BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and Sierra Club,	)	**PCB 04-88**
Petitioners	)	**(Third party NPDES Permit Appeal Water)**
v.	)	
Illinois Environmental Protection Agency and Village of New Lenox,	)	
Respondents	)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that on **Friday, June 1, 2007,** we filed the attached **Respondent Village of New Lenox's Motion for Reconsideration** and **Respondent Village of New Lenox's Memorandum Of Law In Support Of Its Motion for Reconsideration** with the Clerk of the Pollution Control Board, a copy of which is herewith served upon you.

Roy M. Harsch
Counsel for New Lenox

Dated: June 1, 2007

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THIS FILING IS BEING SUBMITTED ON RECYCLED PAPER

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RESPONDENT VILLAGE OF NEW LENOX'S
MOTION FOR RECONSIDERATION

NOW COMES the Respondent, the VILLAGE OF NEW LENOX ("Village"), by and through its attorney, Roy M. Harsch, of Drinker Biddle Gardner Carton LLP, and pursuant to 35 Ill. Adm. Code 101.520, hereby moves the Illinois Pollution Control Board (the "Board") to reconsider its Opinion and Order dated April 19, 2007, in the above-captioned matter. In support thereof, the Village states as follows:

1. The Board should reconsider its Order dated April 19, 2007, and uphold the NPDES Permit as issued by IEPA on October 31, 2003, for the following reasons, and as set forth in the Village's accompanying Memorandum of Law In Support.

2. First, as acknowledged by the Board, a third-party petitioner (not the Board itself) bears the burden to prove that the permit as issued violates the Act or Board regulations. 415 ILCS 5/40(a)(1)(2004); 35 Ill. Adm. Code § 105.112 (a). While the Board repeatedly recited this standard in its Order, it failed to hold Petitioner to this standard, and instead reversed the burden of proof onto IEPA. In doing so, it clearly and improperly relieved Petitioner of its burden of

proof. Because Petitioner itself failed to prove that the permit as issued would violate the Act or applicable Board regulations, the Board acted improperly in looking beyond Petitioner's arguments and performing its own *de novo* review of the evidence in the record to come to its conclusions.

3. Additionally, the Board's conclusions stand in stark contrast to the previous ruling of the Board denying Petitioner's Motion for Summary Judgment (dated November 17, 2005), in which the Board had held that Petitioner failed to show an absence of material fact issues necessary to meet its burden and prove its case, and as to which points the Petitioner never presented any additional evidence subsequent to the ruling.

4. Second, the Board violated Respondent's due process rights because Respondent's discovery requests before the adjudicatory hearing before Board hearing were denied, and Petitioners did not make their witnesses available at the hearing. This left Respondent bereft of opportunity to subject the unsworn public comments and other material previously introduced at the Agency hearing to cross-examination, including the ability to question the commentators, to seek discovery to clarify such arguments, or to otherwise examine such comments at the adjudicatory hearing. This ruling contravenes the Board's procedural rules at 35 Ill. Adm. Code §§ 101.610 and 101.612, past Board decisions, the Illinois Administrative Procedure Act, Illinois Court decisions, and the Illinois Constitution.

WHEREFORE, for these reasons, Respondents respectfully request that the Board reconsider its April 19, 2007 Order and defer to the permit as issued by the IEPA.

Respectfully Submitted,

VILLAGE OF NEW LENOX

By: _____
One of its attorneys

Dated: June 1, 2007

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Petitioners	)	**(Third party NPDES Permit Appeal Water)**
v.	)	
Illinois Environmental Protection Agency and Village of New Lenox,	)	
Respondents	)	

RESPONDENT VILLAGE OF NEW LENOX'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

NOW COMES the Respondent, the VILLAGE OF NEW LENOX ("Village"), by and through its attorney, Roy M. Harsch, of Drinker Biddle Gardner Carton LLP, and hereby submits this Memorandum of Law in support of its Motion for Reconsideration of the decision of the Illinois Pollution Control Board (the "Board") dated April 19, 2007, in the above-captioned matter.

I. INTRODUCTION

On April 19, 2007, the Board entered an Opinion and Order ("Board Order") holding that the Illinois Environmental Protection Agency ("IEPA") improperly issued a National Pollution Control Elimination System (NPDES) Permit to the Village to expand a wastewater treatment facility in New Lenox (the "Plant") that discharges treated effluent to Hickory Creek, a tributary to the Des Plaines River. (Board Order, at 1-2). The Board found that the IEPA failed to properly consider the effect of the increased discharge from the Plant on Hickory Creek, in

violation of 35 Ill. Adm. Code 302.105 (c) and Section 39 of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/39 (2004)), as summarized below:

1) *The Board* found that *the record* establishes that the increased loading may degrade the stream and the IEPA did not consider the impact of increased loading of phosphorus and nitrogen on the receiving stream;

2) *The Board* found that *the record* does not support the IEPA's determinations that the water quality standards for offensive conditions dissolved oxygen, pH, and copper will not be violated based on the increased loading to the stream; and,

3) *The Board* also finds that *the record* does not demonstrate that existing uses will be protected given the increase in discharge to Hickory Creek.

(Board Order, at 2)(emphasis added). The Board therefore remanded the permit to IEPA for additional review pursuant to the antidegredation provisions of the Board rules and consistent with the Board Order. (*Id.*)

For the reasons set forth below, the Board should reconsider its Order dated April 19, 2007, and uphold the NPDES Permit as issued by IEPA on October 31, 2003. First, as acknowledged by the Board, a third-party petitioner (not the Board itself) bears the burden to prove that the permit as issued violates the Act or Board regulations. 415 ILCS 5/40(a)(1)(2004); 35 Ill. Adm. Code § 105.112 (a). While the Board repeatedly recited this standard in its Order, it failed to hold Petitioner to this standard, and instead reversed the burden of proof onto IEPA. In doing so, it clearly and improperly relieved Petitioner of its burden of proof. Because Petitioner itself failed to prove that the permit as issued would violate the Act or applicable Board regulations, the Board acted improperly in looking beyond Petitioner's arguments and performing its own *de novo* review of the evidence in the record to come to its conclusions. These conclusions also stand in stark contrast to the previous ruling of the Board denying Petitioner's Motion for Summary Judgment, in which the Board had held that Petitioner failed to

show an absence of material fact issues necessary to meet its burden and prove its case, and as to which points the Petitioner never presented any additional evidence subsequent to the ruling.

Second, the Board violated Respondent's due process rights because Respondent's discovery requests before the adjudicatory hearing before Board hearing were denied, and Petitioners did not make their witnesses available at the hearing. This left Respondent bereft of opportunity to subject the unsworn public comments and other material previously introduced at the Agency hearing to cross-examination, including the ability to question the commentators, to seek discovery to clarify such arguments, or to otherwise examine such comments at the adjudicatory hearing. This ruling contravenes the Board's procedural rules at 35 Ill. Adm. Code §§ 101.610 and 101.612, past Board decisions, the Illinois Administrative Procedure Act, Illinois Court decisions, and the Illinois Constitution.

For these reasons, Respondents respectfully request that the Board reconsider its April 19, 2007 Order and defer to the permit as issued by the IEPA.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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

these public comments (Record at 339-376). IEPA issued a final NPDES permit with changes in response to the Public Comments on October 31, 2003 (Record at 353).

On December 2, 2003, Petitioners filed an appeal of the NPDES permit issued to the Village. On December 18, 2003, the Board accepted the third party NPDES permit appeal as required by 35 Ill. Adm. Code 105.210 and Section 40(e)(2) of the Act. On January 5, 2004 the IEPA filed the Record. On August 24, 2005, the Hearing Officer granted the IEPA's motion to amend the record and therefore, accepted the Second Amended Record.

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

During the pending of the discovery dispute, Petitioners filed a Motion for Summary Judgment on February 4, 2005. The Board rejected the Village's Motion to Stay the Motion for Summary Judgment, and the parties were ordered to file briefs regarding the Motion for Summary Judgment. On May 25, 2005, the Village filed its Memorandum of Law in

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

Opposition to Petitioner's Motion for Summary Judgment and its Response to Petitioners Statement of Relevant Facts from the Agency Record. The IEPA filed its Agency's Response to Petitioners Motion for said Memorandum of Law in Support of Summary Judgment. Petitioners' Reply Regarding Relevant Facts in the Agency Record was filed on June 8, 2005.

On November 17, 2005, the Board found there were significant factual disputes and genuine issues of material fact with respect to each of the issues raised by Petitioners and therefore, denied the requested summary judgment with respect to each issue. In its conclusion (found on page 40 of the November 17, 2005 order), the Board directed the appeal to proceed to hearing. A hearing was held on March 30, 2006. Despite the fact that the Board had ruled against Petitioners' Summary Judgment Motion due to the existence of fact issues with respect to Petitioners' burden of proof, Petitioners chose not to present any witnesses or evidence at the hearing. In response, neither the IEPA nor the Village presented any witnesses. On April 21, 2006, Petitioners filed their Post Hearing Memorandum, and on June 29, 2006, pursuant to the extensions granted by the Hearing Officer, the Village filed a Post Hearing Brief. IEPA also filed a Post Hearing Brief on June 30, 2006. Petitioners filed a final Post Hearing Reply Memorandum on July 21, 2006.

As noted above, on April 19, 2007, the Board entered its Opinion and Order holding that IEPA improperly issued an NPDES Permit to the Village for the expansion of its New Lenox wastewater treatment facility. Consequently, the Village has timely filed[2] its Motion for Reconsideration and this Memorandum In Support.

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[2] Pursuant to 35 Ill. Adm. Code § 101.520(a), "Any motion for reconsideration . . . of a final Board order must be filed within 35 days after the receipt of the order." New Lenox received a copy of the Board's Order on May 1, 2007. Because the deadline for filing a motion to reconsider is June 5, 2007, New Lenox's Motion and Memorandum in support are timely filed.

III. STANDARD OF REVIEW

Under the standard for a motion to reconsider, the Board should reconsider the rulings in its Order due to errors in the application of existing law under the Act. It is well-accepted that a party may file a motion to reconsider "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or *errors in the [Board's] previous application of existing law.*" *People v. Community Landfill Co, Inc.*, PCB No . 03-191, 2006 WL 1665241, at *1 (June 1, 2006) (emphasis added).

IV. ARGUMENT

A. The Board Improperly Ignored the Petitioners' Burden to Prove that the Issuance of the Permit Would Violate the Act or Board Regulations

No party to this permit appeal, nor the Board itself, disagrees that Petitioners, as third party appellants, bore the burden of proving that "the permit, as issued to the Village, would violate the Act or Board regulations." *Prairie Rivers Network v. PCB*, 335 Ill. App. 3d 391, 400-401, 735 N.E.2d 372, 379-80 (4th Dist. 2002), appeal denied 203 Ill.2d 569, 788 N.E.2d 734 (2003); accord *Prairie Rivers Network v. IEPA and Black Beauty Coal Co.*, PCB 01-112, 2001 WL 950017 (August 9, 2001)(citing 415 ILCS 5/40(e)(3) (2000)). The Board unequivocally held in its April 19, 2007 Order that:

> As recently as January of 2007, the Board reiterated the long standing holding on who bears the burden of proof in a permit appeal proceeding and what the standard of review is in a permit appeal. The Board's scope of review and standard of review are the same whether a permit applicant or a third party brings a petition for review of an NPDES permit. The distinction between the two types of NPDES permit appeals is which party bears the burden of proof. *Under Section 40(e)(3) of the Act, in a third party NPDES permit appeal, the burden of proof is on the third party.* Under Section 40(a)(1) of the Act, if the permit applicant appeals the permit, the burden of proof is on the permit applicant.

(Order, at 11)(citations omitted, emphasis added).

The Board went on to note that the question presented was "whether the *third party proves* that the permit as issued will violate the Act or Board regulations." (Order, at 11)(emphasis added). The Board has noted that "mere dislike" of the permit will not satisfy this burden; rather, petitioners in a permit appeal must demonstrate a violation. *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 District*, PCB 05-55, PCB 05-58 and PCB 05-59 (consolidated), 2005 WL 946593, at *5, (April 21, 2005).

The Board simply cannot ignore the significance of the burden of proof; yet, the language and analysis of the Board Order appears to pay mere lip-service to this central issue, and focuses instead on the Board's own review of the record. In fact, after reciting the law applicable to the burden of proof and reaffirming that Petitioners bear this burden (main discussion at pages 8-11), nowhere after this preliminary discussion in the Board Order does the Board reference the Petitioners' burden or whether or not Petitioners met this burden as to any specific issue. Petitioner's burden of proof is not mentioned again anywhere by the Board[3] until the conclusion on page 50 of the Order.

The specific language of the Order illustrates that the Board's analysis at each turn focuses on its own review of the record rather than viewing IEPA's grant of the permit through the prism of Petitioners' arguments, and holding Petitioners to their burden of proving that the permit as issued would cause violations of the Act or Board regulations. In fact, the approach taken by the Board in the present case often has the effect of reversing the burden of proof onto IEPA, a clear error under the oft-quoted standards acknowledged by the Board itself.

For example, in the Board's discussion of the antidegredation of Hickory Creek, the Board found that "the record indicates that the *IEPA failed to assure* that the water quality standards for offensive conditions, dissolved oxygen, pH and copper *will not be violated* because of the increased discharge under the permit." (Board Order, at 38)(emphasis added). Similarly, in the context of the issue of dissolved oxygen standards, the Board found that "the permit as granted *does not assure* that the increased discharge *would not result in violations* of the dissolved oxygen or pH standards and the issues of the permit violates Section 302.105(c)." (Board Order, at 46)(emphasis added). And, regarding the issue of the copper water quality standard, the Board found that "*IEPA failed to assure* that discharge *would not cause violations* of the acute or chronic [copper] standard and the issuance of the permit violates Section 302.105(c)." (Board Order, at 50)(emphasis added).

This approach strongly contrasts with a similar case in which the Board found that the petitioner, Prairie Rivers Network (also one of the Petitioners in the present case), had failed to sustain its burden of proving that the NPDES permit, as issued, would violate the Act or Board regulations. *Prairie Rivers Network v. IEPA and Black Beauty Coal Co.,* PCB 01-112, 2001 WL 950017 (August 9, 2001). In *Black Beauty Coal Co.,* the Board first reiterated the appropriate burden of proof:

> The Board concludes that Section 40(e)(3) of the Act unequivocally places the burden of proof on the petitioner, regardless of whether the petitioner is a permit applicant or a third-party. See 415 ILCS 5/40(e)(3) (2000). As petitioner, Prairie Rivers bears the burden of proving that the permit, as issued, would violate the Act or Board regulations.

Black Beauty Coal Co., 2001 WL 950017 at * 7.

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[3] While the Petitioners' burden of proof is mentioned in the context of the summaries of the arguments put forth by IEPA and the Village, as explained herein, the Board never applies the burden of proof to any of its analysis.

The Board then discussed the standard of its review of the decision of IEPA to issue the permit:

> Related to the burden of proof issue is the standard of review. Pursuant to the Board's opinion in *Waste Management, Inc. v. IEPA* (November 26, 1984), PCB 84-45, PCB 84-61, PCB 84-68 (consolidated), IEPA'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.*

Id. (emphasis added).

In *Black Beauty Coal Co.*, as in the case at issue here, petitioners and the IEPA engaged in a spirited and lengthy dispute over the facts in the record and the significance and meaning of those facts as they related to IEPA decision to issue the permit. However, in *Black Beauty Coal Co.*, the Board then properly conducted its entire analysis of the permit appeal by considering the petitioner's arguments and weighing whether petitioner had met its burden to prove the permit as issued would cause a violation. For example, the Board concluded that:

> while raising a number of concerns regarding the [Advent Group Water Quality] Study, Prairie Rivers has failed to make a demonstration that the terms of the permit issued by IEPA will result in a violation of the Act of Board Regulations. * * * The Board concludes that Prairie Rivers has not proven that the permitted discharge will harm beneficial uses or cause violations of water quality standards. Therefore, the Board finds that the permit as issued will not violate the Act or Board regulations.

