their arguments irrelevant to the core issue in this case. All parties agree that Petitioners bear the burden of proving that the permit as issued "would violate" the Act or Board regulations. (Pet. Post Hearing Mem. at 18). Respondents, however, incorrectly contend that this burden requires the Petitioners to prove that the discharge allowed by the permit will cause water quality standard violations. (*See e.g.* IEPA Br. at 44-45). Respondents' contention misconceives what is reviewed in permit review proceedings.

A. Plaintiffs met their burden by showing that the permit as issued does not comply with the requirements for permit issuance established by the Act and the Board's regulations.

Respondents err by treating this matter like an enforcement suit against New Lenox rather than a third-party permit challenge. The permit as issued violates the Act and the Board's regulations because New Lenox did not prove under 415 ILCS 5/39 that it was entitled to the permit as issued and IEPA failed to comply with five different statutory and regulatory provisions that require the Agency to "assess" and "assure" that permitted discharges will not cause or contribute to water quality violations and that all reasonable measures to avoid or minimize the extent of the pollution are incorporated into the activity. (*See* Pet. Post Hearing Mem. at 1-3 (describing violations)).

Permit applicants and IEPA are bound to comply with the law and the regulations issued by the Illinois Pollution Control Board. Where duly promulgated regulations limit the discretion of an administrative agency, "the agency is bound by those rules and regulations and cannot arbitrarily disregard them." *Springwood Associates v. Health Facilities Planning Bd.*, 269 Ill. App. 3d 944, 948, 646 N.E.2d 1374, 1376 (4th Dist. 1995) (citing *Service v. Dulles*, 354 U.S. 363 (1957)). Indeed, IEPA acknowledges that "[t]he Agency, just like any other administrative

agency, is ... required to apply [its] rules as written..." (IEPA Br. at 36, *citing Panhandle Eastern Pipe Line v. Illinois EPA*, 314 Ill. App. 3d 296, 303, 734 N.E. 2d 18, 24 (4th Dist. 2000)); *see also Mattoon Community Unit School District No. 2 v. Illinois Educational Labor Relations Board*, 193 Ill. App. 3d 875, 881, 550 N.E.2d 610, 614 (4th Dist. 1990); *Union Electric Co. v. Department of Revenue*, 136 Ill. 2d 385, 391, 556 N.E.2d 236, 239 (Ill. 1990); *Heavner v. Illinois Racing Board*, 103 Ill. App. 3d 1020, 1025, 432 N.E.2d 290, 294 (2nd Dist. 1982); *Holland v. Quinn*, 67 Ill. App. 3d 571, 574, 385 N.E.2d 92, 94 (1st Dist. 1978).

Contrary to Respondents' arguments, (IEPA Br. at 28; New Lenox Br. at 6), focusing on whether the permit applicant and IEPA have complied with the requirements for permit issuance does not "shift the burden of proof." *See IEPA v. PCB*, 86 Ill. 2d 390, 404-05, 427 N.E.2d 162, 169 (Ill. 1981) (finding IEPA's complaint that the Board "shifted the burden of proof" by holding the Agency to its regulatory duties to be "without merit"). Petitioners are not "shifting the burden of proof" in this appeal by seeking to require Respondents to meet the legal requirements for permit issuance.

As explained in Petitioners' opening brief and in Section II below, Petitioners have met their burden of proof by demonstrating that Respondents have not satisfied the applicable regulations. Those regulations, among other things, required that IEPA "assess" Hickory Creek and "assure" that the discharge it permitted would not violate water quality standards or harm existing uses. 35 Ill. Adm. Code 302.105(c)(2). Thus, IEPA's statements that there remain "unresolved issues" as to the cause of algal blooms and other problems in Hickory Creek (IEPA Br. at 30, 44-45) actually constitute frank admissions by IEPA that it did not do the work it needed to do to issue the permit and that the permit must be remanded so that it can perform the

required assessments and assure that the discharge will not contribute to water quality problems.[2]

A decision by the Minnesota Court of Appeals, *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 696 N.W.2d 95 (Minn. App. 2005) ("*MCEA*"), makes clear the distinction between a permit appellants' burden to show that the applicable regulations had not been followed in issuing a permit and the burden of permit applicants and permit writing agencies to comply with applicable law. Just as under Illinois law, in Minnesota the "party challenging the decision of the agency has the burden of proof," *MCEA* at 102, and the Court examined the record using a "substantial evidence" standard, *MCEA* at 100. Applying this law, the Court explicitly distinguished petitioners' burden of proof from the applicant's and agency's duties under the Minnesota nondegradation policy, noting that "the burden of demonstrating that there is no prudent and feasible alternative is *on the permit applicant.*" *MCEA* at 102 (emphasis added). As here, the regulatory agency tried to argue on the basis of "burden of proof" that it did not have to show that it had assured that all feasible methods to avoid or minimize the increased discharge had been required.[3] In that case, the

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[2] Contrary to IEPA's representation (IEPA Br. at 28), this case is exactly like *Ex parte Fowl River Protective Association, Inc.*, 572 So.2d 446 (Ala. 1990) and *Miners Advocacy Council, Inc. v. State of Alaska, Dept. of Env'tal Conservation*, 778 P.2d 1126, 1139 (Alaska 1989) in that, like those cases, the record here makes clear that the permitting agency failed to assess facts it needed to ascertain before issuing the NPDES permit. In both cases, the NPDES permits were remanded.

[3] IEPA's regulatory burden on this point was to "assure" that all reasonable alternatives to avoid or minimize pollution have been incorporated into the permitted activity. 35 Ill. Adm. Code 302.105(c)(2)(B)(iii); *see also* U.S. EPA's *Water Quality Standards Handbook* (4th ed. 1994) (explaining that the lowering of water quality is allowed only where it is clearly justified as "necessary," and "the burden of demonstration on the individual proposing such activity will be very high") (available at Appendix of Authorities B at 4-7 and www.epa.gov/waterscience/standards/handbook).

respondents argued specifically that the petitioners had failed to prove that the alternative of using a decentralized sewage system was feasible. *MCEA* rejected this argument, stating:

> "The [Agency's] Issue Statement submitted to the board most directly responds to the decentralized alternative by explaining that the city developed a plan to meet its population requirements, and that [Petitioners] did not lay out specific enough treatment amounts for the decentralized alternative. *But the burden of showing that downsizing was not feasible and prudent is on the city, not [Petitioners].*"

MCEA, 696 N.W.2d at 105 (emphasis added).

