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

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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board the **MOTION FOR AND MEMORANDUM OF LAW IN SUPPORT OF RECONSIDERATION** of the Respondent, Illinois Environmental Protection Agency, a copy of which is herewith served upon the Hearing Officer, the Petitioners and Respondent.

Respectfully submitted by

_____/ s /_____
Sanjay K. Sofat
Assistant Counsel

Dated: May 30, 2007
Illinois Environmental Protection Agency
1021 North Grand Avenue East
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Respondents.	)	

AGENCY'S MOTION FOR RECONSIDERATION

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 35 Ill. Adm. Code 101.520, hereby submits this Agency's Motion for Reconsideration to the Illinois Pollution Control Board ("Illinois PCB" or "Board"). The Agency is requesting the Board to RECONSIDER its decision as it erred in applying existing law. *See Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156, slip op. at 2 (March 11, 1993), citing *Korogluyan v. Chicago Title & Trust Co*., 213 Ill.App.3d 622, 627, 575 N.E.2d 1154, 1158 (1st Dist. 1991). The Agency respectfully requests the Board to apply the well settled standard of review. Under Section 40(e) of the Illinois Environmental Protection Act ("Act"), the standard of review is whether, based on the record, Petitioners have met their statutory burden. In support of its Motion, the Agency states as follows:

1. On June 10, 2002, the Village of New Lenox ("New Lenox" or "Village") filed a National Pollutant Discharge Elimination System ("NPDES") permit application for expansion of its existing wastewater treatment plant.
2. The Agency issued the NPDES permit to New Lenox on October 31, 2003.
3. On December 2, 2003 the Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and the Sierra Club (collectively, "Petitioners") filed a petition seeking the Board's review of the Agency's issuance of the NPDES permit. Petitioners argued that the Agency's failure to adequately consider the impact of the increased discharge on Hickory Creek violated the antidegradation and water quality standards of the Board regulations.
4. On February 4, 2005, Petitioners filed a motion for summary judgment, alleging that the permit failed to meet Illinois requirements. Specifically, Petitioners argued that: 1) the Agency did not assure that all technically and economically reasonable measures were incorporated into the proposed discharge to prevent nutrient loadings to Hickory Creek; 2) the Agency did not assure that the applicable narrative 'offensive conditions' water quality standards would not be violated as a result of the proposed discharge to Hickory Creek; and 3) the Agency did not assure that the applicable numeric copper water quality standards would not be violated as a result of the proposed discharge to Hickory Creek.
5. On November 17, 2005, the Board denied Petitioners' motion for summary judgment as to each of the three grounds stated above.
6. A Board hearing was held on March 30, 2006. Petitioners did not present any exhibits or presented testimony of its witnesses.

7. On April 19, 2007, the Board ruled on the permit issues raised by Petitioners in its original petition.

8. On April 25, 2007, the Agency received the Board's order dated April 19, 2007. (Hereinafter "*Board's Order*").

9. In its Order, the Board correctly stated that the question before the Board in permit appeal proceedings is, "[w]hether the third party proves that the permit as issued will violate the Act or Board regulations." *Board's Order* at 11 (*emphasis added*).

10. However, the Board did not apply this burden of proof in this case. Instead, the Board reviewed the entire record to determine, "whether the facts support IEPA's decision," to issue the permit. *Board's Order* at 17.

11. In support of its new standard of review, the Board cites to Section 33(a) of the Act. The Board believes that, under Section 33(a), it has a separate and independent authority to review the entire record to determine whether the facts support the Agency's decision to issue the permit.

12. Pursuant to Section 40(e) of the Act, the burden of proof is on Petitioners. This burden cannot be shifted away from the petitioner, who alone bears the burden of proof. *See Prairie Rivers Network v. IEPA and Black Beauty Co.,* PCB 01-112, slip op. at 14 (Aug. 9, 2001). Section 40(e) thus requires the Board to review the entire record to determine whether the petitioner has met its burden. This reading of the Act is consistent with the Board's prior decision in third-party NPDES permit appeals and with the Board's quasi-judicial role. Therefore, the Board's reliance on Section 33(a) is an error.