Black Beauty Coal Co., 2001 WL 950017 at * 22.

As shown above, the Board in *Black Beauty Coal Co.* properly focused its analysis on the petitioner, and the question on appeal was simply whether the petitioner had met its burden of proof. While the Board's analysis detailed the arguments on both sides as to the sufficiency and accuracy of the evidence considered by IEPA, the Board simply concluded that "Prairie Rivers has failed to show that the NDPES permit as issued by IEPA to Black Beauty on December 27,

200, would violate the Act or Board regulations. Therefore, the permit is upheld." *Id.*, 2001 WL 950017 at *25.

Similarly, in *Village of Lake Barrington*, the Board applied exactly the same kind of analysis and held the petitioner to its burden to show that the permit as issued would cause a violation. In that very similar case, the Board held:

> As discussed above, in this proceeding the burden is on the Residents and Slocum to establish that the issuance of the NPDES permit will result in a violation of the Act or Board regulations. Thus, to prevail on this issue, Residents and Slocum must demonstrate that the Agency's antidegradation assessment was insufficient and as a result the permitted discharge will not protect the existing uses of the receiving stream. The Board finds that Residents and Slocum have not demonstrated that the permitted discharge will detrimentally affect the existing uses of the receiving waters.

Village of Lake Barrington, 2005 WL 946593, at *10.

Thus, as explained above, it appears clear that, despite repeatedly acknowledging the burden of proof to which Petitioners must be held in the beginning of the Order, the Board simply failed to hold Petitioner to this standard, and in fact reversed the burden of proof onto IEPA to show that the issuance of the permit would not cause violations. Because Petitioner itself failed to prove that the permit as issued would violate the Act or applicable Board regulations, the Board acted improperly in looking beyond Petitioner's arguments and performing its own *de novo* review of the evidence in the record to come to its conclusions.

The Board's actions in the present case appear even more incongruous to its previous determinations of permit appeals such as *Black Beauty Coal Co.* and *Village of Lake Barrington*, considering that the Board in this case had previously denied Petitioners' Motion for Summary Judgment by order dated November 17, 2005, coupled with Petitioners decision not to present any case at the hearing held on March 30, 2006. The Board's November 17, 2005

order provides a thorough examination of the arguments raised by Petitioners in their Motion for Summary Judgment concerning all of the issues raised in this NPDES Permit appeal: nutrient loadings, offensive water conditions standard and copper water quality standard. Before denying the Motion for Summary Judgment, the Board examined on an issue-by-issue basis the arguments presented by Petitioners in support of their Motion for Summary Judgment, followed by an analysis of the IEPA's responses, and then the Village's response which was then followed by Petitioners' reply. (November 17, 2005 Board Order, 8-40).

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

The Board found that there exist in the record facts that support the IEPA's decision to issue the permit in question with respect to each of the issues raised by Petitioner in its appeal. The denial of the Motion for Summary Judgment put Petitioners on notice of the Board's recognition that such material facts supporting the issuance of the permit exist in the record. Nevertheless, Petitioners chose not to present any case at the hearing and relied solely on the record before the IEPA. Having lost its Motion for Summary Judgment and electing not to proceed with any additional testimony at the hearing in this matter, it seems clear that Petitioners did not, and could not, meet their burden to show that IEPA's decision to issue the permit in question is not supported.

In light of these issues, the Village respectfully requests that the Board reconsider its April 19, 2007 decision and allow the issuance of the permit by IEPA to stand.

B. The Board Has Violated Respondents Due Process Rights and Contravened Its Own Regulations By Denying Respondents Discovery Requests

As has been noted before, the Village continues to respectfully disagree with the Board's November 17, 2005 decision to deny the Village's and IEPA's request for discovery, and submit that this error has unduly prejudiced the Village and deprived it of its due process rights, which should compel the Board to reconsider its April 19, 2007 Order and uphold the issuance of the permit at issue. Significantly, as explained below, the Board seems to acknowledge in the Order itself the Village's entitlement to at least some discovery, but ultimately denies that the Village was deprived of any of its rights. (Order, at 19).

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

The purpose of an adjudicatory hearing is to provide the Board with all the evidence necessary to make an informed decision in the specific case before it, subject to the Act's limits to the kind of information the Board can consider.[4] As argued by the IEPA and the Village in their briefs in support of their request discovery and as noted in pages 36 and 37 of the November 17, 2005 Board Opinion, discovery is authorized by the Board's procedural rules pursuant to 35 Ill. Adm. Code §105.100 and is consistent with past Board NPDES Permit appeal cases, (including third party permit appeal cases), where discovery has been allowed (*See Black Beauty Coal Co.*) The IEPA and the Village presented arguments and examples of where discovery could be useful in attempting to resolve the material issues of fact that were found by the Board

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

in reviewing Petitioners' Motion for Summary Judgment and, thereby, providing the necessary evidence to effectuate an informed decision by this Board.

In presenting this position, the Village readily admits and understands that the appeal is based upon the record amassed before the IEPA at the time of final permit decision pursuant to Section 40(e)(3) of the Act. The Board's statement on page 38 of its November 17, 2005 order that discovery was inappropriate because the Board review is limited to the record before IEPA at the time of permitting decision and is not based on information developed by the permit applicant, or the IEPA after the IEPA's decision, misses the point made by the IEPA and the Village.

As acknowledged by IEPA, the public hearing on a proposed NPDES Permit decision is a legislative informal hearing to inform the public of the proposed agency decision and to garner public comments prior to the IEPA's final decision. (IEPA Brief at 7 citing 35 Ill. Adm. Code § 166.120). In agreeing with Petitioners that discovery is not allowed in this third party NPDES Permit Appeal, the Board is in effect rewriting its procedural rules. The appropriate reading of the requirements of the Act is set forth in IEPA and the Village's pleadings. The review before the Board is based upon the record before the IEPA at the time of permit issuance. However, factual issues presented in the record may be, and should be, subject to discovery to assist the Board in makings its determination. In fact, the Board acknowledges as much in its April 19, 2007 Order, noting that "Respondents could have called witnesses to clarify statements made during the IEPA hearings." (Board Order, at 19). It is clear, therefore, that discovery serves the purpose of allowing any party to the proceeding to present clarifying testimony, including expert testimony, regarding such facts raised before the IEPA and included in the record.

At the time of the original adoption in of the NPDES rules, IEPA told the Board that its resources did not allow for holding two contested adjudicatory hearings, one at the Board and another before the IEPA. Harsch, Roy M. and Gail C. Ginsberg, *The National Pollutant Discharge Elimination System in Illinois,* 27 DePaul L.Rev. 739, 747-750 (1978). The Board concurred and provided that the hearing at the IEPA would be an uncontested public informational hearing with the opportunity for a contested formal adjudicatory hearing at the Board on appeal, as provided in sections 32 and 33(a) of the Act. *Id.* ILL. REV. STAT. ch. 111 ½ §§ 1032, 1033(a) (1975). This decision was in accordance with the then current USEPA regulations mandating what must be in a State program to support delegation of the NPDES permit program. While the USEPA has since changed its rules to reflect its current system of uniform appeals to the Environmental Appeals Board ("EAB")(See 65 Fed. Reg. 30,886 (May 15, 2000)), no changes to the Board's procedural rules have been made that alter the nature of informal IEPA hearing and the Board's Adjudicatory hearing.

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

2. The Board Has Infringed Upon the Respondents' Due Process Rights Because Discovery Is Necessary to Effectuate An Accurate Determination of the Facts In the Record.

The Illinois Supreme Court has recognized and this Board has confirmed that "The safeguards of a due process hearing are absent until the Hearing before the Board." *Village of Lake Barrington*, 2005 WL 946593, at *15 (citing *IEPA v. PCB,* 115 Ill. 2d 65, 70 (1986)). Moreover, the Illinois Supreme Court has stated that when government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use procedures which have traditionally been associated with the judicial process. *Village of Lake Barrington,* 2005 WL 946593, at *15 (citing *Klaeren II v. Village of Lisle*, 202 Ill. 2d 164, 184 (2002)). The process before the IEPA is a fact-finding investigation, while the process before the Board is an adjudication that directly affects the legal rights of an individual. *Id.*

The Illinois Administrative Procedure Act supports the same conclusion. In *Borg-Warner Corporation v. Mauzy,* 100 Ill. App. 3d 862, 872, 427 N.E.2d 415, 422-23 (3d. Dist. 1981), the court held that under the Illinois Administrative Procedures Act, no adjudication was required for the NPDES permit applicant under either State or Federal law, prior to the time the IEPA makes its determination to issue or deny a NPDES permit. However, once the IEPA issues the NPDES permit as occurred in the present case, an applicant or third party is afforded an adjudicatory hearing before the Board as provided under sections 16 (a) and (c) of the Illinois Administrative Procedure Act. *Id.* at 872.[5] Moreover, the hearing before the IPCB is conducted

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

under the Rules for adjudicatory cases. *Id.* at 868. Applying such law to this case, the Village, while not entitled to an adjudicatory-type hearing before the IEPA issued the Village's Permit, is entitled to an adjudicatory hearing that comports to the due process requirements as incorporated into rules for adjudicatory cases once the Village was before the IPCB. Clearly, the Board's decision as to whether Petitioners have met their burden of proof directly affects whether and in what manner the Village will expand its wastewater treatment plant as allowed in the permit issued by IEPA. Therefore, as stated by the Illinois Supreme Court and this Board, the Village must be afforded due process in this present adjudication.

Moreover, the Board's suggestion in its April 19, 2007 Order that Respondents could have solved this problem by calling witnesses on the stand to "clarify" statements made at the IEPA hearing at once acknowledges that Respondent in fact have a right to such discovery, while at the same time suggests an impractical and unworkable half-solution. (Order, at 19). Simply calling witnesses cold to the stand at the Board hearing (even assuming that all needed witnesses would be available) would not afford the Village, the IEPA, or any other party a full and fair opportunity to gather background information, prepare to question witnesses, and otherwise be in a position to fully explore any such issues that required "clarification."

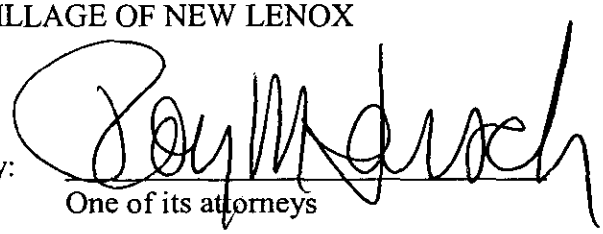
V. CONCLUSION

It is unquestioned that the Petitioners had the burden of proof in this third-party appeal, and that the Board should have required the Petitioners to prove that the permit as issued violates the Act or Board regulations. Yet, the Board appears to have ignored its own iteration of the standard at issue, and in fact, on numerous occasions, reversed the standard and found the IEPA *failed to show a lack of proof* that the permit would not assure that a standard would not be violated. Additionally, the Board violated the Village's due process rights because its discovery

requests before the adjudicatory hearing before Board hearing were denied, and Petitioners did not make their witnesses available at the hearing. This ruling contravenes the Board's procedural rules, past Board decisions, the Illinois Administrative Procedure Act, Illinois Court decisions, and the Illinois Constitution. The Board's suggestion that questioning witnesses at the time of the Board hearing is a sufficient sop for allowing such discovery is unworkable, and in fact illustrates that an opportunity for real and meaningful discovery is in fact necessary to safeguard the Village's due process rights.

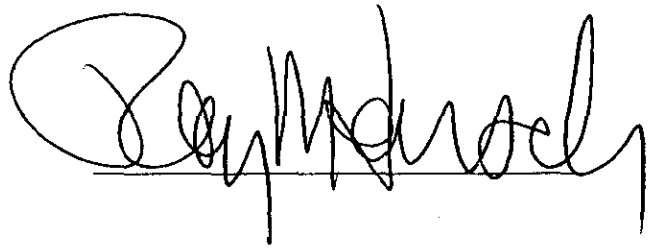
Respectfully Submitted,

VILLAGE OF NEW LENOX

By: 
One of its attorneys

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Notice of Filing** and the attached **Respondent Village of New Lenox's Motion for Reconsideration** and **Respondent Village of New Lenox's Memorandum of Law In Support of Its Motion For Reconsideration** was filed by hand delivery with the Clerk of the Illinois Pollution Control Board and served upon the parties to whom said Notice is directed by first class mail on June 1, 2007.



CH01/ 12511140.1

2006 WL 1665241 (Ill.Pol.Control.Bd.)

(Cite as: 2006 WL 1665241 (Ill.Pol.Control.Bd.))

Illinois Pollution Control Board
State of Illinois

*1 PEOPLE OF THE STATE OF ILLINOIS, COMPLAINANT
v.
COMMUNITY LANDFILL COMPANY, INC., AN ILLINOIS CORPORATION, AND THE CITY OF MORRIS, AN ILLINOIS MUNICIPAL CORPORATION, RESPONDENTS
PCB 03-191
June 1, 2006

(Enforcement - Land)

ORDER OF THE BOARD

On April 17, 2003, the Office of the Attorney General, on behalf of the People of the State of Illinois (People), filed a one-count complaint against alleging failure to provide adequate financial assurance for closure and post-closure operations. **Community Landfill** Company, Inc. (CLC) is the operator, and the City of Morris (Morris) the owner, of the Morris **Community Landfill**, a special waste and municipal solid waste **landfill** located at 1501 Ashley Road, Morris, Grundy County. The Board accepted the complaint for hearing on May 1, 2003.

On March 31, 2006, both CLC and Morris (respondents) filed motions to reconsider the Board's February 16, 2006 interim opinion and order granting summary judgment in favor of the People. As discussed below, the Board grants both parties' motions for reconsideration. Upon reconsideration, however, the Board upholds the Board's February 16, 2006 interim opinion and order and directs the hearing officer to proceed to hearing on the issue of remedy.

PROCEDURAL BACKGROUND

On July 21, 2005, the People moved the Board to grant summary judgment in its favor. On October 3, 2005, CLC responded and moved to strike portions of the People's motion for summary judgment. On October 4, 2005, Morris responded to the People's motion and filed a counter-motion for summary judgment. On October 18, 2005, the People made several filings, including a response to CLC's motion to strike and a response to the counter-motion for summary judgment. On that same day, the People moved the Board for leave to file a reply in support of the People's motion for summary judgment instanter. The People claimed that CLC misrepresented the issue of relief and stated that the misrepresentation could result in material prejudice if the People were not allowed to reply. The Board granted the motion and accepted the People's reply.

On February 16, 2006, the Board granted CLC's motion and struck the People's request for an interim remedy from the motion for summary judgment. The Board then granted the People's motion and denied Morris' counter-motion. Finally, the Board ordered the hearing officer to proceed expeditiously to hearing on the issue of remedy.

STANDARD FOR RECONSIDERATION

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); see also 35 Ill. Adm. Code 101.902. A motion to reconsider may specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 5 (Feb. 19, 2004). "Reconsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character so as to make it probably that a different judgment would be reached." Patrick Media Group, Inc. v. City of Chicago, 255 Ill. App. 3d 1, 8, 626 N.E.2d 1066, 1071 (1st Dist. 1993).

CLC'S MOTION FOR RECONSIDERATION

***2** In its motion for reconsideration, CLC has presented no newly discovered evidence or changes in the law. Accordingly, the following paragraphs discuss only CLC's arguments as to how the Board allegedly misapplied the law. CLC seeks clarification from the Board's "finding of violations." Mot. at 2. CLC contends that a finding that CLC disposed waste is a prerequisite to a violation of Section 811.700(f) of the Board's rules, which prohibits the operation of a waste disposal facility without proper financial assurance. Mot. at 4.