The Act and the Board regulations squarely place the responsibility for issuing a valid permit on the applicant and IEPA. They can not shift that burden to the public.

B. Respondents misapply the "substantial evidence" standard

Contrary to Respondents' apparent belief, the fact that petitioners in permit appeals have the burden of proof does not mean that respondents always win. IEPA's decision to issue the permit "must be supportable by substantial evidence." (Bd. Nov. 17, 2005 Order at 7) This standard is less deferential than the "arbitrary and capricious" standard. *Watts v. Ill. EPA*, PCB No. 94-243, 1996 Ill. Env. LEXIS 243, at *13-15 (Mar. 21, 1996) (declining to adopt the "arbitrary and capricious" standard because it would "severely limit" the Board's review of the Agency's permitting decisions).

The "substantial evidence" standard has been applied many times by the Board to strike down IEPA decisions that were not supported by the agency record. *See, e.g., Illinois Ayers Oil Co. v. Illinois EPA*, PCB No. 03-214, 2004 Ill. Env. LEXIS 195, at *41-43 (April 1, 2004) (IEPA's reliance on "one statement" in the record for support of its position outweighed by the "ample evidence" to the contrary); *Bradd v. Illinois EPA*, PCB No. 90-173, 1991 Ill. Env. LEXIS 367, at *34-35 and *37-38 (May 1, 1991) (IEPA's unsupported conclusions inadequate in light

of unrebutted testimony to the contrary); *IEPA v. PCB*, 115 Ill. 2d 65, 71, 503 N.E.2d 343, 346 (Ill. 1986) (dismissing IEPA statements that are "conclusory" or "fail to cite authority"). In *Noveon, Inc. v. IEPA*, PCB No. 91-17, 2004 Ill. Env. LEXIS 593, at *5 (Nov. 4, 2004), the Board stated that a permit applicant met his burden of proof by merely showing that a "preponderance of the evidence" supported issuing the permit.[4] For the Board then to apply the "substantial evidence" standard to third party appeals the same way it applies it to appeals by permit applicants, Petitioners here need only to show by a preponderance of the evidence that the record does not favor finding that the permit was properly issued under the Act or the Board regulations.[5]

Moreover, Agency conclusions of law are reviewed de novo by this Board. *Saline County Landfill v. Illinois EPA*, PCB No. 04-117, 2004 Ill. Env. LEXIS 255, at *38-39 (May 6, 2004); *City of Kankakee v. County of Kankakee*, PCB No. 03-125, 2003 Ill. Env. LEXIS 462, at *34-35 (Aug. 7, 2003). The distinction between a "finding of fact" not supported by substantial evidence and an "error of law" that is reviewed de novo was employed in *MCEA*, 696 N.W.2d at 106-07.

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[4] Preponderance of the evidence, as defined in *Moss-American, Inc. v. Illinois Fair Employment Practices Comm'n.*, 22 Ill. App. 3d 248, 259, 317 N.E.2d 343, 351 (5th Dist. 1974), means,"[T]he greater weight of the evidence, not necessarily in numbers of witnesses, but in merit and worth that which has more evidence for it than against it is said to be proven by a preponderance. Preponderance of the evidence is sufficient if it inclines an impartial and reasonable mind to one side rather than the other."

[5] In another bizarre formulation of what it believes that Petitioners must prove to prevail, IEPA argues that "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." (IEPA Br. at 28) This is like asking Petitioners to prove the existence of an invisible cat. C.S. Lewis, The Four Loves ("We are arguing like a man who should say, 'if there were an invisible cat in that chair, the chair would look empty; but the chair does look empty; therefore there is an invisible cat in it.'"). Such an attempt to force parties in Board proceeding to prove a negative already has been rejected by the PCB. *See Dorothy v. Flex-N-Gate Co.*, PCB No. 05-49, 2005 Ill. Env. LEXIS 599, at *35-36 (Oct. 20, 2005). Anyway, unless written in invisible ink, no basis in the record appears for any of the IEPA decisions challenged here.

There the Court found that the Minnesota permitting agency had focused on the wrong factors under its nondegradation policy and had "ignored the clear mandate of the CWA and nondegradation rules" because the Agency's "restrictions on the discharge were set only to prevent degradation below ordinary water quality standards rather than to protect the existing high quality of the water." This constituted an "error of law," requiring remand of the permit.

As will be discussed further below, IEPA made errors of law in failing to require reasonable controls on phosphorus or nitrogen, as required by 35 Ill. Adm. Code 302.105(c)(2)(B) or to examine carefully whether the expanded discharge would harm existing uses under 35 Ill. Adm. Code 302.105(a) and (c)(2)(B)(ii) based on its theory that it need not comply with those sections of the Board rules if it complied with other standards.

C. Respondents further confuse the standard to prevail post-hearing with the standard applied by the Board in considering summary judgment.

Respondents repeatedly argue that "undisputed facts" are necessary to overturn the Agency's decision (E.g. IEPA Br. at 43-45, 49), but the substantial evidence standard does not require Petitioners to produce "undisputed facts" resolving all "unresolved factual issues." Respondents are confusing the Board's standard of review for deciding motions for summary judgment with the Board's "substantial evidence" standard.[6]

The Board in denying Petitioners' motion for summary judgment made clear that it was doing so because summary judgment is a "drastic" means of disposing of litigation and that the Board only grants summary judgment where "the movant's right to relief 'is clear and free from

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[6] Petitioners would not have to present "undisputed facts" even if we were bringing an enforcement case against New Lenox. It would only have to show the violation by a preponderance of the evidence. *Dorothy v. Flex-N-Gate Co.*, PCB No. 05-49, 2005 Ill. Env. LEXIS 599, at *35 (Oct. 20, 2005).

doubt.'" (PCB Ord. at 7, *citing Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (Ill. 1986)). The Board only denied summary judgment because it was applying that very strict standard. Basically, by denying Petitioners' motion for summary judgment while reaffirming that the case had to be heard strictly on the basis of the administrative record, the Board required all the parties carefully to present the evidence in the record so that the Board could apply the rules regarding post hearing decisions.