13. In *Prairie Rivers Network v. Illinois Pollution Control Board*, 335 Ill.App.2d 391, 781 N.E.2d 372 (4th Dist. 2002), the court upheld the Board's reading of Section 40(e) of the Act. The court held that to prevail under Section 40(e), "a third-party petitioner must show that the permit, as issued, would violate the Act or the Board's regulations." *Id*. *See also Damron v. Illinois E.P.A.*, PCB 93-215 (April 21, 1994).

14. In its prior third-party permit appeal decisions, the Board applied the same standard of review and burden of proof as the court did in *Prairie Rivers Network v. Illinois Pollution Control Board*, 335 Ill.App.2d 391, 781 N.E.2d 372 (4th Dist. 2002). In *Village of Lake Barrington, Cuba Township, Prairie Rivers Network, Sierra Club, Beth Wentzel and Cynthia Skrukrud v. Illinois EPA and Village of Wauconda* and *Slocum Drainage Dist. of Lake Co., Illinois v. Illinois EPA and Village of Wauconda*, PCB 05-55, PCB 05-58 (consolidated) slip op. at 20 (April 21, 2005) (Hereinafter "*Village of Lake Barrington*"), the Board held that, "[t]he petitioners have failed to establish that the permit as issued would violate the Act and Board regulations." *Id.*

15. Also, under Section 40(e), the petitioner, not the Board, is required to show that the permit as issued would cause a violation of the Act or Board regulations. Thus, pursuant to Section 40(e)(3) of the Act, Petitioners must come forward with substantial evidence or lack of substantial evidence in the record to show that the permit as issued would cause a violation of the Act or Board regulations. Discretionary issues, disputes of fact or issues that could support the permit in

absence must be decided in support of the permit decision. Unsworn comment cannot create a lack of substantial evidence.

16. Petitioners cannot meet this burden of proof because there remain genuine issues of various material facts in the record. The Board specifically determined that, "substantial issues [remain] unresolved" with regard to various matters in the record. *Board's Order* dated November 17, 2005, slip op. at 22.

17. To prevail under Section 40(e), Petitioners were required to cure genuine issues of material fact identified by the Board in its November 17, 2005 order. However, Petitioners made no attempt at the Board hearing to cure these genuine issues of material facts.

18. In sum, the Board failed to apply the standard of review established by the express language of Section 40(e) of the Act. The well settled standard of review in a third-party permit appeal proceeding is whether Petitioners, based on the facts in the record, have met their burden under Section 40(e) of the Act.

WHEREFORE, the Agency respectfully requests that the Board RECONSIDER its decision regarding the standard of review applied to this third-party permit appeal. Specifically, the Agency requests that the Board's review must be whether Petitioners, based on the facts in the record, have established that the permit as issued would cause a violation of the Act or Board regulations.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

_____/ s /_____
Sanjay K. Sofat

Assistant Counsel

DATED: May 30, 2007
1021 North Grand Avenue East
P.O. Box 19276
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Respondents.	)	

AGENCY'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION

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 35 Ill. Adm. Code 101.520, hereby submits this Agency's Memorandum of Law in Support of Motion for Reconsideration to the Illinois Pollution Control Board ("Illinois PCB" or "Board"). The Agency respectfully requests the Board to RECONSIDER its decision regarding the standard of review in a third-party permit appeal proceeding. The Agency contends that the well settled standard of review in a third party permit appeal is whether Petitioners have met their burden of proof as required by Section of the Illinois Environmental Protection Act ("Act"). In support, the Agency states as follows:

ARGUMENTS

A party can file a motion to reconsider "to bring to the [Board's] attention … changes in law or errors in the [Board's] previous application of existing law." (*emphasis added*) *See Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156, slip op. at 2 (March 11, 1993), citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill.App.3d 622, 627, 575 N.E.2d 1154, 1158 (1st Dist. 1991). By applying the standard of review as whether the facts supported the Agency's decision, the Board has erred in applying the existing law.

I. Under Section 40(e) of the Act, the Well Settled Standard of Review is Whether Petitioners have Established that the Permit as Issued Would Violate the Act or Board Regulations, Not Whether the Agency's Decision is Supported by the Record.