CLC requests that the Board order the parties to hearing on the matter of the respondents' liability in regard to allegations of "improper waste disposal" prior to any hearing on remedy. Further, CLC asks the Board to clarify its findings and to reconsider the grant of summary judgment in favor of complainant.

MORRIS' MOTION FOR RECONSIDERATION

As in CLC's motion for summary judgment, Morris has also presented no newly discovered evidence or changes in the law. Morris has set forth many of the same arguments as in its response to the People's motion for summary judgment opposing any finding of violation. The Board will not reanalyze these arguments, but will discuss only Morris' arguments as to how the Board allegedly misapplied the law. Though Morris continually refers to assertions made by the State and the State's arguments, the Board assumes Morris is alleging that the Board misapplied the law. Morris' primary argument is that the Board is mistaken in interpreting Section 21(d)(2) liberally, when Morris argues Section 21(d)(2) should be interpreted narrowly.

THE THE PEOPLE'S RESPONSES

Response to CLC

The People claim that CLC has failed to articulate any newly discovered evidence, changes in the law or errors in the Board's application of existing law. The People argue, therefore, that CLC's motion for reconsideration must fail. The People contend that if the Board should find sufficient reasons for reconsideration, the motion should fail and the Board should reaffirm its February 16, 2006 interim opinion and order in its entirety.

The People assert that the Board's order "clearly articulates that both Respondents conducted a waste disposal operation." Resp. to CLC at 4; citing Board order at 14. Further, the People argue that there is no requirement to prove that the respondents' waste disposal was improper, only that it occurred at the time the respondents failed to have proper financial assurance. Because there are no genuine issues of material fact that would preclude summary judgment, the People urge the Board to deny CLC's motion for reconsideration and uphold the February 16, 2006 interim opinion and order. Resp. to CLC at 8

Response to Morris

The People assert that Morris does not offer any new evidence or allege a change in the Act or Board regulations. Rather, Morris is challenging the Board's interpretation of the record. In doing so, the People claim Morris merely repeats many of the arguments already rejected by the Board in the Board's February 16, 2006 order granting summary judgment.

*3 The People state that in accordance with Section 2 of the Act, the Board must liberally construe the Act to effectuate its purposes. Resp. to Morris at 2; citing State Oil Co. v. People, 352 Ill. App. 3d 813, 822 N.E.2d 876, at 822 (2d Dist. 2004); 415 ILCS 5/2 (2004). The People also restate many of the arguments presented in the motion for summary judgment. The THE People maintain that the behavior of a party determines whether it is an "operator," and the City's actions demonstrate continuous involvement in waste disposal-related decisions at the Site. Resp. to Morris at 4. The People conclude that the Board has correctly applied the relevant provisions of the Act and Subtitle G regulations and that Morris' motion to reconsider should be denied.

BOARD DISCUSSION

The Board grants both parties' motions for reconsideration, finding that the Board did not misapply the law on either of the two points that the parties raised. Despite granting the respondents' motion for reconsideration, the Board finds no errors in how it applied the law in the February 16, 2006 order and upholds the opinion and order granting summary judgment in favor of the People.

The Board first seeks to clarify CLC's confusion about the Board's finding of

violations in the February 16, 2006 interim opinion and order. The Board's February 16, 2006 order the Board struck allegations that continued disposal at the site qualified as a newly pled cause of action on which relief could be requested. This is evidenced by the Board's statement "the Board grants CLC's motion and strikes references to the People's requests for relief from the summary judgment pleading." See People v. **Community Landfill** Co., Inc. and City of Morris, PCB 03-191, slip op. at 13 (Feb. 16, 2006) (emphasis added). The Board order did find that the respondents operated a waste disposal site without having adequate financial assurance. These findings are what are required to have a cause of action under Section 811.700(f) of the Board's rules. 35 Ill. Adm. Code 811.700(f) . The alleged fact that waste disposal continued at CLC has not been struck from the record, as there is no reason to do so. In fact, the February 16, 2006 Board order explicitly stated that "[t]he parties may address ... the duration of the violations ... at hearing and in final briefs on the issue of remedy."

Improper waste disposal is not a prerequisite to a finding of violation under Section 811.700(f). The Board will not, therefore, grant CLC's request to hold a hearing on the "Respondents' liability in regard to Complainant's allegations of improper waste disposal."

Next, the Board addresses Morris' arguments in support of reconsideration. The Board finds it correctly interpreted Section 21(d)(2) of the Act and Sections 811.700(f) and 811.712(b) of the Board's regulations. According to Section 2 of the Act, "[t]he terms and provisions of the Act shall be liberally construed so as to effectuate the purposes of this Act." 415 ILCS 5/2 (2004). Rowe Foundry & Machine Co., v. IEPA, PCB 88-21, slip op. at 9 (Feb. 23, 1989); citing Reynolds Metals Co. v. PCB and IEPA, 108, Ill. App. 3d 161, 438 N.E.2d 1267, 63 Ill. Dec. 904 (1982) (holding that it is generally unnecessary to look beyond the language of the statute. Where different interpretations are urged, however, the court must look to the reasons for enactment of the statute and construe the statute in a way that is consistent with that purpose).

*4 Section 811.700(f) states that "no person ... shall conduct any waste disposal operation" unless that person complies with the financial assurance regulations. As discussed in the Board's February 16, 2006 order, caselaw specifically provides that the Board takes a broad view of what types of activities constitute "operating" a waste disposal site. See People v. Poland, Yoho, and Briggs Ind., Inc., et al., PCB 98-148, slip op. at 18 (Sept. 6, 2001). The purpose of the Act is to ensure that financial assurance obligations are met so that neither human health nor the environment is harmed from the operation of a municipal solid waste landfill. The Board must interpret the Act as it applies in each individual instance. The Board finds that Morris' decision-making authority, financial involvement, history of litigation, and responsibility for at least one aspect of the site operations, the treatment of leachate, collectively qualifies as "conducting a waste disposal operation."

As concerns the Board's finding of violations against both respondents, the Board's procedural rules require the "owner or operator" to provide financial

assurance. See 35 Ill. Adm. Code 811.700, 706, et seq. Under the Illinois codification scheme, the use of "or" allows either or both parties to meet the requirements. The Board is not allowed to use "and/or" in drafting rule language. See Safe Drinking Water Act Update, Phase IIB and Lead and Copper Rules (6/1/91-12/31/91), R92-3 (May 5, 1993). The Board finds it properly interpreted the Act and Board regulations broadly in analyzing the specific facts of this case and upholds the February 16, 2006 interim opinion and order granting summary judgment on the alleged financial assurance violations.

REMEDY

The parties have not yet analyzed the 33(c) or 42(h) factors regarding an appropriate remedy, including civil penalty, if any, in this proceeding. If a complainant proves an alleged violation, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act to fashion an appropriate remedy for the violation. See 415 ILCS 5/33(c), 42(h) (2004). Specifically, the Board considers the Section 33(c) factors in determining, first, what to order the respondent to do to correct an on-going violation, if any, and, second, whether to order the respondent to pay a civil penalty. The factors provided in Section 33(c) bear on the reasonableness of the circumstances surrounding the violation, such as the character and degree of any resulting interference with protecting public health, the technical practicability and economic reasonableness of compliance, and whether the respondent has subsequently eliminated the violation.

If, after considering the Section 33(c) factors, the Board decides to impose a civil penalty on the respondent, only then does the Board consider the Act's Section 42(h) factors in determining the appropriate amount of the civil penalty. Section 42(h) sets forth factors that may mitigate or aggravate the civil penalty amount, such as the duration and gravity of the violation, whether the respondent showed due diligence in attempting to comply, any economic benefit that the respondent accrued from delaying compliance, and the need to deter further violations by the respondent and others similarly situated.

*5 Accordingly, the Board further directs the hearing officer to advise the parties that at hearing, each party should: (1) discuss whether to impose a remedy, if any, including a civil penalty, for the violations and support its position with facts and arguments that address any or all of the Section 33(c) factors; and (2) propose a civil penalty, if any, including a specific dollar amount, and support its position with facts and arguments that address any or all of the Section 42(h) factors.

In the motion for summary judgment, the People also request attorney fees pursuant to Section 42(f) of the Act. 415 ILCS 5/42(f) (2004). Therefore, at hearing the parties must also address whether the respondents committed any "willful, knowing, or repeated violation of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order." Id.

2006 WL 1665241 (Ill.Pol.Control.Bd.)

(Cite as: 2006 WL 1665241 (Ill.Pol.Control.Bd.))

CONCLUSION

The Board grants both CLC's and Morris' motions to reconsider with respect to the Board's alleged misapplication of the law. The Board, however, denies the respondents' requests and upholds the Board's February 16, 2006 ruling granting summary judgment in favor of the People on the violations alleged in the complaint and directs the hearing officer to proceed to hearing on the issue of remedy.

IT IS SO ORDERED.

N.J. Melas

2006 WL 1665241 (Ill.Pol.Control.Bd.)

END OF DOCUMENT

Illinois Pollution Control Board
State of Illinois

*1 PRAIRIE RIVERS NETWORK, PETITIONER
v.
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY AND BLACK BEAUTY COAL COMPANY, RESPONDENTS
PCB 01-112
August 9, 2001

(Permit Appeal - NPDES, Third-Party)

Albert F. Ettinger, Appeared on Behalf of Prairie Rivers Network

SPAT

Sanjay K. Sofat, Assistant Counsel, Appeared on Behalf of Respondent, Illinois Environmental Protection Agency; and

SPAT

W.C. Blanton, Appeared on Behalf of Black Beauty Coal Company

OPINION AND ORDER OF THE BOARD

Petitioner Prairie Rivers Network (Prairie Rivers) appeals the issuance of a National Pollutant Discharge Elimination System (NPDES) permit to Black Beauty Coal Company (Black Beauty) by the Illinois Environmental Protection Agency (IEPA). Prairie Rivers brings this appeal pursuant to Section 40(e) of the Environmental Protection Act (Act) (415 ILCS 5/40(e) (2000)).

For the reasons described below, the Board finds that Prairie Rivers failed to sustain its burden of proving that the NPDES permit, as issued, would violate the Act or Board regulations. Accordingly, the Board finds that IEPA properly issued the permit to Black Beauty.

PRELIMINARY MATTERS

Before addressing the substance of this appeal, there are three preliminary matters before the Board. The first is a motion to supplement the record filed by Black Beauty via facsimile on May 29, 2001, and a response filed by Prairie Rivers on June 7, 2001. Black Beauty's motion seeks to supplement the record with a press release issued by Prairie Rivers on May 10, 2001. Black Beauty argues that the press release should be admitted as an admission by Prairie Rivers that the water quality standards of 35 Ill. Adm. Code 302 and 303 (Subtitle C) do not apply to mine-related discharge. *Black Beauty Mot.* at 2. In its response, Prairie Rivers argues that the Board should make its decisions based exclusively on the record that was before

IEPA, and that the press release was written for laymen. Prairie Rivers Resp. at 1-2.

The Board finds that the press release is not relevant to the issue of whether Prairie Rivers has proven that the NPDES permit, as issued, would violate the Act or Board regulations. Further, the Board finds that the press release is not a document IEPA would have relied upon in making a permit decision. Accordingly, Black Beauty's motion to supplement the record is denied.

The second preliminary matter is IEPA's June 1, 2001 motion for leave to file its posthearing brief instanter. In its motion, IEPA states that although it served its posthearing brief on the parties on May 25, 2001, as required by hearing office order, it failed to also serve the Board. In fact, IEPA's brief was not filed with the Board until May 31, 2001. [FN1] IEPA's attorney claims that he misunderstood the hearing officer's directions regarding service of the brief on the Board. As a result, IEPA seeks leave to file its posthearing brief instanter. Because the parties to this permit appeal did receive IEPA's brief in a timely manner, and because Prairie Rivers' ability to file its posthearing reply brief was not prejudiced by IEPA's late filing with the Board, the Board grants IEPA's motion for leave to file instanter and accepts the brief.

*2 Finally, the Board must address the fact that a number of the public comments submitted in this matter were filed well after the public comment period expired. Pursuant to the hearing officer's order of May 11, 2001, posthearing public comments were due on or before May 14, 2001. The hearing officer explicitly stated in his order that the "mail box rule" of 35 Ill. Adm. Code 101.300 would not apply, and that each filing, including but not limited to public comments, must be in the Board's Chicago office on or before the assigned due date.

The Board received a total of 30 public comments. The Board received 10 public comments before the May 14, 2001 deadline, and 20 more after expiration of the deadline. Of those, public comments 18, 20, 21, and 22 were docketed as group comments consisting of 46, 22, 9, and 5 (respectively) identical pre-printed postcards, which provide, in pertinent part:

I am a member of Prairie Rivers Network. As a citizen who is deeply concerned about the Little Vermilion River I urge you to make significant changes to the water pollution permit for Black Beauty Coal Company's Vermilion Grove Mine.

In issuing the permit Illinois EPA did not allow the public to comment on key aspects such as the monitoring of effluent and stream flow rates, monitoring of fish and mussel populations, and the plan for operating the mine. In short, public participation was circumvented.

This mine has already impacted the Little Vermilion River. In February Black Beauty had three illegal discharges from its facility. These discharges allowed large amounts of silt and sediment to enter a tributary to the Little Vermilion, possibly adding to siltation problems in nearby Lake Georgetown and smothering habitat important to three state protected species in the area.

We urge you to address the issues which Prairie Rivers Network has raised in its petition.

Of the 96 postcards received, only two were timely received. Vermilon Coal Company (Vermilion Coal) filed its public comment on May 14, 2001 (PC 10), then filed a supplement on May 25, 2001, without a proof of service and refiled on May 29, 2001, with a proof of service. None of the public comments received after May 14, 2001, were accompanied by a motion for leave to file instanter.

The Board finds that the hearing officer order imposing a deadline of May 14, 2001, for the filing of public comments was unambiguous. Among other things, it was designed to assure that the parties in this permit appeal would have a sufficient opportunity to address public comments in their posthearing briefs. No justification for these late filings was offered and leave to file comments late was not sought. Accordingly, the Board strikes those comments received by the Board after May 14, 2001. While the Board will not consider the substance of these late-filed comments, it notes that two of the Prairie Rivers ""postcard" comments and the original comments from Vermilion Coal were timely received and may, therefore, be considered by the Board in this decision.

BACKGROUND

*3 Black Beauty was granted an NPDES permit on December 27, 2000, for discharges from the Vermilion Grove Mine, located in Vermilion County, Illinois. R. at 953. [FN2] The Vermilion Grove Mine (mine) is an underground coal mine that is expected to produce two to three million tons of coal per year. Tr. at 383. While Black Beauty will actually be mining the coal, Vermilion Coal is the owner of the coal. R. at 321. While the Board denied Vermilion Coal's petition for leave to intervene, the Board did grant Vermilion Coal permission to file an amicus curiae brief pursuant to Section 101.110(c) of the Board's procedural rules (35 Ill. Adm. Code 101.110(c)). See Prairie Rivers Network v. IEPA (April 19, 2001), PCB 01-112. Vermilion Coal's amicus brief was filed on May 25, 2001.

The mine is located approximately 2.5 miles south of Georgetown and one mile west of State Highway 1. R. at 558. The proposed discharge, via Outfall 003, is to an unnamed tributary of the Little Vermilion River. Id. Downstream of the unnamed tributary's confluence with the Little Vermilion River is the Georgetown Reservoir, the Harry "Babe" Woodyard State Natural Area, and the Carl Flierman River Nature Preserve. Id.