Related to this point, Respondents' attack on Petitioners because they "made no attempt to establish lack of substantial evidence in the record through testimony at the Board hearing" as well as their claim that Petitioners "waived" a right to cross examine agency witnesses and present a case-in-chief (New Lenox Br. at 7, IEPA Br. at 29) seems designed to amuse. Nobody offered evidence at the hearing held in this case because, under the Board Nov. 17, 2005 Order, it would have been futile.[7]

D. The agency decision must be justified in the Responsiveness Summary and it must be supported by facts in the record.

It is well established that an agency's decision can only be upheld based on rationales actually offered by the agency at the time of its decision, and not on the basis of post-hoc rationalizations offered by counsel. (*See* Pet's. Post Hearing Mem. at 21). Respondents claim that Petitioners are "coining a new requirement" (IEPA Br. at 34) by pointing out that the Board can only uphold IEPA's decision based on reasons offered by IEPA in its Responsiveness

[7] Contrary to IEPA's suggestion in a footnote (IEPA Br. at 29, n.1), Petitioners have not claimed that the Act prohibits testimony being given at the hearing. The Act, however, prohibits any testimony in the hearing being taken into account by the Board in making its decision except in so far as such testimony might show that documents had been left out of the agency record. (*See* Bd. Nov. 17, 2005 Order at 39, *citing Waste Management, Inc. v. IEPA*, PCB 84-45, PCB 84-61, PCB 84-68 (consolidated). Given that there was no dispute about the content of the record in this case, giving testimony at the hearing would have been wasted breath.

Summary, but the principle that an agency action can only be affirmed on the same bases articulated by the agency is one of the most well-established principles of administrative law. *United States v. Chicago, M. St. P. & Pac. R.R.*, 294 U.S. 499, 511 (1935) (Agency must set forth clearly the grounds on which it acted so that court can "know what a decision means before the duty becomes ours to say whether it is right or wrong."); *SEC v. Chenery Corp.*, 332 U.S. 194, 196, (1947) ("simple but fundamental rule of administrative law" is that court must evaluate an administrative action "solely by the grounds invoked by the agency"); *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43, 50 (1983) ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself"). Contrary to the representations by IEPA (IEPA Br. at 34), there is nothing in Section 40(e) that "specifically mandates" or even permits the agency to now rumble through the whole record to try to find a basis for its decision that was not articulated in the Responsiveness Summary.[8]

Indeed, in *West Suburban Recycling and Energy Center v. Ill. EPA*, PCB No. 95-119, 1996 Ill. Env. LEXIS 718 at *36, *74 (Oct. 17, 1996), the Board held that the right to challenge an Agency decision would be "rendered empty" unless the Agency "accurately, clearly, and completely" stated the reasons for its action. Similarly in *IEPA v. PCB*, 86 Ill. 2d at 405-406, the Court held that the IEPA must give "specific reasons" for its decision in order to "frame the issue of fact or law in controversy".

The Board's regulations requiring a Responsiveness Summary serve the function of

[8] In attempting to overturn a basic principle of administrative law, IEPA offers the practical concern that it will not have an opportunity to articulate the basis for its decision in a Responsiveness Summary in cases where "no public hearing was held or no public comments were received." (IEPA Br. at 34) This concern is groundless. In cases in which there has been no hearing or public comments, there will be no parties with standing to challenge IEPA's decision. 415 ILCS 5/40(e)(2)(a); 35 Ill. Adm. Code 105.210(d).

requiring IEPA to articulate the reasons for its decisions. 35 Ill. Adm. Code 166.192 incorporates the requirements of 40 C.F.R. § 124.17 by requiring the Agency's "specific response to all significant comments, criticisms, and suggestions."[9] Therefore, the Board should examine only the reasons given by the Agency in its Responsiveness Summary, and should not sift through the entire record to reconstruct a rationale that the Agency did not rely on. *See Motor Vehicle Manufacturers*, 463 U.S. at 43 ("We may not supply a reasoned basis for the agency's action that the agency itself has not given."). IEPA can use the entire record to support the decision rationales presented in the Responsiveness Summary but it is not free to offer new rationales for its decision that were not, in the words of the Board, "accurately, clearly and completely" set forth in the Responsiveness Summary. IEPA attempts to do that in its Response Brief most glaringly in its revisionist theories for why it did not have to consider phosphorus or nitrogen removal at the plant (IEPA Br. at 39-40) and for why it actually did seek to protect against violations of the "offensive conditions" standard although the Responsiveness Summary only offers that compliance with the standard is "very difficult." (HR 357)

Moreover, statements in the Responsiveness Summary may only be used to uphold the Agency decision to the extent they are supported by facts in the record. (Pet. Post Hearing Mem. at 22). In a remarkable passage, IEPA sets forth Petitioners' claim "that the Agency's statements must be supported by facts and logic" and then purports to refute this claim as though it is free to make permit decisions based on agency conclusions that are not supported by facts or logic.

[9] Contrary to the implication of the IEPA's statement that 40 C.F.R. § 124.17 and cases decided under it are not applicable to this case (IEPA Br. at 32), 40 C.F.R. § 124.17 actually is specifically applicable to delegated state NPDES programs like that of Illinois. 40 C.F.R. § 123.25 and Board regulation 35 Ill. Adm. Code 166.192 was obviously designed to track 40 C.F.R. § 124.17.

(IEPA Br. at 35-36) IEPA's attempt to free itself from the constraint of basing its decision on facts in the record and logic naturally fails.

II. Respondents did not show that IEPA assured that all reasonable technical measures to minimize pollution were implemented, that the new or total discharge would not cause or contribute to the violation of narrative and numeric water quality standards, or that existing uses were protected.