Pursuant to Section 40(e) of the Act, the Board's review must be based exclusively on the record before the Agency and the burden of proof is on the petitioner. 415 ILCS 5/40(e)(3) (2004). The Board correctly stated that the issue before the Board in permit appeal proceedings is, "[w]hether the third party proves that the permit as issued will violate the Act or Board regulations." *Board's Order* at 11 (*emphasis added*). However, in its opinion, the Board abandoned this standard of review. Instead, the Board reviewed the entire record to determine, "whether the facts support IEPA's decision," to issue the permit. *Board's Order* at 17.

In support of its new standard of review, the Board cites to Section 33(a) of the Act. According to the Board, Section 33(a) "requires it to enter a final opinion stating the facts and reason leading to the decision of the Board." *Board's Order* at 16. The Board also reads this section as granting it the authority to "make determinations the Board

deems appropriate under the circumstances of the case." *Id.* The Board, thus, concludes that it is "required by the Act to review the facts and arguments and make a finding on those facts." *Id.* Therefore, the Board believes that, in a third-party appeal, it has a separate and independent authority under Section 33(a) of the Act to determine whether the facts support the Agency's decision to issue the permit.

The Board's reading of Section 33(a) to conclude that the review in a third-party permit appeal is whether the facts support the Agency's decision to issue the permit is an error. Section 33 of the Act is under Title VIII: Enforcement. However, this is not an enforcement case; rather, it is a third-party permit appeal. Challenges to the Agency's decision regarding permits are governed by Title X of the Act. Section 40(e) under Title X clearly states that, "the burden of proof shall be on the petitioner." 415 ILCS 5/40(e) (2004). The Board's review thus must be whether the petitioner has met its burden. The Board's reliance on Section 33(a) to coin a new standard of review in a third-party permit appeal is thus inconsistent with the clear mandate of Section 40(e). Further, the only application of Section 33(a) in reference permit decisions under Title X of the Act is that the hearing rules of Sections 32 and 33(a) apply at the Board's hearings. *See Town & Country Utilities, Inc. v. Illinois PCB*, 2007 WL 851608 (Ill. March 22, 2007).

A. Under Section 40(e) of the Act, the Board Neither has the Authority to Conduct a *de novo* Review of the Record, Nor has the Authority to Shift the Burden of Proof Away from Petitioners to the Agency.

Pursuant to Section 40(e) of the Act, the Board's review must be whether Petitioners have met their burden of proof. In *Prairie Rivers Network*, the Board has noted that, "IEPA's [Agency's] decision to issue the permit in this instance must be

supportable by substantial evidence. This does not, however, shift the burden away from the petitioner, who alone bears the burden of proof in this matter." *Prairie Rivers Network v. IEPA and Black Beauty Co.*, PCB 01-112, slip op. at 9 (August 9, 2001), citing *Waste Management v. IEPA*, PCB 84-45, PCB 84-61, PCB 84-68 (consolidated), slip op. at 3-10 (November 26, 1984) (*emphasis added*). This reading of the Act is consistent with the Board's prior decision in third-party NPDES permit appeals and with the Board's quasi-judicial role.

In *Prairie Rivers Network v. Illinois Pollution Control Board*, 335 Ill.App.2d 391, 781 N.E.2d 372 (4th Dist. 2002), the court upheld the Board's reading of Section 40(e) of the Act. In *Prairie Rivers Network*, the petitioner, Prairie Rivers Network, appealed the Agency's decision to issue a NPDES permit to Black Beauty Coal Company. The appellate court held that, "Section 40(e)(3) clearly provides that in a third-party appeal, the burden of proof lies with the petitioner." *Id.* at 379. Further, the court held that to prevail under Section 40(e), "a third-party petitioner must show that the permit, as issued, would violate the Act or the Board's regulations." *Id*. *See also Damron v. Illinois Environmental Protection Agency*, PCB 93-215 (April 21, 1994).