Prairie Rivers is "a statewide river conservation group [that works] with organizations and individuals throughout Illinois on issues that deal with protection of our rivers and streams as well as water quality issues throughout the state of Illinois." Tr. at 13. [FN3]

On January 30, 2001, Prairie Rivers filed this third-party petition for review of IEPA's December 27, 2000 issuance of a final NPDES permit to Black Beauty for the mine. On February 15, 2001, the Board accepted this matter for hearing. IEPA filed its administrative record on March 2, 2001. A hearing was held before Board Hearing Officer *John Knittle on* May 1 and 2, 2001, at the Vermilion County Courthouse in Danville, Illinois.

At hearing, Prairie Rivers offered testimony from two witnesses: Robert Moore, Executive Director of Prairie Rivers (Tr. at 13); and Rosa Ellis, a concerned citizen who is a member of Prairie Rivers (Tr. at 86). IEPA presented one witness, Toby Frevert, an IEPA employee who coordinated "the agency's review and preparation in response to [Black Beauty's] permit application." Tr. at 95. Two persons testified on behalf of Black Beauty: Dean Vlachos, an environmental engineer with Advent Group; and Eric Fry, a geologist for Black Beauty. In addition to the testifying witnesses, the following persons also gave public comments on the record: Jean Hayward, Gloria Mariage, Bill Ellis, Rosa Ellis, and Karen Crum. A number of exhibits were also introduced into the record at hearing.

Posthearing briefs were filed by all parties. Prairie Rivers filed its brief and reply brief on May 18, 2001, and May 31, 2002, respectively. Posthearing briefs, including amicus briefs, were filed on May 25, 2001, by Black Beauty, Vermilion Coal, and the Illinois Environmental Regulatory Group (IERG). IEPA filed its brief on May 31, 2001. The Board has also received a number of public comments, including comments from Vermilion Coal and from members of Prairie Rivers. [FN4]

*4 Oral argument was sought on two separate occasions. Prairie Rivers and Black Beauty first sought oral argument after the hearing and before posthearing briefs were filed. Since the Board could not determine whether oral argument would be necessary or beneficial, this first request was denied. See Prairie Rivers Network v. IEPA (May 17, 2001), PCB 01-112. The second motion for oral argument was made by Black Beauty following completion of the posthearing briefing schedule. Having then had the opportunity to review the posthearing briefs, the Board determined that it would be beneficial to schedule an oral argument, and did so for July 12, 2001. Oral argument was held as scheduled; Prairie Rivers, Black Beauty, and IEPA all participated. [FN5]

REGULATORY FRAMEWORK

Statutory Authority

Prairie Rivers' **permit appeal** was brought pursuant to a statutory provision, enacted in 1997, which authorizes interested third-parties to **appeal** NPDES **permits** to the Board. See 415 ILCS 5/40(e) (2000). Section 40(e) of the Act provides:

1. If the Agency grants or denies a **permit** under subsection (b) of Section 39 of this Act, a third party, other than the **permit** applicant or Agency, may petition the Board within 35 days from the date of issuance of the Agency's decision, for a hearing to contest the decision of the Agency.

2. A **petitioner** shall include the following within a petition submitted under subdivision (1) of this subsection:

A. a demonstration that the **petitioner** raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES **permit** application, if a public hearing was held; and

B. a demonstration that the **petitioner** is so situated as to be affected by the **permitted** facility.

3. If the Board determines that the petition is not duplicitous or frivolous and

contains a satisfactory demonstration under subdivision (2) of this subsection, the Board shall hear the petition (i) in accordance with the terms of subsection (a) of this Section and its procedural rules governing **permit** denial **appeals** (ii) exclusively on the basis of the record before the Agency. The **burden** of **proof** shall be on the **petitioner**. The Agency and **permit** applicant shall be named co-respondents. 415 ILCS 5/40(e) (2000) (emphasis added).

Regulatory Obligations

In addition to the statutory framework of Section 40(e) of the Act, several rules also guide the Board's consideration of this permit appeal. In particular, the provisions of 35 Ill. Adm. Code 406.202 and 406.203 are integral to the Board's determination in this case. They provide as follows:

Section 406.202 Violation of Water Quality Standards:

In addition to the other requirements of this Part, no mine discharge or non-point source mine discharge shall, alone or in combination with other sources, cause a violation of any water quality standards of 35 Ill. Adm. Code 302 or 303. When the Agency finds that a discharge which would comply with effluent standards contained in this Part would cause or is causing a violation of water quality standards, the Agency shall take appropriate action under Section 31 or 39 of the Environmental Protection Act to require the discharge to meet whatever effluent limits are necessary to ensure compliance with the water quality standards. When such a violation is caused by the cumulative effect of more than one source, several sources may be joined in an enforcement or variance proceeding and measures for necessary effluent reductions will be determined on the basis of technical feasibility, economic reasonableness and fairness to all dischargers. 35 Ill. Adm. Code 406.202.

*5 Section 406.203 TDS Related Permit Conditions provides:

a) This Section sets forth procedures by which water quality-based permit conditions for total dissolved solids, chloride, sulfate, iron and manganese may be established by the Agency for coal mine discharges. These procedures apply instead of Section 406.202 whenever a permit applicant elects to proceed under this Section. A permittee must comply with water quality-based permit conditions for total dissolved solids, chloride, sulfate, iron and manganese established pursuant to this Section instead of Section 406.202. Public hearings may be required pursuant to 35 Ill. Adm. Code 309.115.

b) An applicant may elect to proceed under this Section by providing the required information as part of a new or renewed or supplemental state or NPDES permit application.

c) The Agency shall establish permit conditions under this Section if all of the following conditions are met:

1) The applicant proves to the Agency that the discharge will not cause an adverse effect on the environment in and around the receiving stream, by either:

A) Demonstrating that the discharge will contain a concentration less than or equal to 3500 mg/1 sulfate and 1000 mg/1 chloride; or,

B) Through actual stream studies.

2) The applicant proves to the Agency that the discharge will not adversely af-

fect any public water supply; and

3) The applicant proves to the Agency that it is utilizing good mining practices designed to minimize discharge of total dissolved solids, chloride, sulfate iron and manganese.

d) The Agency may promulgate under 35 Ill. Adm. Code 405.101(c) a code of good mining practices consistent with the definition in Section 406.204. Compliance with the code of good mining practices shall be prima facie evidence that the applicant is utilizing good mining practices within the meaning of paragraph (c)(3).

e) Whenever the Agency issues a permit based on this Section, it shall include such conditions as may be necessary to ensure that:

1) There is no adverse effect on the environment in and around the receiving stream;

2) The discharge does not adversely affect any public water supply; and

3) The permittee utilizes good mining practices designed to minimize discharge of total dissolved solids, chloride, sulfate, iron and manganese.

f) Whenever the Agency issues a permit pursuant to this Section, [it] may include as a condition a requirement that the permittee submit to the Agency effluent data for total dissolved solids, chloride, sulfate, iron and manganese. 35 Ill. Adm. Code 406.203.

Section 406.202 requires compliance with the general water quality standards of Section 302 and 303 (Subtitle C) of the Board's water regulations. Section 406.203, however, gives an NPDES **permit** applicant the option of proceeding under its provisions instead; electing this option means that IEPA (rather than a pre-existing series of regulations) establishes "water quality-based **permit** conditions for total dissolved solids, chloride, sulfate, iron and manganese ... for [the] coal mine discharges." 35 Ill. Adm. Code 406.203(a).

BURDEN OF **PROOF**/STANDARD OF REVIEW

*6 Section 40(e)(3) of the Act provides that the **burden** of **proof** shall be on the **petitioner** in third-party NPDES **permit appeals** such as this. 415 ILCS 5/40(e)(3) (2000). Although this is the first third-party **appeal** of an NPDES **permit** in which a Board hearing has been held since Section 40 was amended to specifically authorize the filing of NPDES **permit appeals**, (See Pub. Act. 90- 274, adding Section 40(e)(1) to the Act effective July 30, 1997), the Board has consistently applied this same statutory burden in other **permit appeals** brought under Section 40 of the Act (415 ILCS 5/40 (2000)). See, e.g., Panhandle Eastern Pipe Line Company v. IEPA (January 21, 1999), PCB 98-102.

Prairie Rivers argues that a different interpretation of the **burden** of **proof** in third-party NPDES **permit appeals** should be applied. Specifically, Prairie Rivers urges the Board to consider the petitioner's **burden** of **proof** "together with the language of the statute limiting the review to the Agency record and the provision of Section 39(a) of the Environmental Protection Act that states that **permits** shall only be issued 'upon proof by the applicant' that the **permit** 'will not cause a violation of this Act or the regulations hereunder."D' Prairie Rivers Br. at 12, citing 415 ILCS 5/39(a) (2000). Prairie Rivers further argues that, "while the burden of

persuasion is on the petitioner ... [[i]t is for the applicant to prove to the Agency that it is eligible for the requested permit." Prairie Rivers Br. at 13. Prairie Rivers cites to case law from other states (Alabama and Alaska) in support of the proposition that IEPA permitting decisions should be reversed if not supported by "substantial evidence in the administrative record." Id. Finally, Prairie Rivers also argues that with regard to legal questions, the Board is entitled to a de novo review of IEPA determinations. Id.

Prairie Rivers reaffirmed these arguments during the July 12, 2001 oral argument. Specifically, Prairie Rivers acknowledged that as petitioner, it ""must show that there were legal errors or that ... factual determinations were made that were not supported by substantial evidence in the record." Oral Arg. Tr. at 7. Prairie Rivers, however, argues that its burden, "is informed by the burden that went on below ... [a]nd in this case, the burden below was on the applicant, Black Beauty Mining Company, to prove that it qualified, that it was eligible for the **permit** it received." Oral Arg. Tr. at 8.

Black Beauty, IEPA, and IERG oppose Prairie Rivers' interpretation of the **burden** of **proof**. Black Beauty argues that the **burden** of **proof** is on the **petitioner** in a **permit appeal**, regardless of whether the **petitioner** is the **permit** applicant or a third-party. Black Beauty Br. at 9. Furthermore, Black Beauty maintains that Prairie Rivers **bears** the burden of showing that, "the **permit**, as issued by the Agency, would violate the Act or the Board's regulations." Id. citing Damron v. IEPA (April 21, 1994), PCB 93-215.

*7 Similarly, IEPA also argues that Prairie Rivers, as the **petitioner, bears** the **burden** of **proof** in this matter. IEPA states that, "[s]ince the **Petitioner** challenged the Agency's decision, it must come forward with the evidence to show that the **permit** issued by the Agency will cause a violation of the Act or the regulations hereunder." IEPA Br. at 4 (emphasis in original). IEPA agrees, however, that the "substantial evidence" test is the appropriate standard by which the Board should review IEPA's decision. Id. In other words, according to IEPA, if its decision is supportable by substantial evidence in the record, then it must be sustained. Id.

Black Beauty and IEPA reiterate these positions during oral argument. First, IEPA states that, "for the **petitioner** to bring a third-party **permit appeal** at a **bear** minimum it must provide some evidence to show that the **permit** as issued will cause a violation of the [A]ct or the regulations." Oral Arg. Tr. at 17. Likewise, Black Beauty argues that the nature of this **appeal** (third-party) does not change the **burden** of **proof** from that which is applied in **permit appeals** when the appellant is the **permit** holder. Oral Arg. Tr. at 33. Black Beauty maintains that Prairie Rivers, "must prove that this **permit** as written will cause a violation of Illinois law." Id.

Finally, IERG's arguments support the positions of Black Beauty and IEPA. Specifically, IERG states, "[i]t has long been clear in Illinois that in **appeals** of decisions by the IEPA regarding **permits**, 'the **burden** of **proof** shall be on the **petitioner**."D' IERG Br. at 3, citing 415 ILCS 5/40(e)(3) (2000).

The Board concludes that Section 40(e)(3) of the Act unequivocally places the **bur-**

den of **proof** on the **petitioner**, regardless of whether the **petitioner** is a **permit** applicant or a third-party. See 415 ILCS 5/40(e)(3) (2000). As **petitioner**, Prairie Rivers **bears** the burden of proving that the **permit**, as issued, would violate the Act or Board regulations.

Related to the **burden** of **proof** issue is the standard of review. Pursuant to the Board's opinion in Waste Management, Inc. v. IEPA (November 26, 1984), PCB 84-45, PCB 84-61, PCB 84-68 (consolidated), IEPA'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.

SCOPE OF BOARD REVIEW

Section 40(e)(3) of the Act directs the Board to consider the petition ""exclusively on the basis of the record before the Agency." 415 ILCS 5/40(e)(3) (2000). Section 105.212(b) of the Board's procedural rules provides a listing of the information that is to be included in IEPA's administrative record, including:

1) Any permit application or other request that resulted in the Agency's final decision;

2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;

*8 3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;

4) The hearing file of any hearing that may have been held before the Agency, including any transcripts and exhibits; and

5) Any other information the Agency relied upon in making its final decision. 35 Ill. Adm. Code 105.212(b) (emphasis added).

Section 105.214(a) of the Board's procedural rules also addresses the scope of review. It provides, in pertinent part, that the hearing before the Board, ""will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act." 35 Ill. Adm. Code 105.214(a).

Prairie Rivers argues that generally, "there are sound policy reasons for ... limiting the Board's review to the record before the Agency." Prairie Rivers Br. at 11. Prairie Rivers acknowledges, however, that under some circumstances, the Board should consider evidence outside the record, such as when IEPA record is allegedly incomplete, or when there are allegations of improper conduct in the permitting process.

Black Beauty's interpretation of the statutory scope of review is broader. Black Beauty maintains that Prairie Rivers "effectively agreed to supplement the record" and that Prairie Rivers, "[h]aving supplemented the evidentiary record itself ... has waived any contention it might otherwise have that the Board is limited in deciding this case on the basis of the Record before IEPA alone." Black Beauty Br. at 4. At hearing, Black Beauty sought to introduce into evidence various materials

which it offered to refute Prairie Rivers' allegations, but which were not necessarily part of IEPA's record. Many of these documents were admitted without objection of Prairie Rivers or IEPA. Accordingly, Black Beauty asks the Board to consider this case based not only on the record before IEPA, but also on those documents admitted during the hearing conducted by the Board's hearing officer. Black Beauty Br. at 5.

IEPA did not address this issue in its posthearing brief. It is worth noting, however, that IEPA did not object during hearing to Black Beauty's introduction of evidence that was not in its administrative record.

In addressing the scope of review for this permit appeal, the Board is bound by the clear directives of Section 40(e)(3) of the Act (415 ILCS 5/40(e)(3) (2000)). Accordingly, for purposes of this appeal, the only information the Board may properly consider is that information that was before IEPA below.

The Board has consistently held that in permit appeals, its review is limited to the record that was before IEPA at the time the permitting decision was made. See Community Landfill Company v. IEPA (April 5, 2001), PCB 01-48, PCB 01-49 (consolidated); Panhandle Eastern Pipe Line Company v. IEPA (January 21, 1999), PCB 98-102; and West Suburban Recycling and Energy Center, L.P. v. IEPA (October 17, 1996), PCB 95-199, PCB 95-125 (consolidated); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 516 N.E.2d 275 (5th Dist. 1987) (court affirmed Board, holding that scope of Board's review in permit appeal is limited to record before permitting agency). Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280. Moreover, Section 40 of the Act (415 ILCS 5/40 (2000)) does not differentiate between the scope of review in permit appeals brought by permit holders and those brought by third parties.