A. Respondents identified no evidence showing the necessity of the increased phosphorus and nitrogen loadings at the levels permitted and no evidence that IEPA assured that technically reasonable measures to avoid or minimize phosphorus or nitrogen loadings were required, and the arguments IEPA offers to excuse these failures are without merit.

IEPA essentially admits that the record does not contain substantial evidence that it even considered phosphorus or nitrogen removal at the plant although such removal is feasible. To try to avoid the conclusion that the permit must be remanded so that the agency can consider whether nutrient removal should be required, IEPA offers a number of reformulations of the antidegradation regulation, most of which actually support Petitioners. In addition, IEPA offers a number of mischaracterizations of Petitioners' position, repeats its mistaken view that Petitioners must meet their burden with "undisputed facts," and offers a variety of excuses, not offered in the Responsiveness Summary, for why IEPA believes it was reasonable for it not to even consider nutrient removal for this permit. (IEPA Br. at 37-41) The excuses offered by IEPA are neither consistent with 35 Ill. Adm. Code 302.105(c) or factually supported by the record. Further, it cannot go without mention that IEPA's argument – that it would have been unreasonable to require phosphorus controls on New Lenox with regard to its increased discharge from 1.54 to 2.516 million gallons per day – approaches surrealism given that in R2004-026 the IEPA presented evidence, found persuasive by the Board, that a 1.0 mg/L phosphorus effluent limit should be required of all new or increased discharges totaling over 1

million gallons per day.

1. IEPA is correct that a "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"(IEPA Resp. p. 38) and this requires that the permit be remanded for such consideration.

In the middle of a number of formulations and reformulations of the antidegradation regulations, IEPA states that "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."(IEPA Br. at 38) Except for the fact that formulation actually only covers the requirements of 35 Ill. Adm. Code 302.105(c)(2)(B)(iii), IEPA got it exactly right here. And because IEPA does not claim to have considered whether phosphorus or nitrogen removal from the New Lenox plant were technically and economically available as a way to reduce the degradation of Hickory Creek, a remand is clearly mandatory.[10]

Other IEPA reformulations of the regulation are less accurate. After getting it right on page 38, IEPA states that "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." (IEPA Br. at 39) Actually, that is almost *precisely* what the plain language of

[10] Contrary to IEPA's claim (*See* IEPA Br. at 38), Petitioners do not believe that "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 agree with IEPA that treatment technologies must be incorporated if they are "technologically and economically available." As explained in federal guidance, this requires a consideration of what technologies are available and imposing those technologies that would reduce degradation without requiring technological controls that are so expensive that they are inconsistent with the economic or social development. (*See* Pet. Post Hearing Mem. at 24-5). Degradation that could only be avoided through use of technologies that are inconsistent with the proposed development can be said to be necessary. Here, placing 1 mg/L phosphorus limits would certainly not affect New Lenox's growth and IEPA should consider the technical and economic feasibility of nitrogen removal.

35 Ill Adm. Code 302.105(c)(2)(B)(iii) requires by stating that the Agency must "assure" that *"[a]ll 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" (emphasis added). In order to "assure" that all reasonable measures to avoid or minimize pollution have been taken, IEPA must demonstrate that it has considered alternatives and explain why those alternatives are not "reasonable." *See also* 35 Ill. Adm. Code 302.105(f)(1)(D)(i).

2. Respondents offer no valid excuse for IEPA's failure to consider the technical and economic availability of nutrient removal.

IEPA also jumps the track in its consideration of "necessity" as required by the antidegradation regulations. It states that the "record reflects that [sewage treatment plant] expansion was necessary to accommodate the future growth of the area" and in a blatant *non sequitur* argues "[t]hus, the lowering of water quality was necessary in this case to accommodate an important social need." (IEPA Br. at 39) However, just because the *expansion* may be necessary does not mean that the *lowering of water quality* or that the full lowering of water quality allowed by the permit was necessary. Obviously the whole point of the antidegradation alternatives analysis is to determine whether alternative pollution control measures are available to avoid or minimize water quality degradation while accommodating important development. *See e.g. Hughey v. Gwinnett County*, 278 Ga. 740, 743, 609 S.E.2d 324, 328 (Ga. 2004) (reversing permit for new wastewater discharge where agency had violated antidegradation provision by failing to require the "highest and best level of treatment practicable" although court agreed that plant expansion was necessary).

IEPA also states that "the Village's plant is not a major source of phosphorus to Hickory Creek" (*See* IEPA Br. at 41) as though there were an exemption from antidegradation

requirements for unnecessary new pollution that is not major. Such exception, of course, does not exist. Anyway, the claim is factually preposterous. New Lenox's documents and IEPA itself acknowledges that the New Lenox discharge will make up over 25% of the total phosphorus loading to the creek no matter how one juggles the numbers. (IEPA Br. at 9). No one denies that the New Lenox discharge is a substantial portion of the total stream flow[11] and that, without phosphorus removal, the New Lenox discharge is discharging at a much higher concentration than the upstream concentration and at a considerable multiple of both the Illinois figure for water bodies potentially affected by phosphorus and the U.S. EPA suggested stream criteria for phosphorus in the region of Hickory Creek. The Board has required phosphorus limits in cases where the discharger was only 7% of the loading to the water body. *In the Matter of: Site-Specific Phosphorus Limitation for the City of Shelbyville*, No. R83-12, 1984 Ill. Env. LEXIS 129 (Dec. 20, 1984).

Respondents also imply that IEPA was excused from considering alternatives because there are other sources of phosphorus discharging into the Hickory Creek. (IEPA Br. at 41) However, the fact that some other sources may contribute to the nutrient problems in the Creek is no excuse to allow unnecessary new pollution from New Lenox. 35 Ill. Adm. Code 302.105(c)(2) does not only apply to new or increased discharges that are the sole source of pollution in the receiving water and the fact that there is already much pollution in a water body

[11] IEPA attacks Professor Lemke and Jenkins for using the stream flow at Joliet to calculate the percentage of the stream flow made up by the discharge and claims that they should have instead used the stream flow at New Lenox. (IEPA Br. at 13). Obviously, however, using the lower stream flow at New Lenox yields the conclusion that the permitted New Lenox discharge is an even higher percentage of the total stream flow than the 11% figure calculated by Jenkins and Lemke. (HR 304) The New Lenox discharge then makes up at least 11% of the stream flow and 25% of the phosphorus.

is certainly no excuse for adding new unnecessary pollution. The purpose of the Clean Water Act is to "restore and maintain" our waters, 33 U.S.C. §1251(a), and neither restoration nor maintenance are furthered by allowing unnecessary new pollution into troubled waters.