In its prior third-party permit appeal decisions, the Board's review has been whether the petitioner, based on the facts in the record, has demonstrated that the permit as issued would violate the Act or Board regulations. In *Village of Lake Barrington, Cuba Township, Prairie Rivers Network, Sierra Club, Beth Wentzel and Cynthia Skrukrud v. Illinois EPA and Village of Wauconda* and *Slocum Drainage Dist. of Lake Co., Illinois v. Illinois EPA and Village of Wauconda*, PCB 05-55, PCB 05-58 (consolidated) slip op. at 20 (April 21, 2005) (Hereinafter "*Village of Lake Barrington*"),

the Board applied the same standard of review and burden of proof as the court did in *Prairie Rivers Network*. *See Prairie Rivers Network v. Illinois Pollution Control Board*, 335 Ill.App.2d 391, 781 N.E.2d 372 (4th Dist. 2002). In *Village of Lake Barrington*, the Board held that, "[t]he petitioners have failed to establish that the permit as issued would violate the Act and Board regulations." *Id.* Thus, in third-party permit appeals the burden never shifts away from petitioners. *See Prairie Rivers Network v. IEPA and Black Beauty Co*., PCB 01-112, slip op. at 9 (Aug. 9, 2001).

B. Petitioners have not and could not demonstrate that the permit as issued would violate the Act or Board regulations.

Under Section 40(e), the petitioner, not the Board, is required to show that the permit as issued would cause a violation of the Act or Board regulations. 415 ILCS 5/40(e) (2004). Therefore, Petitioners must come forward with substantial evidence or lack of substantial evidence in the record to show that the permit as issued by the Agency would cause a violation of the Act or Board 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. *See Prairie Rivers Network v. Illinois Pollution Control Board*, 335 Ill.App.2d 391, 781 N.E.2d 372 (4th Dist. 2002). Thus, the Board's review must focus on whether Petitioners have met this statutory burden, before the Board can find that the permit as issued would violate the Act or Board regulations.

In reviewing the record to determine whether the facts support Petitioners' motion for summary judgment, the Board repeatedly stated that it, "cannot conclude that there is no genuine issue of material fact." *Board's Order*, slip op. at 22 (November 17, 2005). The Board agreed with the Agency that, "[the disputes identified by respondents]

nonetheless indicate that significant factual issues remain unresolved." *Id.* Though the Board determined that the record presented genuine issues of material fact, in its Order, the Board concluded that the Agency's decision to issue the permit is not supported by the record. In this opinion, the Board did not discuss on whether Petitioners have met their statutory burden. The Board thus erred in determining that the record that presented genuine issues of material fact for the Petitioners' motion for summary judgment was somehow now sufficient to determine that the permit as issued would violate the Act or Board regulations.

Also, Petitioners did not present any testimony at the Board's hearing to cure genuine issues of material fact identified by the Board in its November 17, 2005 order. Therefore, Petitioners could not have met their burden under Section 40(e) of the Act based on the record that had genuine issues of material fact. Simple logic dictates that a record with genuine issues of material fact cannot show that the permit as issued would violate the Act or Board regulations, unless the Board concludes that a lesser level of facts are somehow sufficient to meet the statutory burden under Section 40(e) of the Act.

In sum, the Board failed to apply the well settled standard of review. The standard of review established by the express language of Section 40(e) of the Act is whether Petitioners have met their statutory burden of proof.

CONCLUSION

For the reasons and arguments provided herein, the Agency respectfully requests that the Board RECONSIDER its decision regarding the standard of review applied to third-party permit appeals. Specifically, the Agency requests the Board to apply, whether the Petitioners have met their statutory burden of proof, as the standard of review in third-party permit appeals.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

_____/ s /_____
Sanjay K. Sofat
Assistant Counsel

Dated: May 30, 2007
1021 North Grand Avenue East
P.O. Box 19276
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May, 2007, I did send, by electronic mail following instruments entitled **MOTION FOR AND MEMORANDUM OF LAW IN SUPPORT OF RECONSIDERATION**:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601

And a true and correct copy of the same foregoing instrument, by First Class Mail with postage upon thereon fully paid and deposited into the possession of the United States Postal Service to:

Albert F. Ettinger
Senior Staff Attorney
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1300
Chicago, IL 60601

Bradley P. Halloran
Illinois Pollution Control Board
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