*9 Accordingly, the Board rejects Black Beauty's argument that Section 105.214(a) provides a basis for supplementing the record in this proceeding by agreement of parties. Section 105.214(a) provides the parties may agree to supplement the record pursuant to Section 40(d) of the Act. 35 Ill. Adm. Code 105.214(a). Section 40(d) of the Act provides for supplementation of the record in appeals involving permits issued pursuant to Section 9.1(c) of the Act. 415 ILCS 5/40(d) (2000). Section 9.1(c) of the Act pertains only to the establishment of permitting programs under the Clean Air Act. 415 ILCS 5/9.1(c) (2000). Therefore, reading all of these statutory provisions together, Section 105.214(a) allows for supplementation of the administrative record by agreement of parties in appeals involving Clean Air Act permits. Since the permit at issue in this case is an NPDES permit, and since there are no specific procedures allowing for supplementation of the record in NPDES permit appeals, the Board's review is limited, pursuant to Section 40(e)(3) of the Act, to the record that was before IEPA during its permit review process. See 415 ILCS 5/40(e)(3) (2000).

FINDINGS OF FACT

The Permitting Process

The events leading to this NPDES permit appeal are straightforward. Black Beauty has certain mining rights to coal reserves in east-central Illinois. Once all necessary permits have been issued, Black Beauty intends to mine Herrin No. 6 coal, which exists at a depth of roughly 200 feet below land surface. IEPA Br. at 1. The coal reserve is described as "the largest remaining low sulfur coal in Illinois." Id.

Black Beauty estimates that the mine will produce between two and three million tons of coal per year. Tr. at 383. The coal will be shipped via rail to a power plant. Tr. at 383-84. In its public comment, Vermilion Coal estimates that the coal mined from this site will produce, "more than 100 billion kilowatt-hours of electric energy, at less than one-fifth the fuel cost of natural gas." PC 25 at 2. Vermilion Coal also contends that the mine contains at least 40 million saleable tons of coal. Id.

The surface facilities at the mine include:

> the hole in the ground to enter and leave the mine ... an air shaft that enables ventilation of the mine ... sediment ponds to control drainage in the disturbed areas ... a refuse pile ... a preparation plant which more or less just washes the coal [through] a gravity separation process ... no chemicals [[are] used other than some flocculents, the same sort of flocculents that you would see used at the Georgetown water treatment facility ... there will be a railroad ... [and] an office, maintenance building. Tr. at 384-5.

IEPA describes the sedimentation basins as follows:

> [t]he surface run-off from the mine property will be collected into three basins, designated as, 003B, 003A, and 003. These basins are connected in series. The series basin system has been designed with a capacity equal to the runoff volume from a 10 year, 24 hour precipitation event of approximately 4.5 inches. The Outfall 003 discharge structure is designed to hold discharges resulting from a 100-year, 6-hour, storm event of approximately 4.65 inches. IEPA Br. at 2; R. at 583.

*10 On March 8, 2000, Black Beauty submitted an application for a coal mining and reclamation operating permit (Application) to the Illinois Department of Natural Resources, Office of Mines and Minerals (DNR). R. at 616. On May 15, 2000, IEPA received a copy of this Application. Id. The application for an NPDES permit is contained in the Application originally submitted to DNR. Tr. at 380-81. Also contained in the Application is a section that allows an applicant to identify whether it is seeking an NPDES permit and whether it is seeking a Subtitle D permit. Tr. at 382; See R. at 617. In its Application, Black Beauty checked the boxes for both the NPDES and Subtitle D permits. Id.

On July 31, 2000, Larry Crislip of the IEPA's Mine Pollution Control Program, Bureau of Water, requested that a hearing be held regarding Black Beauty's application for an NPDES permit. R. at 1. Public concern over the proposed mine and permit appears to have been the impetus for the hearing. R. at 1-7.

On August 2, 2000, IEPA issued public notice of the draft NPDES permit. IEPA Br. at 2. On September 20, 2000, it conducted a public meeting on the permit, and held a public hearing a week later, on September 27, 2000. Tr. at 96. Due to the "obvious

public interest" in the proposed mine and permit, IEPA decided to hold a public meeting in advance of the hearing in an attempt to make the hearing itself more "sufficient." Id. The public meeting was held at the Georgetown High School and consisted of the "Illinois EPA, Vermilion County Department of Public Health, the Illinois Department of Natural Resources, [[Prairie Rivers], and another group of concerned citizens from the area [with] information booths there." Tr. at 15.

Prairie Rivers participated in both the public meeting and public hearing. It provided oral testimony, questioned IEPA participants, and filed written comments. Tr. at 14. Between 150 and 200 people attended the public hearing. IEPA Br. at 3; Tr. at 16. A number of the attendees were members of Prairie Rivers; some live in such proximity to the Little Vermilion watershed that they will be affected by the permit. Tr. at 16; Pet. at 2.

Following the public hearing, there was a 30-day public comment period. Numerous comments were submitted to IEPA. Tr. at 96. After the close of the record, IEPA,

> evaluated the information that was brought in, assessed the issues which came to the surface ... prepared a response to the summary, drafted the revisions to the permit, discussed and reached consensus with [the United States Environmental Protection Agency (USEPA)] on the substance of that permit as modified, and proceeded to issue that permit ... on December 27th. Tr. at 96-7.

USEPA was consulted regarding issuance of this permit because, "[t]his is a joint state and federal discharge permit" for which IEPA is the delegated authority in Illinois. Tr. at 97. As part of the delegation of authority to IEPA, USEPA retains some oversight responsibilities with regard to NPDES permits. Id. IEPA witness Toby Frevert (Frevert) testified that USEPA's interest in this particular permit was, in his opinion, the result of public interest. Tr. at 98. USEPA originally objected to the draft NPDES permit, but through discussions with IEPA, changes were made to the permit to which USEPA ultimately agreed. Tr. at 97; R. at 942-43.

*11 The final NPDES permit was issued to Black Beauty on December 27, 2000. Tr. at 97; IEPA Br. at 3; R. at 953.

The Permit

The NPDES permit allows Black Beauty to discharge intermittently (in response to precipitation events) from Outfall 003. Several of the permit conditions are particularly relevant to the Board's analysis of this appeal. They are special conditions 11 and 12.

Special Condition No. 11: Biological Inventory

> The permittee must prepare a study plan for approval by the Agency that addresses a biological inventory of the Little Vermilion River in the vicinity of the proposed mine. This study plan is due within 60 days of the effective date of this permit. The Agency will review and provide comments leading to the approval of the study plan within 45 days of its receipt. The field work for the inventory will occur during the first spring and summer following issuance of the permit.

Before runoff impacted by mining operations is discharged, two components of the aquatic life community of the river, fishes and unionid mussels, must be inventoried in the Little Vermilion River. The sites of these inventories will be immediately upstream and downstream of the confluence of the unnamed tributary that will receive the mine discharge. These sites will be chosen such that areas of similar physical habitat will be contained in each area. Before the actual aquatic life inventories begin, the habitat of each site must be evaluated and boundaries for each of the two survey sites established so that direct comparisons of aquatic life between the sites may be facilitated.

The inventory of fishes shall be conducted in both spring and summer with a minimum of one day of collection effort for each season, i.e., one-half day of effort per site per season. The study plan must identify the sampling gear to be used, which must include electrofishing and seining. All habitats supporting fish must be sampled including riffles, runs and pools. The study must strive to both qualitatively and quantitatively characterize the sites. Special attention must be paid to the identification of endangered or threatened species. If these species are encountered, every effort must be made to return them unharmed to the river. Voucher specimens may be retained for threatened or endangered species only with the permission of the Illinois Department of Natural Resources (IDNR). In order that a relevant comparison of the existing fish community may be made between the two sites, the Index of Biological Integrity (IBI) or similar indicator of the health of the fish community will be calculated for each site. Attention will also be paid to the health and physical condition of fish collected, including the incidence of external physical deformity and disease. The report for the fish inventory must include the species and quantity of fish collected at each site along with the length and weight of the larger species captured such that comparisons of species composition and biomass maybe made.

***12** The mussel inventory must be conducted once, during a period in the summer when stream flows are low, visibility high and mussels will be easily detected. At least one-half day of effort is required for each site. Species collected must be vouchered with dead shells whenever possible. Living specimens may be taken as vouchers only with the permission of the IDNR. The mussel survey must strive to identify all species present at each site, the numbers collected for each species and whether each individual collected was an adult or juvenile. Every effort must be made to release mussels in the same habitat from which they were collected. Similar areas and types of habitats must be sampled at each site in order that a comparison of the sites may be made.

Special Condition No. 12: Water Quality Monitoring

The permittee will monitor discharge and receiving stream water quality during discharge events. Water quality must be monitored at the following sites during discharge events:

1. Outfall 003
2. The unnamed tributary of the Little Vermilion River upstream of the confluence with the discharged permitted effluent.
3. The Little Vermilion River upstream of the confluence of the unnamed tributary receiving the effluent.

4. The Little Vermilion River downstream of the confluence of the unnamed tributary receiving the effluent at a point where mixing with the unnamed tributary has been demonstrated to be complete.

5. The Little Vermilion River (Georgetown Lake) immediately above the Georgetown dam.

All samples will be collected by the grab method. Little Vermilion River sites (# 3 and # 4) shall be sampled at a time sufficiently delayed from the onset of discharge to allow downstream travel such that samples from site # 4 will include the contribution from the discharge. All samples, including the effluent sample collected for each studied storm event will be analyzed for each parameter listed in the table below.

This monitoring program will begin with the initial discharge from the sedimentation basins and continue for every discharge event up to and including ten events per year. One round of sampling from the five locations given above is required for each discharge event. If sampling results at site # 4 exceed the trigger concentrations given in the following table, the biological inventory specified in Special Condition # 11 must be repeated during the next spring and summer sampling season. If trigger concentrations are exceeded due to upstream sources apart from the Vermilion Grove Mine discharge, the permittee may document this condition and demonstrate to the Agency that no additional biological inventories should therefore be required.

Substance/Units	STORET Number	Minimum Reporting Level (MDL)	Biological Inventory Trigger Concentration
Field pH [FNa1] standard units	400	Tenth of a standard unit	<6.5 or >9.0 [FNaaa1]
Total Dissolved Solids mg/L	70300	50	500 mg/L
Chloride mg/L	940	5	250 mg/L
Sulfate mg/L	945	5	250 mg/L
Total Mercury ng/L	71900	10	1,300 ng/L
Total and Dissolved Metals			Total metals except for iron [FNaa1]
Barium <<mu>>g/L	1007/1005	10	2,500

<<mu>>g/L

Boron <<mu>>g/L <<mu>>g/L	1022/1020	10	500
Cadmium <<mu>>g/L <<mu>>g/L	1027/1025	3	13.5
Chromium (trivalent) <<mu>>g/L <<mu>>g/L	1034/1030	5	1,800
Copper <<mu>>g/L <<mu>>g/L	1042/1040	10	20.5
Iron <<mu>>g/L <<mu>>g/L	1045/1046	50	500
Lead <<mu>>g/L <<mu>>g/L	1051/1049	5	148.5
Manganese <<mu>>g/L <<mu>>g/L	1055/1056	10	500
Nickel <<mu>>g/L <<mu>>g/L	1067/1065	25	500
Silver <<mu>>g/L <<mu>>g/L	1077/1075	3	2.5
Zinc <<mu>>g/L <<mu>>g/L	1092/1090	100	500

FNa1. Field measurement
aa1. Total metals are regulated under water quality standards except for iron, which is a dissolved metals standard. Hardness based metals triggers are based on a Little Vermilion River hardness value of 244 mg/L
aaa1. If pH is in violation of water quality standard at site # 4 and the effluent is not in compliance with the pH permit limit, a biological inventory requirement is triggered.

*13 Mg/L = milligrams per liter; <<mu>>g/L = micrograms per liter; ng/L = nanograms

per liter

As part of the same collections described above, the following parameters must be reported only.

Substance/Units	STORET Number	Minimum Reporting Level (MDL)
Air Temperature [FNa1] ° C	20	Tenth ° C
Water Temperature [FNa1] ° C	10	Tenth ° C
Field Dissolved Oxygen [FNa1] mg/L	299	Tenth of a mg/L
Field Conductivity [FNa1] <<mu>>mhos	94	Nearest Whole Number
Volatile Suspended Solids mg/L	535	Nearest Whole Number
Total Suspended Solids mg/L	530	Nearest Whole Number
Total Ammonia as N mg/L	610	0.01
Alkalinity mg/L	410	50
Total Acidity mg/L	70508	50
Hardness (as CaCO3) mg/L	900	Nearest Whole Number

FNa1. Field measurement

***14** Within 60 days of receipt, all information, data and reports prepared in response to Special Condition Nos. 11 and 12 shall be submitted to the Agency .... R. at 962-64.

The Appeal

On January 30, 2001, Prairie Rivers filed this appeal of the NPDES permit pursuant to Section 40(e) of the Act. 415 ILCS 5/40(e) (2000). In its appeal, Prairie Rivers raises a number of issues, both procedural and substantive, in support of its argument that the NPDES permit issued to Black Beauty should be revoked.

Prairie Rivers claims that its concerns for potential damage to the environment "were confirmed" by comments provided by the Illinois Nature Preserves Commission (Commission) and by DNR. Pet. at 2. Prairie Rivers maintains that during the public hearing held on September 27, 2000, and in comments submitted thereafter, it raised

concerns regarding the draft NPDES permit. They included: (a) failure to specify mixing zones; (b) improper consideration of non-point source runoff as contributing to dilution of discharge; (c) potential for violation of Illinois water quality standards; (d) no guarantee that all stormwater would be collected and treated prior to discharge; (e) incomplete antidegradation analysis; and (f) potential exacerbation of existing water quality problems in drinking water supply for the Village of Georgetown. Pet. at 3.

Prairie Rivers claims that the final permit, issued on December 27, 2000, contains "most of the defects that were identified by [it] in the draft permit." Pet. at 4. In its petition for review, Prairie Rivers identifies the following alleged areas in which IEPA's analysis and the final NPDES permit are flawed:

a) insufficient monitoring requirements (i.e., no provision for continuous flow monitoring to ensure that three to one dilution ratio is met);

b) no requirement for whole effluent toxicity (WET) monitoring;

c) IEPA improperly relied upon "grossly flawed" Advent Stormwater Mixing Zone Evaluation (Pet. at 4); and

d) no proper antidegradation analysis, including lack of biological study in receiving water to assure protection of existing uses. See generally, Pet. at 4-5.

In addition to these alleged substantive deficiencies in the permit, Prairie Rivers also challenges the procedures utilized by IEPA prior to issuance of the final NPDES permit. Tr. at 36. Specifically, Prairie Rivers objects to the fact that the final permit is the result of what it characterizes as a "very defective permit-writing process [in which] [t]he public was denied its right under the Clean Water Act and Illinois law to participate in reviewing and commenting on permit conditions that are critical to the future of the Little Vermilion River and the unnamed tributary." Prairie Rivers Br. at 1.

IEPA filed its 980 page administrative record on March 2, 2001, and supplemented it with an additional 16 pages on March 21, 2001. A two-day hearing was conducted by a Board hearing officer on May 1 and 2, 2001. Black Beauty filed several waivers of the decision deadline; the last extended the deadline for Board action to August 10, 2001.

DISCUSSION

Public Participation in Permitting Process

Prairie Rivers' Argument

***15** Prairie Rivers challenges the procedures employed by IEPA prior to issuance of the final NPDES permit. Specifically, Prairie Rivers argues that it should have been allowed an opportunity to review information submitted by Black Beauty after close of the public comment period, and that the final NPDES permit should have been available for public comment and review prior to its issuance by IEPA. Prairie Rivers Br. at 14.

Prairie Rivers cites to the public participation provisions of the Clean Water Act

in support of its position that IEPA's process is flawed. Section 101(e) of the Clean Water Act provides:

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. Prairie Rivers Br. at 15, citing 33 U.S.C. §1251(e).