Despite a subheading in which IEPA claims to have considered "all alternatives" to minimize pollution (IEPA Br. at 14-15, subheading D.1), IEPA's brief and the record make clear that the only alternative considered was land application at a neighboring golf course. (IEPA Br. at 40, HR 372-74) The Responsiveness Summary notes that the question of phosphorus and nitrogen removal at the plant was raised but never purports to show that such wastewater treatment was infeasible or unreasonable for New Lenox. (See Pet's Post Hearing Mem. at 15, *citing* HR 357) The Board antidegradation rules and common sense dictate that the Agency consider all feasible alternatives, particularly those raised by members of the public in the record.

The present situation is virtually indistinguishable from that facing the Minnesota Appellate Court in *MCEA*. There, the court found that the Minnesota agency had violated the state's nondegradation policy by failing to adequately analyze feasible alternatives to increased discharges before issuing a permit for an expanded wastewater treatment facility. Specifically it was found that the agency's "purported examination" of an alternative that would have required downsizing the expansion and providing some decentralized treatment consisted merely of "asserting narrative reasons why the alternative need not be analyzed" and made "no attempt at a cost/benefit analysis or specific information" about the alternative as compared to the proposed discharge. *MCEA,* 696 N.W. 2d at 103. This was not good enough. Finding that there was "not substantial evidence in the record to support rejection of the alternative," the Court remanded the issue to the Agency with instructions to "actually analyze the prudence and feasibility" of the alternative. *MCEA,* 696 N.W. 2d at 105.

The permit should be remanded to allow IEPA to actually analyze the prudence and feasibility of phosphorus and/or nitrogen removal at the New Lenox sewage treatment plant.

B. The record does not contain substantial evidence that the Agency complied with its duties to "assure" that the water quality standards regarding "offensive conditions," dissolved oxygen, and pH will not be violated as a result of the new or total discharge.

The Petitioners demonstrated that IEPA failed to comply with its legal duty to assure that the New Lenox permit would not lead to violations of water quality standards regarding offensive conditions, dissolved oxygen, and pH. (Pet. Post Hearing Mem. at 33-7). IEPA responds that Petitioners have failed to show that New Lenox's existing discharges have caused water quality violations. (IEPA Br. at 42-3). That response is factually incorrect, but, more importantly, irrelevant. The applicable legal standard is whether New Lenox proved and IEPA assured that the new discharge combined with the existing discharge would not cause or contribute to violations of water quality standards in the future. On this point, IEPA offers nothing. Indeed, IEPA now candidly admits that the study it relies on in the Responsiveness Summary to prove compliance with the regulations concerning compliance with water quality standards is only "valid for its limited purpose to show that the existing discharge is not adversely impacting Hickory Creek." (IEPA Br. at 7)[12]

Petitioners do not believe that the Earth Tech study proves even as much as IEPA claims, but it is now clear that no one believes that the sole study of Hickory Creek required by IEPA assures that the increased discharge would not cause or contribute to a violation of water quality standards. Certainly, the study does not support the conclusion drawn in the IEPA antidegradation analysis that the "incremental nutrient loading" from the New Lenox expansion

[12] This is the same thing IEPA personnel said before the permit was issued. (HR 660.5, 667)

is "not expected to increase algae or other noxious plant growth, diminish the present aquatic community or otherwise aggravate existing stream conditions." (HR 6).

The regulations require the *Agency* to "assure" that environmental damage will not take place *prior to* issuing the permit. Respondents' implicit argument that the Agency need not establish permit limits until *someone else* conclusively proves to the Agency that a discharge will violate water quality standards is not consistent with the Board's regulations, including the federal regulations incorporated into the Board's regulations by reference. These regulations require *the Agency* to "assure" and "ensure" that the discharges it permits will not cause violations of water quality standards. 35 Ill. Adm. Code 302.105, 309.141(d); 40 C.F.R. §§ 122.4(d), 122.44(d)(1); *cf. In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility*, NPDES Appeal No. 04-113, 2005 EPA App. LEXIS 14, at *40 (EAB Aug. 11, 2005) (holding that Agency must actually "demonstrate that the Permit, as written, will ensure compliance with water quality standards" or must modify the permit).

Because IEPA has essentially conceded that it had no basis for concluding that the new and total discharge would not cause or contribute to violations of water quality standards, IEPA's efforts to minimize the apparent effects that the New Lenox discharge were having in 2002 are irrelevant. The Board should not be left, however, with a misimpression regarding the state of Hickory Creek. In particular, IEPA makes a number of factual claims that are wrong or likely to be misunderstood:

> *Hickory Creek in 2002 had a "balanced healthy assemblage" of fish species* (IEPA Br. at 3) - Actually it was rated a "C" stream and clearly had degraded from the days when it was one of the outstanding streams in the region. According to the Earth Tech study, Hickory Creek had Biotic Index Values that showed "some organic pollution" and the Creek subsequently was listed as

impaired based on biological studies. (HR 5, HR 115, 514, 519 ,520, Pet. Post Hearing Mem. at 6 n.3)

Hickory Creek had "typical levels of nutrients" (IEPA Br. at 14) - Actually, as IEPA itself acknowledges, Hickory Creek had "elevated" levels of phosphorus (IEPA Br. at 8), which is a typical condition for an "effluent dominated stream" (IEPA Br. at 12). Earth Tech and USGS found levels of phosphorus and nitrogen in the stream that were far in excess of what would be expected of an Illinois stream that was not receiving numerous municipal discharges that were not treated to remove nutrients. (HR 304, 526) IEPA found Hickory Creek to be "chemically disturbed" by total phosphorus and other pollutants as early as 1997. (HR 661) As of 2002, IEPA listed Hickory Creek as potentially affected by nutrients in its 2002 303(d) list because it was at or above the 85th percentile for nutrients. (Pet. Post Hearing Mem. at 4, IEPA Br. at 2).