Prairie Rivers also relies upon Section 402 of the Clean Water Act (33 U.S.C. §1342) as requiring "effective public participation ... in the drafting of NPDES permits." Prairie Rivers Br. at 15. Finally, Prairie Rivers claims that, unlike what happened in this case, the NPDES permit drafting process should be conducted in a "fishbowl-like" atmosphere. Prairie Rivers Br. at 15, citing Adams v. USEPA, 38 F.3d 43, 52 (1st Cir. 1994).

Prairie Rivers argues that the decision in Village of Sauget v. IPCB, 207 Ill. App. 3d 974, 566 N.E.2d 724 (5th Dist. 1990), dictates that Black Beauty's permit be remanded to IEPA. In Sauget, the appellate court held that IEPA improperly issued a final permit in which new conditions were added after the close of the public comment period and without providing the permit applicant or another interested party with notice of the new conditions prior to issuance of the permit. Prairie Rivers argues that the situation in Sauget is similar to that currently before the Board and that, as a result, the permit should be revoked and remanded to IEPA for further consideration.

IEPA's Response

IEPA maintains that it "followed all the applicable provisions of an NPDES permit public participation process." IEPA Br. at 7. IEPA directs the Board to Sections 309.115 through 309.119 of the Board's water regulations as being applicable to the issue of public participation. IEPA Br. at 7. These sections provide: (1) that IEPA hold a public hearing if a significant degree of public interest in the draft NPDES permit exists (35 Ill. Adm. Code 309.115); (2) that IEPA issue public notice of the draft permit and public hearing (35 Ill. Adm. Code 309.116); (3) that any person is permitted to submit oral or written public comment on the draft permit (35 Ill. Adm. Code 309.117); (4) that IEPA hearing officer prepare and make available to the public a "hearing file" (35 Ill. Adm. Code 309.118); and (5) that following the public hearing, "the [IEPA] may make such modifications in the terms and conditions of proposed permit as may be appropriate." 35 Ill. Adm. Code 309.119 (emphasis added). IEPA Br. at 7. IEPA states that it complied with each of these procedural requirements. Id.

Black Beauty's Response

*16 Black Beauty echoes IEPA's arguments by stating that IEPA, ""scrupulously adhered to the Illinois regulations that establish the procedures that agency must follow in issuing an NPDES permit." Black Beauty Br. at 27. Black Beauty argues that, in order to prevail, Prairie Rivers must prove that IEPA violated a regulation regarding public participation. Black Beauty Br. at 28. Black Beauty suggests that

all Prairie Rivers is doing in this case is suggest that the applicable regulations be changed. Id. Black Beauty further notes that Prairie Rivers' argument for applicability of the public participation procedures of the Clean Water Act (CWA) is "baseless" insofar as the CWA does not apply. Id.

Black Beauty also responds to Prairie Rivers' reliance on the Sauget case. Black Beauty Br. at 29. Black Beauty claims that Sauget is distinguishable because the permit appellants were not third-parties, but were the permit applicant and a major industrial facility that discharged into the applicant's treatment works. Id. Since the regulations only require notification of significant changes be given to the applicant, and not a third-party such as Prairie Rivers, Black Beauty argues that Prairie Rivers has not been denied an opportunity to participate in the process. Black Beauty Br. at 30.

Board's Finding

The Board finds that Prairie Rivers has failed to show that it was denied a meaningful opportunity to participate in the permit process before IEPA. The record is clear that IEPA provided Prairie Rivers, and other interested members of the public, with a reasonable opportunity to participate in the process. Once IEPA learned of the significant public interest in this NPDES permit, it proceeded to schedule not only a public hearing, but a preliminary public meeting at which time information regarding the permit application and draft permit was freely exchanged and questions regarding the public hearing were answered. Prairie Rivers was provided an opportunity to participate in the public hearing by providing testimony and questioning witnesses. Additionally, Prairie Rivers also participated in a public comment period by submitting written comments to IEPA.

The Board notes that since Section 40(e) of the Act (415 ILCS 5/40(e) (2000)) was enacted in 1997, this appeal is the first third-party appeal in which a hearing has been held and in which the Board will make a final, appealable determination on the merits. Nonetheless, the statutory language, for purposes of this case, is not ambiguous. Moreover, Illinois has specific regulations setting forth the procedures IEPA must follow in issuing an NPDES permit. See 35 Ill. Adm. Code 309.108, 309.109, 309.115, and 309.119. IEPA complied with these procedures. Prairie Rivers' arguments that IEPA should have provided additional opportunities pursuant to USEPA guidelines and the CWA are not persuasive, because these federal procedures are inapplicable here.

*17 Accordingly, the Board finds that the permitting process was fair and reasonable and that IEPA complied with all regulatory "public participation" requirements in issuing the permit.

Applicability of 35 Ill. Adm. Code 406.203

Many of Prairie Rivers' arguments are based on the alleged failure of the NPDES permit to meet certain water quality standards (35 Ill. Adm. Code 302 and 303, generally). Black Beauty and IEPA argue that the complained of water quality standards do not apply to this permit or to Black Beauty's discharge.

Black Beauty argues that, as the permit applicant, it had the option to: (a) elect to proceed under 35 Ill. Adm. Code 406.202, which requires compliance with the general water quality standards of 35 Ill. Adm. Code 302 or 303; or (b) elect to proceed under 35 Ill. Adm. Code 406.203, which provides water quality permit conditions specifically developed for coal mine discharges. Tr. at 382. At hearing, Eric Fry, an employee of Black Beauty, testified that if a coal mine wishes to take advantage of the water quality permit conditions of Section 406.203, it must affirmatively "opt" to do so by checking the appropriate box in the operating permit application submitted to both DNR and IEPA. Id. Fry testified that Black Beauty "opted" into Section 406.203. Tr. at 383.

The language of Section 406.203 is very clear. Subsection (a) provides that, ""[t]hese procedures apply instead of Section 406.202 whenever a permit applicant elects to proceed under this Section." 35 Ill. Adm. Code 406.203(a) (emphasis added). Furthermore, subsection (b) clearly gives the permittee the option of making the election:

> An applicant may elect to proceed under this Section by providing the required information as part of a new or renewed or supplemental state or NPDES permit application. 35 Ill. Adm. Code 406.203(b).

The Board finds that 35 Ill. Adm. Code 406.203(a) allows IEPA to establish specific water quality standards for coal mine discharges for total dissolved solids, chloride, sulfate, iron, and manganese. The plain language of this regulation allows a permit applicant the choice of proceeding under the Section 406.203 standards or the general water quality standards of 35 Ill. Adm. Code 302 and 303. 35 Ill. Adm. Code 406.203(a), (b). The record in this case is clear as to Black Beauty's election to proceed under the provisions of Section 406.203. Tr. at 383; R. at 618. Because the plain language of the regulation clearly and unambiguously allows a permittee to make this election, the Board concludes that the general water quality standards of 35 Ill. Adm. Code 302 and 303 do not apply to coal mine discharges from Black Beauty's mine for chloride, sulfate, iron, or manganese, since a specific election was made in the permit application to proceed according to the conditions contained in 35 Ill. Adm. Code 406.203. Rather, the site specific requirements of 35 Ill. Adm. Code 406.203 and the NPDES permit itself apply to Black Beauty's discharge. As discussed below, the Board also finds that these conditions are protective of the environment and of the unnamed tributary that will receive discharge from Black Beauty's mining operations.

Sufficiency of Permit

Monitoring/Dilution Ratio

***18** Prairie Rivers' Argument. Prairie Rivers asserts that the permit should require proper monitoring to prevent violations of the water quality standards. Specifically, Prairie Rivers argues that the permit issued to Black Beauty does not include the monitoring requirements that will assure a three-to-one dilution rate is achieved. Prairie Rivers Br. at 23-24. Instead, Prairie Rivers alleges that the permit inappropriately leaves the monitoring to a side arrangement, i.e., to a plan to

be developed by Black Beauty 180 days after the issuance of the permit. Prairie Rivers Resp. Br. at 14. Prairie Rivers maintains that 40 C.F.R. 122.48 requires monitoring to be included in the permit and that 35 Ill. Adm. Code 309.141(d) and Section 122.48 require Illinois NPDES permits to comply with federal monitoring requirements. Prairie Rivers Br. at 23.

Prairie Rivers' dissatisfaction with the monitoring requirements focuses on Permit Condition No. 11 (a) and its sediment pond operation and maintenance provisions. Prairie Rivers Br., Exh. E at 6. Permit Condition No. 11(a) sets forth as follows:

> There shall be no offsite discharge from Outfall 003 caused by any source other than precipitation, or during "no flow" or "low flow" conditions in the receiving stream. For purposes of this paragraph "low flow" shall be defined as any condition wherein upstream flow available for mixing with the discharge from Outfall 003 is less than three times the flowrate being discharged from Outfall 003. Offsite discharge from this facility is approved only at such times that sufficient flow exists in the receiving stream to insure that water quality standards in the stream beyond the mixing zone will not be exceeded .... At times of discharge and monitoring of Outfall 003, receiving stream flow rates shall be determined and submitted with discharge analysis results (Discharge Monitoring Reports) to demonstrate that adequate mixing is provided to insure water quality standards are not exceeded in the receiving stream. Within 180 days of the effective date of this permit, the permittee shall submit an operational plan specifying the procedures to be utilized to accomplish the requirements of this paragraph. IEPA Exh. 1 at 6.

While the preceding condition requires Black Beauty to demonstrate that adequate mixing is available, i.e., the available dilution is more than 3 to 1, the condition allows the permittee 180 days after the effective date of the permit to develop the actual monitoring protocols needed to make that demonstration. As noted above, Prairie Rivers argues that IEPA should have included in the permit the actual monitoring protocols that Black Beauty must use to demonstrate that adequate mixing is available upon discharge.

IEPA's Response. IEPA's response rejects Prairie Rivers' concern regarding the dilution and monitoring requirements. First, IEPA states that the permit contains the dilution provisions found in the Board's regulations for mine-related water pollution at Section 406.104 (35 Ill. Adm. Code 406.104). IEPA Br. at 13. IEPA explains that under the Board regulations, dilution of mine discharge is permissible as long as the effluent is given the best treatment available prior to discharge. Id. Further, IEPA cites to a Board opinion concerning the mine-related water pollution control regulations, in which the Board states that the controlled release of water containing high levels of total dissolved solids during periods of naturally occurring high flow in stream is not dilution. Id. For this reason, IEPA states that the permit allows Black Beauty to discharge only during wet weather conditions and requires that the dilution ratio in the receiving stream be 3 to 1. IEPA Br. at 13, 15. Finally, IEPA maintains that the monitoring protocols provided in the permit are adequate. Tr. at 105.

***19** Black Beauty's Response. Black Beauty states that Prairie Rivers' contention regarding the monitoring requirements is without substantive merit. Black Beauty ar-

gues that the 3 to 1 dilution requirement does not violate Section 302.102(b). Black Beauty Br. at 26. In this regard, Black Beauty asserts that "dilution of the Discharge by the receiving waters of the Tributary (and vice-versa with respect to TSS [total suspended solids]) would be accomplished within one hundred feet downstream of Outfall 003, well before the Tributary enters the River." Id. Furthermore, Black Beauty offered an exhibit at hearing, which was admitted as Black Beauty exhibit 56, which demonstrates that the monitoring plan has, in fact, been defined and submitted to IEPA. While the Board does not look to the substance of this plan, it is worth noting that such a plan was actually submitted pursuant to the 180 day requirement of the NPDES permit.

Board's Finding. First, the Board notes that the requirement concerning available mixing was not part of the original draft permit. See Prairie Rivers Br., Exh. B at 6. It appears as if the Agency included the available mixing requirement in the final permit in response to comments received on the draft permit concerning low flow conditions in the unnamed tributary. Condition No. 11 of the final permit clearly prohibits any discharge from Outfall 003 when the dilution ratio is less than 3 to 1. The Board finds that this requirement, coupled with Black Beauty's obligation to develop and utilize discharge monitoring procedures, addresses Prairie Rivers' concern regarding potential violation of water quality standards during low flow conditions.

Likewise, the Board finds that allowing Black Beauty 180 days from issuance of the permit to develop a monitoring plan is not inconsistent with applicable regulations; especially since the condition appeared for the first time in the final permit. The Board believes that the 180-day period provides a reasonable amount of time for Black Beauty to develop an appropriate plan to comply with the permit condition based on site-specific factors. In this regard, the Board also notes that Black Beauty is still subject to the offsite discharge prohibition during times of "no flow" and "low flow" during the 180-day period.

The Board concludes that Prairie Rivers has failed to demonstrate that the terms of the permit pertaining to mixing and discharge monitoring requirements, will cause a violation of the Act or of Board regulations.

Advent Study/Nondegradation

Prairie Rivers' Argument. The Advent Study (Study) [FN6] was submitted to IEPA by Black Beauty after IEPA's public hearing to address concerns raised regarding the potential for water quality impacts and degradation of the receiving stream. Prairie Rivers Resp. Br. at 19. Because the Study was submitted after the close of the public hearing and public comment period, Prairie Rivers criticizes the fact that it was not made available for public review and comment. Prairie Rivers Br. at 22. In addition, Prairie Rivers argues that the Study is seriously flawed and that, had it been given the opportunity, Prairie Rivers would have discussed these flaws with IEPA prior to issuance of the permit. Prairie Rivers Br. at 24.

***20** Prairie Rivers is also critical of the nondegradation analysis performed by

IEPA (Prairie Rivers Br. at 21), and maintains that the Study does little to alleviate its concerns. Prairie Rivers Br. at 24. Prairie Rivers contends, therefore, that the Board should remand the issue of compliance with the nondegradation rules back to IEPA for a proper nondegradation demonstration that allows for public participation. Prairie Rivers Resp. Br. at 19.

Prairie Rivers suggests that the Study is not reliable because, instead of using maximum permit effluent limits to model water quality impacts, the Study is based on surrogate data. Prairie Rivers Resp. Br. at 19. In this regard, Prairie Rivers notes that the concentrations of the surrogate data are much lower than the maximum permit effluent limits contained in the final permit, and are therefore not reliable. Prairie Rivers Br. at 24.

Prairie Rivers also questions the Study's reliance on an arithmetic average for establishing water quality data. Prairie Rivers Br. at 20. According to Prairie Rivers, this is problematic because the simulated background conditions underestimate the actual background water quality of the receiving stream. Id. Prairie Rivers further contends that because an arithmetic average eliminates higher levels of pollutants from consideration, the Study

underestimates the actual levels of contaminants that may enter the receiving stream following a discharge from Outfall 003. Id.

Prairie Rivers further asserts that the Study is based on an incorrect assumption that mixing occurs instantaneously. Prairie Rivers Reply Br. at 20. Prairie Rivers notes that Dean Vlachos, an engineer from Advent Group, and the person responsible for preparing the Study, testified that complete mixing would occur at approximately 100 feet from Outfall 003. Id.; Tr. at 328. Moreover, IEPA estimated that mixing would be complete at approximately 200 feet from Outfall 003. Tr. at 159. IEPA also testified that the entire flow of the stream may be used for dilution. Tr. at 163. Prairie Rivers disagrees with these IEPA assumptions and contends that if the permit allows the entire flow of the stream to be used for dilution purposes, then the permit should be found to violate 35 Ill. Adm. Code 302.102 (b)(6) and (b)(10) and 406.204(e). Id.

Similarly, Prairie Rivers disagrees with an assumption contained in the Study that the entire flow from the watershed caused by a precipitation event reaches the unnamed tributary and the Little Vermilion River instantaneously, rather than over a period of time. Prairie Rivers Reply Br. at 21-22. Prairie Rivers argues that this is an incorrect assumption that ignores the time dependent nature of the peak flows. Id. Thus, Prairie Rivers contends that the assumption results in model simulations that represent "average" discharge conditions instead of the "worst case" conditions. Id.