IEPA opines that the algal growth reported by numerous persons may have been natural (IEPA Br. at 42) - Actually, as found by IEPA (HR 357), numerous area residents "have observed excessive and offensive [algal] blooms. (HR 76, 80, 82-3, 110) Only one of those observers was a professional limnologist, but subsequently, IEPA itself listed the water as impaired by "excess algal growth." (Pet. Post Hearing Mem. at 4 n.2) Hickory Creek was known to experience wild dissolved oxygen swings that IEPA agreed were probably the result of algal activity. (HR 67) Further, two University of Illinois scientists provided comments that the stream conditions caused by the discharges from New Lenox and other dischargers were conducive to algal blooms. (HR 303-09)

IEPA urges that conditions immediately below the New Lenox plant are not worse that those above the plant and that the observed algal bloom may have extended above the plant. (IEPA Br. at 8, 11) - Actually, there is some evidence collected immediately below the plant of degradation caused by the plant, although Earth

> Tech did not think it was "definitive" (HR 514, 561). Tn any case, everyone agrees that there are also numerous nutrient above New Lenox. The scientific treatises recognize that nutrient pollution often has a effect well below the discharge point where flow and other conditions cause the excess nutrients to cause algal blooms. (HR 125, 255-63) This was recognized by the Board years ago when it established limits for phosphorus discharges up to 25 miles above a lake. 35 Ill. Adm. Code 304.123.[13]

Finally, Petitioners must respond to IEPA's misrepresentation of Petitioners' position regarding phosphorus discharges. IEPA claims that Petitioners consider the "discharge of even a small amount" of phosphorus to be a violation of 35 Ill. Adm. Code 302.203 and argues that Petitioners' "narrow and literal interpretation" of that section would result in a "total prohibition" of phosphorus and other "absurd and unfair results." (IEPA Br. at 42) Actually, Petitioners ask that IEPA assure that it does not allow new or increased phosphorus discharges that can be avoided through means that are "technologically and economically available" (*see* IEPA Br. at 38) and that IEPA ensure that it not permit phosphorus discharges that may cause or contribute to violations of the narrative "offensive conditions" standard or the dissolved oxygen or pH standards. This is also what the law requires..

C. IEPA failed to assure that that discharge would not cause violations of the

[13] IEPA attempts to make much of the fact that some testimony is consistent with the possibility that the reported offensive algal bloom extended above the New Lenox plant insofar as the witness said that the bloom extended "almost" to Cedar Road and the New Lenox plant is below Cedar Road. (IEPA Br. at 11). It is unnecessary here, however, to spend much time on the issue of whether "almost" gets as far upstream as the plant both because nutrient pollution may have its effect miles below the discharge and, as everyone agrees, there are dischargers above New Lenox. The New Lenox discharge of nutrients probably is having its affect well below the New Lenox discharge point where the algae have had time to use the phosphorus from New Lenox and there are suitable sunlight and flow conditions. The question here is not whether Petitioners proved that New Lenox is the sole cause of problems in Hickory Creek. The question is whether IEPA assured that New Lenox will not contribute to "offensive conditions" in Pilcher Park and other sites perhaps many miles below the discharge point.

acute or chronic copper standard.

IEPA in its response admits that it did not follow US E.P.A. technical guidance and declined to take more samples to determine whether the New Lenox discharge had a "reasonable potential" to violate copper standards, even though one of the only two data points in the record essentially equaled the chronic standard and the technical guidance showed a reasonable potential for violation of both acute and chronic standards.[14] IEPA offers several arguments to excuse this, but they all fail.

IEPA's primary argument is to state in various ways that the few tests done did not show a violation of acute or chronic water quality standards. (IEPA Br. at 47-8). That's true but misses the whole point of the US E.P.A. guidance that when only a few tests are taken, it is statistically necessary to multiply the pollutant figures found in order to take into account uncertainty and assure that there will not be a violation. IEPA did not offer any refutation of this mathematical truth in the Responsiveness Summary and it does not offer one in its brief.

IEPA also argues that it just knows that the copper levels found in the tests of New Lenox's discharge are not a problem based on its experience that copper levels over 30 ppb are what may be considered elevated levels. However, the facts regarding IEPA's "experience" do not appear in the permit record and, in any case, IEPA's experience that only levels of 30 ppb are elevated does not override the Board-established chronic copper standard which is .0206 mg/L. If IEPA believes the copper standard is too stringent, it should petition the Board to change it.

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[14] The sample indicated a level of copper in the New Lenox effluent that was 0.0001 mg/L lower than the chronic water quality standard for copper of 0.0206 mg/L. To put this in perspective – the mass of one grain of sand averages between 0.3 and 13 mg. http://www.reference.com/browse/wiki/Orders_of_magnitude_%28mass%29 (accessed July 10, 2006).

Moreover, as mentioned, under the Technical Guidance there was also a danger of violating the acute standard.

IEPA also mentions that it suspects that the copper found by the tests "are from erosion of pipes within homes and houses." (IEPA Br. at 47). While this may be reasonable speculation, there is no exemption from the copper standards provided in the Board rules for violations caused by pipe erosion.

Finally, IEPA argues that had it developed a site specific metal translator or allowed for dilution in a mixing zone it might well have come to the conclusion that no copper limit was necessary. (IEPA Br. at 48) Well, maybe that is true, but IEPA cannot just assume the results of studies that it has not bothered to do and then claim that it has assured that there will be no problem. Moreover, the dilution and metals translator rationales for not including a copper limit are not included in the Responsiveness Summary and, thus, are not available here.

Since the Agency had a duty to ensure that the discharge would not cause violations of water quality standards, and one of the two samples available indicated copper levels virtually equaling the chronic standard, IEPA should have required some reasonable monitoring or taken other steps under 35 Ill. Adm. Code 302.105(c)(2)(B)(i), 304.105, and 309.141(d).

D. Respondents misunderstand their duties with respect to existing uses

In their initial brief Petitioners showed that IEPA did not conduct a study or analysis of any kind regarding the potential effects of the *increased* discharge, even though the increased discharge makes up a large portion of the flow of the creek during critical low flow conditions. (*See* Pet. Post Hearing Mem. at 40). As such, IEPA failed to assure that both water quality standards and existing uses would be protected, as required by 35 Ill. Adm. Code 302.105(a). In its response, IEPA basically has agreed that the one study that was conducted was "valid for its

limited purpose to show that the existing discharge is not adversely impacting Hickory Creek." (IEPA Br. at 7)

Respondents' only real argument that it complied with 35 Ill. Adm. Code 302.105(a) and (c)(2)(B)(ii) is to claim that it is sufficient if "there is substantial evidence in the record to show that the final permit complies with all water quality standards." (IEPA Br. at 20). In other words, Respondents essentially assert that IEPA had no duty to protect existing uses of Hickory Creek except to limit discharges so as to prevent violations of standards other than the existing use standard.

This argument is flawed for several reasons. First, it conflicts with the plain language of 35 Ill. Adm. Code 302.105(a) in several places and, indeed, interprets the Section out of existence. Section 302.105(a) states that "[u]ses actually attained in a surface water body ... *whether or not they are included in the water quality standards*, must be maintained and protected." (emphasis added). Furthermore, Section 302.105(a) gives specific examples of prohibited "degradation of existing uses" that make clear that the focus of the section is on protecting the *actual* existing uses in the water body, not a proxy for existing uses based on attainment of water quality standards.

The Agency cites the Board's June 21, 2001 Proposed Rule regarding revisions to the Illinois antidegradation rules (R01-13) as support for its argument. (IEPA Br. at 20). However, it is not clear what part of this document Respondents intended to refer to, and in any event this document does not support the proposition that Section 302.105(a) only protects water quality standards and not actual existing uses. In fact, at page 3 of the Proposed Rule, the Board notes that the "Agency's proposal provides that existing uses *actually attained* in the water body must be maintained and protected." Proposed Rule, R01-13 at 3 (emphasis added).

Finally, the Agency's argument that Section 302.105(a) only requires the Agency to focus on water quality standards would render the entire section "mere surplussage." 35 Ill. Adm. Code 309.141(d)(1) *already* requires the Agency to ensure that NPDES permits include limits "necessary to meet water quality standards." Therefore, Respondents' interpretation of Section 302.105(a) reads it out of existence. Because the Agency never evaluated the potential for the increased discharge at New Lenox to degrade the existing recreational and aquatic life uses of Hickory Creek, the permit must be remanded. (*See* Pet. Post Hearing Mem. at 39).

III. The Illinois Environmental Protection Act's requirement that review be limited to the administrative record does not violate due process.

New Lenox, in an argument not joined by IEPA, devotes a significant portion of its brief to rearguing the discovery issues decided by this Board on November 17, 2005 and mounting a constitutional attack on the statutory framework for PCB proceedings. (*See* New Lenox Br. at 8-13). As New Lenox has noted, this issue has already been "thoroughly briefed by the parties," (New Lenox Br. at 4). It has also been conclusively decided by the Board.

New Lenox's constitutional argument is fundamentally unsound. Before showing this, three observations are in order.

First, a number of New Lenox arguments regarding discovery and due process appear to stem from the same fundamental misunderstanding that has characterized the entirety of Respondents' arguments - their attempt to treat this case as an enforcement case against New Lenox, rather than a third-party permit appeal. (*See* 11/17/05 Bd. Order at 40 ("In a permit appeal such as this, respondents do not have the same opportunity to engage in discovery as they would in an enforcement case.")). New Lenox will not be punished or lose anything tangible as a direct result of anything that could happen in this permit appeal proceeding. Petitioners seek only

a remand to the IEPA so that it can look again at some potential permit requirements that will comply with applicable regulations and better protect Hickory Creek.

Second, no one has identified anything that could possibly be found through discovery that would strengthen Respondents' case in this proceeding. For example, even if somehow New Lenox convinced all of the witnesses at the hearing to recant their testimony that they observed offensive algal blooms in Hickory Creek, the fact would remain that IEPA had failed to assure that the increased discharges allowed by the permit would not create offensive algal blooms. IEPA's failure itself to follow up on the reports of offensive algal blooms before issuing the permit would be one of the ways it had failed to assure that the increased discharge it permitted would not be a problem.[15]

Third, New Lenox did not attempt to ask any of the members of the public any questions at the hearing that was held and did not offer any testimony of its own. Having sat out the opportunities to participate in the process that the rules do provide, New Lenox is in a poor position to claim that those opportunities were inadequate.

In any event, New Lenox's due process arguments fail because a NPDES permit, much less the Village's mere *application* for a NPDES permit, does not convey "property rights of any sort, or any exclusive privilege," 40 C.F.R. § 122.41(g). Furthermore, even if the Village *could* claim some kind of property right to pollute Hickory Creek, the Board's rules would provide all the "process" that was "due," especially given the State's significant interests in preventing pollution.

[15] Of course, IEPA did not do this in part because it knew full well that the reports were accurate and IEPA itself listed Hickory Creek as impaired by unnatural algal blooms the following year.

A. The Village's application for an NPDES permit does not carry with it a "property right" subject to the protections of due process.

Section 40(e)(3) of the Act requires the Board to "hear the petition ... exclusively on the basis of the record before the Agency." 415 ILCS 5/40(e)(3) (2004). In its November 17th, 2005 Order, the Board found that because there was "no dispute about the contents of the Agency record" in this case, there was "no compelling reason to permit discovery." (Bd. Ord. at 39). The Village argues that this decision, coupled with the Agency's inability under the Act and the Board's rules to cross-examine members of the public that offer testimony at IEPA's public hearings, impinges on the "Village's rights" and the Illinois Constitution. (New Lenox Br. at 12-13).