Another concern raised by Prairie Rivers involves the failure of the Study to address the possible instream impacts from manganese, which is one of the regulated permit parameters. Prairie Rivers Reply Br. at 22. Prairie Rivers asserts that the Study completely neglected to simulate or predict the levels of manganese that would be present in the Outfall 003 discharge, receiving stream, or the Little Vermilion

River. Id.

*21 Finally, Prairie Rivers contends that the Study does not accurately reflect the measured levels of pollution in the Little Vermilion River. Prairie Rivers Resp. Br. at 22. Prairie Rivers asserts that the monitoring station 7SW-6, which is located on the Little Vermilion River, downstream of the confluence with the unnamed tributary, actually detected higher levels of pollution than those predicted by the Study. Id. Prairie Rivers notes that the predicted levels of iron are less than the average levels of iron in the Little Vermilion River; predicted levels of sulfate are less than the lowest levels detected in the Little Vermilion River; and predicted levels of total suspended solids are barely above the lowest levels detected in the Little Vermilion River. Id. Prairie Rivers concludes that if the model cannot accurately predict even the lowest levels of pollution, it does not predict a "worst case" scenario. Id.

IEPA's Response. According to IEPA, the Study is not flawed. IEPA Br. at 21. Regarding the issue of mixing, IEPA states that even if mixing does not occur instantaneously, the discharge will still meet the water quality standards due to the significant mixing (dilution) available in the receiving waters. IEPA Br. at 22. Further, IEPA notes that mixing regulations do not require instantaneous mixing and do allow for creation of mixing zones. Id. Therefore, IEPA maintains that Prairie Rivers has failed to demonstrate that even if mixing does not occur instantaneously, that this would lead to a violation of the Act or Board regulations. Id.

IEPA disagrees with Prairie Rivers' allegations that the Study is flawed and maintains that it was justified in relying on it and in issuing the final permit. In response to Prairie Rivers' concerns that the Study underestimates background values, IEPA notes that it performed its own water quality impact analysis using historically high background water quality parameters and that the results of its own analysis were not much different from the Study results. IEPA Br. at 23. Finally, IEPA states that Prairie Rivers has failed to demonstrate that the failure of the Study to address either a 3 to 1 dilution scenario or the potential impacts from manganese will somehow result in a violation of the Act or Board regulations. IEPA Br. at 22-23.

Black Beauty's Response. Black Beauty claims that the Study accurately demonstrates that if the discharge from Outfall 003 contains certain regulated constituents at the same concentrations historically recorded at the nearby Riola Mine, then the water quality standards of Section 302.208 will not be exceeded in either the unnamed tributary or the Little Vermilion River. Black Beauty Br. at 20. In response to Prairie Rivers' assertions that the Study did not consider the "worst case" conditions, Black Beauty states that even those calculations made by Robert Moore, an employee of Prairie Rivers, show that there will be no exceedence of water quality standards for sulfates, chlorides, or iron. Black Beauty Br. at 21.

*22 Black Beauty acknowledges that the Study is silent as to any potential impacts from manganese, indicating that there was no available data on manganese from the Riola mine. Black Beauty Br. at 21. However, Black Beauty argues that the Board, in

a previous rulemaking, has already addressed the issue of manganese in coal mine discharge. Oral Arg. Tr. at 31. Specifically, Black Beauty directs the Board to its own opinion and order in Proposed Amendments to Title 35, Subtitle D: Mine Related Water Pollution, Chapter I, Parts 405 and 406 (December 15, 1983), R83-6. Id. In R83-6, the Board determined that an effluent standard of 2.0 milligrams per liter (mg/L) manganese was appropriate for mine waste effluent, and was accordingly added to the table of mine waste effluent found at 35 Ill. Adm. Code 406.106. See Proposed Amendments to Title 35, Subtitle D: Mine Related Water Pollution, Chapter I, Parts 405 and 406 (December 15, 1983), R83-6. Since the manganese limit contained in Black Beauty's NPDES permit is 2.0 mg/L, Black Beauty argues that the Board has already found this to be an appropriate amount. Oral Arg. Tr. at 31.

Black Beauty also argues that additional sampling performed by Vlachos supports the conclusions contained in the Study. At hearing, Black Beauty introduced exhibits 39, 40, and 41, in support of its position that sampling and analysis conducted after issuance of the permit demonstrate that the permit, as issued, will not violate the Act or Board regulations. However, because the additional analyses are based on data collected after issuance of the NPDES permit, the information is not properly considered by the Board in the scope of this permit appeal. Accordingly, the Board strikes these exhibits and will not consider them in rendering a decision in this matter.

Nevertheless, the Board concludes that, while raising a number of concerns regarding the Study, Prairie Rivers has failed to make a demonstration that the terms of the permit issued by IEPA will result in a violation of the Act or Board regulations. The Board is persuaded that the terms of the permit itself, specifically Special Conditions 11 and 12 (See supra pp. 13-17), which require a specific biological inventory and monitoring, will ensure that the requirements of the Act, Board regulations, and NPDES permit are met, and that the stream quality of the unnamed tributary and Little Vermilion River is not degraded.

The Board finds that the information submitted by Black Beauty to IEPA, including the Study, provided IEPA with enough substantive information upon which it could rely in issuing a permit that is protective of water quality. Moreover, IEPA performed its own evaluations, including a nondegradation analysis, that support issuance of the permit. The Board concludes that Prairie Rivers has not proven that the permitted discharge will harm beneficial uses or cause violations of water quality standards. Therefore, the Board finds that the permit as issued will not violate the Act or Board regulations.

Whole Effluent Toxicity Monitoring

*23 Prairie Rivers' Argument. Prairie Rivers argues that the NPDES is flawed in that it fails to require whole effluent toxicity (WET) monitoring and biological monitoring. Prairie Rivers Br. at 25. Prairie Rivers argues that this monitoring is important given the potential effluent characteristics and the importance of the Little Vermilion River. Id.

At hearing, Moore described WET testing as follows:

Whole effluent toxicity testing differs from the normal chemical -- monitoring chemical parameters in the permit. When you're monitoring specific parameters, specific chemicals within a permit, you're basically measuring concentrations of a pollutant and comparing them against a standard which has been established and assumed to be protective of various uses of the stream.

It's commonly accepted that those standards are certainly not assumed to be protective of every use of every aquatic organism known to man because, quite honestly, they haven't been tested.

Whole effluent toxicity testing is done in order to gauge the toxicity of the effluent in its entirety. All chemicals present at one time in specific -- in whatever concentrations they happen to be present in, you'll then be able to measure the actual toxicity of the effluent itself, not simply measuring the chemical concentrations and comparing those against some standard which has been assumed to be protective. It's really an important backstop. It's a well accepted methodology which U.S. EPA encourages the use of in numerous permits. And, in fact, based on some initial research which Prairie Rivers conducted, we've even found other mines in the country which require whole effluent toxicity testing. Tr. at 26-27

Prairie Rivers maintains that WET monitoring should be required because coal mines are capable of producing a large variety of pollutants with a potentially unknown toxicity. Prairie Rivers Br. at 25. At hearing, Moore testified that WET monitoring is frequently required, "it seems to be an accepted methodology of -- USEPA, Illinois EPA requires whole effluent toxicity testing in permits on a routine basis, and whole effluent toxicity testing has been required around the country for mines of various types." Tr. at 34. However, upon cross examination, Moore conceded that the only NPDES permit of which he was aware in which WET monitoring was required was a permit issued in the State of Alaska; he was not aware of any Illinois NPDES permits requiring WET monitoring. Tr. at 62-63.

Regarding biological monitoring, Prairie Rivers testified that although at least three protected species reside in the Little Vermilion River near the mine, no biological inventories of the unnamed tributary have been done. Tr. at 35. Prairie Rivers contends that biological monitoring should have been done prior to the issuance of the permit. Id. Furthermore, Prairie Rivers maintains that DNR shares similar concerns regarding the potential harm from mine discharge on aquatic life in the receiving stream. Prairie Rivers Resp. Br. at 24-25. Prairie Rivers notes that DNR refers to the Little Vermilion River as one of the ten most outstanding aquatic ecosystems in the state (Tr. at 27) and is therefore deserving of protection.

***24** IEPA's Response. IEPA rejects Prairie Rivers' contention that WET monitoring would be beneficial for the Black Beauty discharge. Specifically, IEPA testified that WET monitoring is less reliable than other types of monitoring for evaluating water quality and effluent characteristics during short-term wet weather discharges. Tr. at 122. During oral argument, IEPA clarified a statement in its brief by stating that WET monitoring and other forms of biological monitoring are not typically applied to discharges that occur during wet weather conditions only. IEPA Br. at 21; Oral Arg. Tr. at 16. IEPA testified that WET monitoring is typically used for continuous or non-episodic discharges. Tr. at 120. IEPA noted that it utilizes WET

testing as a screening mechanism in conjunction with other types of monitoring. Tr. at 119- 20. IEPA maintained that chemical monitoring, of the type required in Black Beauty's NPDES permit, is more appropriate for intermittent and infrequent discharges than WET monitoring would be. Tr. at 122.

Furthermore, regarding biological monitoring, IEPA maintains that the broad range chemical monitoring required by the permit is more proven and appropriate for intermittent and infrequent discharges. Tr. at 122. Moreover, IEPA clarified that the permit does require Black Beauty to perform "introductory or preliminary biological inventories" to help maintain the integrity of the receiving stream Tr. at 123. IEPA explained that supplemental biological monitoring would be required if, through monitoring, exceedences of certain specified conservative triggers are detected. Id. Special Condition 12 of the final NPDES permit (supra at pp.14-17) contains the biological monitoring requirements and the trigger levels that, if exceeded, would require further monitoring by Black Beauty. According to IEPA, Special Conditions 11 and 12 were specifically added to the NPDES permit in response to the concerns raised by DNR regarding the need to protect aquatic life within the receiving stream. Tr. at 190-191. In fact, IEPA testified that Special Conditions 11 and 12 were developed in collaboration with DNR. Id.

Black Beauty's Response. Black Beauty argues that issues concerning WET monitoring and biological monitoring should not be terms of the permit itself, but rather relate only to how it will comply with the permit and how IEPA (or a third party) can enforce the permit. Black Beauty Br. at 26. Additionally, Black Beauty contends that these issues were fully addressed by IEPA's testimony at hearing and were shown to be without merit. Black Beauty Br. at 27.

Board's Finding. As an initial matter, the Board notes the differences between WET monitoring and biological monitoring. Specifically, while WET monitoring involves the evaluation of the effluent impact on aquatic organisms before it reaches the receiving waters, biological monitoring is concerned with the assessment of the actual impact of the effluent on aquatic life after entering the receiving stream.

***25** The Board also notes that USEPA regulations require NPDES permits to include a limit for whole effluent toxicity only if the permitting authority determines that there exists a reasonable potential for causing or contributing to a violation of a state's effluent toxicity criterion. See 40 C.F.R. 122.44(d)(1). Prairie Rivers has produced no evidence in this proceeding to show that such a potential exists.

As for biological monitoring, the Board observes that Special Conditions 11 and 12 provide a balanced approach for addressing any potential concerns regarding the biological integrity of the receiving stream. Considering both the infrequent nature of Black Beauty's discharges, and the nature of the anticipated contaminants, the Board finds that the permit's comprehensive chemical monitoring scheme, coupled with the conservative "warning" triggers, afford sufficient protection from any potential threat to the biological integrity of the receiving stream.

The Board further finds that a permit condition requiring Black Beauty to perform WET monitoring is not appropriate given the infrequent nature of the discharge. Fur-

ther, the Board finds that Prairie Rivers has produced no evidence in the record that would demonstrate that the permit, as issued, would cause a violation of any water quality standard. Finally, the Board finds that the biological monitoring requirements specified at Special Conditions 11 and 12 provide sufficient protection from any potential threat to the biological integrity of the receiving stream.

CONCLUSION

For the reasons expressed herein, the Board concludes that Prairie Rivers has failed to show that the NPDES permit as issued by IEPA to Black Beauty on December 27, 2000, would violate the Act or Board regulations. Therefore, the permit is upheld.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (2000)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.520, Motions for Reconsideration.

E.Z. Kezelis

FN1. The Board acknowledges, however, that a copy of IEPA's brief was hand delivered to the Board's Springfield office on May 29, 2001.

FN2. IEPA's administrative record is referred to as "R. at ___."

FN3. The hearing transcript is referred to as "Tr. at ___."

FN4. Black Beauty's hearing exhibits are referred to as "Black Beauty Exh. ___." IEPA's hearing exhibits are referred to as "IEPA Exh. ___." The supplement to the hearing record (filed via facsimile by Black Beauty on May 29, 2001) is referred to as "Supp. at ___." Prairie Rivers' petition for review is referred to as "Pet. at ___." Prairie Rivers' first brief is referred to as ""Pet. Br. at ___." Black Beauty's brief is referred to as "Black Beauty's Br. at ___." IEPA's brief is referred to as "IEPA Br. at ___." Vermilion Coal's amicus brief is referred to as "Vermilion Br. at ___." IERG's amicus brief is referred to as "IERG Br. at ___." Prairie River's reply brief is referred to as "Reply Br. at ___."

FN5. The July 12, 2001 transcript from the oral argument will be referred to as "Oral Arg. Tr. at ___."

FN6. "Advent Study" refers to the report prepared for Black Beauty by Advent Group, Inc. dated October 20, 2000. The report is marked as petition exhibit A.

2001 WL 950017 (Ill.Pol.Control.Bd.)

END OF DOCUMENT

Illinois Pollution Control Board
State of Illinois

*1 VILLAGE OF LAKE BARRINGTON, CUBA TOWNSHIP, PRAIRIE RIVERS NETWORK, SIERRA CLUB, BETH WENTZEL AND CYNTHIA SKRUKRUD, PETITIONERS
v.
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY AND VILLAGE OF WAUCONDA, RESPONDENTS
PCB 05-55
SLOCUM DRAINAGE DISTRICT OF LAKE COUNTY, ILLINOIS, PETITIONER
v.
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY AND VILLAGE OF WAUCONDA, RESPONDENTS
PCB 05-58
AL PHILLIPS, VERN MEYER, GAYLE DEMARCO, GABRIELLE MEYER, LISA O'DELL, JOAN LESLIE, MICHAEL DAVEY, NANCY DOBNER, MIKE POLITIO, WILLIAMS PARK IMPROVEMENT ASSOCIATION, MAT SCHLUETER, MYLITH PARK LOT OWNERS ASSOCIATION, DONALD KREBS, DON BERKSHIRE, JUDY BRUMME, TWIN POND FARMS HOMEOWNERS ASSOCIATION, JULIA TUDOR, AND CHRISTINE DEVINEY, PETITIONERS
v.
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY AND VILLAGE OF WAUCONDA, RESPONDENTS
PCB 05-59
April 21, 2005

(Third-Party NPDES Permit Appeal - Water)

Percy L. Angelo of Mayer, Brown, Rowe, & Maw, LLP Appeared on Behalf of the Petitioners in PCB 05-55

Bonnie MacFarlane of Law Offices of Bonnie MacFarlane, P.C. Appeared on Behalf of Slocum Drainage District of Lake County, Illinois

Jay Glenn Appeared on Behalf of the Petitioners in PCB 05-59

Sanjay K. Sofat of the Illinois Environmental Protection Agency Appeared on Behalf of Respondent; and

Willliam D. Seith of Total Environmental Solutions Appeared on Behalf of Village of Wauconda

OPINION AND ORDER OF THE BOARD

Multiple petitioners challenged the Illinois Environmental Protection Agency's (Agency) August 23, 2004 determination to grant a National Pollutant Discharge Elimination System (NPDES) permit to the Village of Wauconda (Wauconda). Some of the petitioners filed a stipulation and settlement reached with Wauconda, while the remaining petitioners continue to challenge the issuance of the NPDES permit. The Board will not adopt the stipulation and settlement. The Board finds that the arguments challenging the issuance of the permit do not succeed and, therefore, the

Agency properly issued the permit. The opinion will set forth the background, facts, and issues in this proceeding. The opinion will then summarize the arguments of the parties under each issue and explain the Board's decision on each of the issues.