In *Board of Regents of State Colleges v. Roth*, the Supreme Court explained the types of benefits that create "property rights" subject to the protections of due process:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

408 U.S. 564, 577 (1972). Here, the Village of New Lenox clearly has no "legitimate claim of entitlement" to pollute Hickory Creek. *See Citizens Utils. Co. of Ill. v. Pollution Control Bd.*, 265 Ill. App. 3d 773, 781, 639 N.E.2d 1306, 1312 (3rd Dist. 1994) ("The grant of a permit does not insulate violators of the Act or give them a license to pollute."); *Peabody Coal Co. v. Pollution Control Board*, 36 Ill. App. 3d 5, 17, 344 N.E.2d 279, 288 (5th Dist. 1976) (court is "not convinced" that Peabody has a "statutory entitlement" to pollute). This is made perfectly clear by the federal regulations setting the ground rules for the NPDES permitting program. *See* 40 C.F.R. § 122.41 (g) (stating that NPDES permits "[do] not convey any property rights of any sort, or

any exclusive privilege").[16] At most, the Village can claim an "abstract need or desire" for its expanded permit, which does not convey a property right subject to due process protections. Therefore, the Village's due process arguments fail.

B. Even if New Lenox *could* claim a property right to pollute Hickory Creek, the Board's regulations provide all the "process" that is "due."

Even where there is a "property right" in a government benefit, a reviewing court must perform a balancing test to determine how much process is "due." *See Matthews v. Eldridge*, 424 U.S. 319 (1976). This balancing test takes into account the public's interest in a specific outcome as well as the government's interest in its efficient adjudication. *Id.*

In *Peabody Coal Co.*, 36 Ill. App. 3d at 16-19, the Fifth District Appellate Court was faced with a due process claim remarkably similar to the one here.[17] Assuming for the sake of argument that Peabody did possess a right to pollute, the Court found that the Board's rules provided all the process that was due. The Court of Appeal first held that while the Board's permitting process is like an adjudication, "[i]t does not follow ... that a permit holder is entitled to a 'full-dress' hearing before a permit becomes effective." *Id.* at 17. Instead, the court "must weigh the interest of the State against the seriousness of the deprivation to the applicant in determining whether the procedural safeguards are adequate." *Id.*

After performing this balancing test, the Court of Appeals found that Peabody's interest

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[16] 40 C.F.R. § 122.41(g) is made applicable to state programs by 40 C.F.R. § 123.25(a)(12) ("All State Programs under this part must have legal authority to implement each of the following provisions ... [including] Section 122.41(a)(1) and (b) though (n) – (Applicable permit conditions).").

[17] Peabody argued that the Board regulations' lack of a provision for an automatic stay of an IEPA permitting decision pending appeal to the Board, and the failure of the rules to provide a "full dress" hearing before the permit becomes effective, constituted a denial of procedural due process. *Peabody Coal Co.*, 36 Ill. App. 3d at 16.

in polluting Illinois water was "not as compelling" as interests alleged in other due process cases. *Id.* at 18 (citing *Goldberg v. Kelley*, 397 U.S. 254 (1970) and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)). On the other hand, "[t]he government's interest in making permits effective when issued is great, as it allows the government to restrict the amount of pollutants being discharged into the waters of Illinois." *Peabody Coal Co.*, 36 Ill. App. 3d. at 19. Given the State's significant interest in "protecting the public health and the environment," the Court found Peabody's due process argument "without merit." *Id.*

The Second District followed *Peabody* the following year in rejecting a due process challenge to the Board's NPDES permitting rules. *United States Steel Co. v. Pollution Control Bd.*, 52 Ill. App. 3d 1, 9, 367 N.E.2d 327, 333-34 (2nd Dist. 1977) (holding that U.S. Steel "has not demonstrated a sufficiently great hardship to outweigh the interests of the State in protecting its waters, health and environment"). For substantially the same reasons articulated by the Court in *Peabody* and *U.S. Steel*, New Lenox's due process arguments would fail *even if* it could claim a "property right" or "entitlement" to pollute Illinois waters.

Finally, New Lenox's argument that it has a constitutional right to cross-examine members of the public that offer comments at IEPA public hearings (New Lenox Br. at 10-12) was considered and rejected by the Tennessee Court of Appeals in *Big Fork Mining Co. v. Tennessee Water Quality Control Bd.*, 620 S.W.2d 515, 521 (Tenn. App. 1981). In *Big Fork Mining*, the Tennessee Board denied plaintiff's application for a permit, finding that the permit would violate the State's antidegradation policy. Big Fork was concerned that the Board had relied on "evidence presented at the hearings" that was "composed of opinions not based on facts." *Id.* However, the Court dismissed applicant's concerns, explaining that:

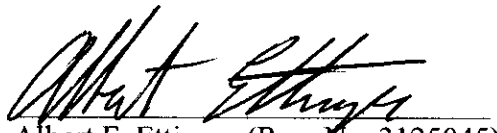
> "[t]his was an administrative proceeding and not a court

> proceeding," so "strict rules of evidence do not apply." Therefore, the opinions in the administrative record constituted "valid evidence" that "may support a decision of an administrative tribunal." The "trier of fact" could determine the "weight to be given the testimony." *Id.*

As in *Big Fork*, New Lenox cannot support their argument that due process requires a full-dress hearing in this case, with full opportunities to cross-examine persons giving public comment. New Lenox could have presented evidence itself at the March 30, 2006 hearing (or 30 days thereafter) or ask questions of persons who testified at the hearing.

IV. Conclusion

The Board should remand the permit to the Agency so that a revised permit can be issued in compliance with the Act and the Board rules. In addition, the Board should clarify the standards applicable to permitting and review of permits by the Board so that IEPA can issue proper permits based on a properly documented agency decision.



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DATED: July 21, 2006

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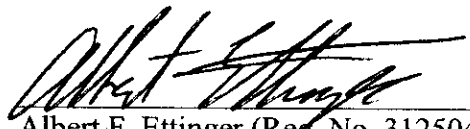
CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that on July 21, 2006, I filed the attached PETITIONERS' POST HEARING REPLY MEMORANDUM. An original and 9 copies was filed, on recycled paper, with the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL 60601, and copies were served via United States Mail to those individuals on the included service list.



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