PROCEDURAL BACKGROUND

On September 17, 2004, Village Of Lake Barrington, Cuba Township, Prairie Rivers Network, Sierra Club, Beth Wentzel and Cynthia Skrukrud (Municipal-Environmental petitioners) filed a petition asking the Board to review an August 23, 2004 determination by the Agency. On September 27, 2004, Slocum Lake Drainage District of Lake County, Illinois (Slocum) filed a petition for review of the Agency's decision. Also on September 27, 2004, Al Phillips, Vern Meyer, Gayle Demarco, Gabrielle Meyer, Lisa O'Dell, Joan Leslie, Michael Davey, Nancy Dobner, Mike Politio, Williams Park Improvement Association, Mat Schlueter, Mylith Park Lot Owners Association, Donald Krebs, Don Berkshire, Judy Brumme, Twin Pond Farms Homeowners Association, Julia Tudor, and Christine Deviney (Residents) filed a petition for review of the Agency's decision. (collectively, petitioners). On October 7, 2004, the Board accepted the petitions for hearing in a single order, thus consolidating the cases.

*2 On January 11, 2005, the Municipal-Environmental petitioners along with Wauconda filed a stipulation. The stipulation notes that "upon the Pollution Control Board's acceptance and approval of the terms of this Stipulation" the Municipal-Environmental petitioners will ask the Board to dismiss the permit appeal in PCB 05-55. Stip. at 8. The stipulation further indicates that "if the Board does not approve and accept" the stipulation, the stipulation will remain binding on the parties to the stipulation. Stip. at 12. On February 3, 2005, the Board declined to accept the stipulation and settlement.

On February 10, 2005, hearing was held before Board Hearing Officer Bradley P. Halloran. The parties filed simultaneous briefs on February 25, 2005, [FN1] and simultaneous replies on March 7, 2005.

Wauconda's brief includes a motion to dismiss the petition in PCB 05-59 and a motion to dismiss or for summary judgment in PCB 05-59. WBr. At 1-9. Pursuant to the Board's rules both the motions have been filed untimely. See 35 Ill. Adm. Code 101.506 and 101.516(a). Furthermore, the case has now been fully briefed and is ripe for decision on the merits. Therefore, the Board denies the motions and will decide the case on the merits of the arguments.

On March 2, 2005, the Board received a public comment from David J. Suchor. Mr. Suchor indicated that the Mylith Park Lot Owners Association had not voted to become a part of the permit appeal and asked that the Mylith Park Lot Owners Association be removed from the proceeding. PC 1. On March 10, 2005, the Board received a public comment from Mike Politio. Mr. Politio indicated that Mr. Jay Glenn no longer represents either Mr. Politio or the Williams Park Improvement Association. PC 2. On March 28, 2005, the Williams Park Improvement Association filed an additional comment indicating that Mr. Glenn does represent the Williams Park Improvement Association. PC 3. Because the Board today decides this case, the Board finds that the My-

lith Park Lot Owners Association and Mr. Politio's requests are moot.

FACTS

On March 24, 2003, the Agency received Wauconda's application for modification of Wauconda's NPDES permit. R. at 1608-69. Wauconda proposes to expand the existing wastewater treatment plant in two phases. R. at 1608. In phase one, Wauconda plans to expand from a design average flow of 1.4 million gallons per day (mgd) to 1.9 mgd with design maximums changing from 4.0 mgd to 5.963 mgd. R. at 1614, 2213. In phase two, Wauconda will expand the plant to a design average flow of 2.4 mgd and a design maximum flow of 7.93 mgd. Id.

Wauconda's treatment plant is located at 302 Slocum Lake Road and the effluent from the plant discharges into Fiddle Creek. R. at 2213. Fiddle Creek is classified as a general use stream, which ultimately discharges into the Fox River. Id. Wauconda has used this same discharge point since 1983. Id.

Prior to using the current discharge point, Wauconda discharged effluent into the Bangs Lake Drain Creek, which flows into Slocum Lake. R. at 2213. Slocum Lake discharges into the Slocum Drainage ditch which joins the Fox River. Id. In 1977, Wauconda was granted a variance from the phosphorus standard. R. at 2213; see also Village of Wauconda v. IEPA, PCB 11-125 (Aug. 4, 1977). The discharge was move in 1983 based on another Board order. R. at 2213; See also Village of Wauconda v. IEPA, PCB 83-237 (Jan. 9, 1986).

*3 Fiddle Creek is a part of a system that includes wetlands and man-made drainage ditches. R. at 2213. Fiddle Creek flows through a man-made silt trap and then joins into a wetlands complex that has been channelized. Id. The drainage ditch flows west for approximately 625 feet, south for approximately 1,500 feet, west for approximately 5,250 feet, south for approximately 1,250 feet and west for approximately 1,125 feet where the ditch joins the Slocum Lake Drain before entering the Fox River. R. at 236-38.

The land use surrounding Fiddle Creek has changed from farmland to highly populated residential. R. at 2213. Fiddle Creek passes through several subdivisions before discharging into the Fox River about 2.4 miles from Wauconda's outfall. Id.

After receiving the NPDES permit application, the Agency conducted a general review on April 9-10, 2003. R. at 1673-76. Starting on July 25, 2003, the Agency provided public notice in the Wauconda Leader of the draft NPDES permit. R. at 2212. On July 23, 2003, the Agency mailed public hearing notices to local legislators, county and municipal officials, environmental organizations, and interested citizens. Id. Prairie Rivers Network also provided notice of the public hearing by sending the notice to the "listserv" to assist the Agency in notifying the public. Id. From August 1, 2003 through September 7, 2003, the Agency published notice of the public hearing in four separate newspapers. Id.

A public hearing was held after proper newspaper notice on September 9, 2003. R. at 2212. Approximately 200 participants attended the public hearing. Id. On October 8,

2003, the Agency posted the transcript of the public hearing on the Agency's website. The Agency accepted public comment until October 31, 2003. Id. On August 23, 2004, the Agency issued the NPDES **permit**. R. at 2251.

STATUTORY BACKGROUND

Section 40(e)(1) of the Environmental Protection Act (Act) (415 ILCS 5/40(e)(1) (2002)) allows certain third parties to **appeal** Agency determinations to grant NPDES **permits**. The third party's petition to the Board must contain:

a demonstration that the **petitioner** raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES **permit** application, if a public hearing was held; and

a demonstration that the **petitioner** is so situated as to be affected by the **permitted** facility. 415 ILCS 5/40(e)(2) (2002).

Pursuant to Section 40(e)(3) of the Act (415 ILCS 5/40(e)(3) (2002)), **petitioners** have the **burden** of **proof** and hearings "will be based exclusively on the record before the Agency at the time the **permit** or decision was issued." 415 ILCS 5/40(e)(3) (2002).

Section 39(a) of the Act (415 ILCS 5/39(a) (2002)) provides that the Agency has a duty to issue a **permit** upon proof that the facility will not cause a violation of the Act or Board regulations. Section 39(a) further provides that "[i]n making determinations on **permit** applications ... the Agency may consider prior adjudications of noncompliance" with the Act. 415 ILCS 4/39(a) (2002 State Bar Edition, 2003 Supp.)

STANDARD OF REVIEW

***4** The Board's scope of review and standard of review are the same whether a permit applicant or a third party brings a petition for review of an NPDES permit. Prairie Rivers Network v. PCB et al., 335 Ill. App. 3d 391, 401; 781 N.E.2d 372, 380 (4th Dist. 2002) and Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E. 2d 189 (1st Dist. 1983). The distinction between the two types of NPDES **permit appeals** is which party **bears** the **burden** of **proof**. Under Section 40(e)(3) of the Act, in a third party NPDES **permit appeal**, the **burden of proof** is on the third party. 415 ILCS 5/40(e)(3) (2002); Prairie Rivers, 335 Ill. App. 3d 391, 401; 781 N.E.2d 372, 380. Under Section 40(a)(1) of the Act, if the **permit** applicant **appeals** the **permit**, the **burden** of **proof** is on the **permit** applicant. 415 ILCS 5/40(a)(1) (2002).

The question before the Board in **permit appeal** proceedings is: (1) whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would have occurred if the requested **permit** had been issued; or (2) whether the third party proves that the **permit** as issued will violate the Act or Board regulations. Joliet Sand & Gravel, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958; Prairie Rivers, 335 Ill. App. 3d at 401; 781 N.E.2d at 380. The Agency's denial letter frames the issues on **appeal** and the **burden** of **proof** is on the **petitioner**. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 676 N.E.2d 299 (3rd Dist.

1997).

The Board's review of **permit appeals** is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the **permit** applicant, or the Agency, after the Agency's decision. Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112 (Aug. 9, 2001) aff'd at 335 Ill. App. 3d 391, 401; 781 N.E.2d 372, 380 (4th Dist. 2002); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987).

ISSUES

The parties have raised several issues for Board decision in this proceeding. The first issue that the Board will address is whether or not the stipulation and settlement agreement entered into by Wauconda and the Municipal-Environmental petitioners should be accepted. The second issue is the sufficiency of the Agency's antidegradation analysis. The third issue is the lack of a pretreatment program included in the permit. The fourth issue is the Agency's evaluation of prior permit violations in determining to issue a permit. The fifth issue is whether the Agency denied due process to the Residents. The Board will address each issue in turn below.

DISCUSSION

The Board will first summarize the general arguments put forth by the Agency. Then the Board will organize the discussion by issue. Each issue will be set forth followed by the arguments of the parties. The Board will conclude each section with a discussion of the Board's findings on the particular issue raised.

Agency's General Arguments

***5** The Agency argues that the burden of proof is on the Residents and Slocum to establish that the permit as issued would violate the Act or Board regulations. Ag.Br. at 13. The Agency opines that "as long as there is substantial evidence in the record" the Agency's decision must be affirmed. Ag.Br. at 14. The Agency asserts that the Residents and Slocum have made no attempt to establish a lack of evidence in the record supporting issuance of the permit and in fact waived their right to present a case or cross-examine Agency staff. Ag.Br. at 15. The Agency notes that the Residents and Slocum also did not present expert witnesses or scientific evidence to establish shortcomings in the **permit** that would cause a violation of the Act or Board regulations. Id.

The Agency maintains that mere dislike of the NPDES **permit** and **permit** conditions or mere allegations of noncompliance with the law does not satisfy the **burden** of **proof**. Ag.Br. at 15. The Agency asserts that the petitions and the failure of Residents and Slocum to present any evidence at the Board's hearing demonstrate that Residents and Slocum mere belief is not based on any scientific findings that the water quality standard would not be met. Ag.Br. at 16.

Board Analysis

The Board agrees with the Agency that the **petitioners** in a third party NPDES **permit appeal bear** the burden of establishing that the **permit** as issued would violate the Act or Board regulations. The Board also agrees that mere dislike is not sufficient to satisfy that burden. In this case, the Board finds that **petitioners** must establish that the **permit** issued to Wauconda will violate the Act or Board regulations in order for the Board to find for the **petitioners** in this matter.

Stipulation and Settlement Agreement

The first issue the Board will examine is whether or not the stipulation and settlement agreement entered into by the Municipal-Environmental **petitioners** and Wauconda should be adopted by the Board. The following paragraphs summarize the positions of the parties. Then the Board will discuss the Board's decision on this issue.

The Municipal-Environmental **Petitioners**' Argument

The Municipal-Environmental **petitioners** believe that the settlement agreement reached "involves an appropriate resolution of the issues" raised in this proceeding. 05-55Br. at 5. The Municipal-Environmental **petitioners** ask that the Board "confirm that the resolution reached is appropriate" and that the Board use the resolution as the basis for the Board's decision in this proceeding. 05-55Br. at 5-6.

The Municipal-Environmental **petitioners** approached settlement of the issues between them and Wauconda by adopting intergovernmental agreements; however, there was concern as to how to include the environmental groups and individuals. 05-55Br. at 10. The Municipal-Environmental **petitioners** decided that a stipulation and settlement document could be used. Id. Further, the stipulation was a mechanism that would allow the agreement to be presented to the Board, according to Municipal-Environmental **petitioners**. Id.

*6 The Municipal-Environmental **petitioners** ask that the Board review the issues raised in the proceeding and based on the record, exercise the Board's independent judgment to accept the conclusions and resolutions in the stipulation. 05-55Br. at 10. The Municipal-Environmental **petitioners** accept that the Board is not bound by the resolutions reached in the stipulation; however, they believe that the Board will find that the record in this proceeding supports the resolution of the issues set forth in the stipulation. Id. The Municipal-Environmental petitioners seek to have the Board accept the stipulation in the same manner as stipulations are accepted in enforcement cases. Id.

The Municipal-Environmental petitioners suggest that accepting stipulations in third-party NPDES permit appeals is a way of encouraging responsible settlements. 05-55Br. at 11. Settlement would involve the public as much as possible, but would not compromise the obligation of the Board to review permit appeals, argue the Municipal-Environmental petitioners. Id. The Municipal-Environmental petitioners also believe that it is significant that Wauconda has agreed "to accept a revised permit incorporating the additional limitations identified, insuring their incorporation in a permit document with appropriate public availability." Id.

Wauconda's Argument

Wauconda states that Wauconda "fully understands and accepts the Board's decision to decline acceptance of the stipulation" without the Board conducting a review. WBr. at 16. Wauconda is bound by the terms of the agreement and "is prepared to accept a Board order in this case that is consistent" with the stipulation. Id.

Agency's Argument

The Agency states that as the Municipal-Environmental petitioners and Wauconda have "expressed their desire to be bound by the terms of the stipulation" and the Agency does not address the issues raised by the Municipal-Environmental petitioners. Ag. Br. at 8.

Board Analysis

As the Board stated in the February 3, 2005 order, the Board is reluctant to accept settlement agreements in permit appeals. The Board has stated:

> The Board has difficulty in dealing with settlement in permit appeal cases which involve the Agency issuance of negotiated permit containing conditions for which no record exists "setting out sufficient technical fact and legal assertions to allow the Board to exercise its independent judgment and to make proper findings of fact and conclusion of law." Caterpillar Tractor Co. v. IEPA, PCB 79-180 (June 2, 1983) slip op at 1-2. The Board has not issued orders incorporating the terms of such stipulations as the Board does in enforcement cases. Meyer Steel Drum, Inc. v. IEPA, PCB 92-76 (Aug. 13, 1992); General Electric Company v. IEPA, PCB 90-65 (Sept. 12, 1991).

The Board is not persuaded that the Board should accept the stipulation filed in this proceeding. The Board is reluctant to adopt this procedure for several reasons. First, the settlement would have Wauconda seek modification of the NPDES permit (05-55Br. at Attach A pgs 7-8). Acceptance of a settlement wherein a modified permit must be sought might be interpreted as the Board approving the modifications Wauconda must seek by agreement, before the application is filed. In addition, the Agency, who is responsible for reviewing all permit applications, including any that the settlement agreement might require, is not a party to the stipulation. Finally, the stipulation represents an agreement between Wauconda and the Municipal-Environmental petitioners that would require modification of the permit at issue in this proceeding. The Board's acceptance of the settlement might also be viewed as agreement by the Board that the permit at issue was somehow insufficient. Therefore, the Board declines to accept the stipulation and settlement.

*7 The Municipal-Environmental petitioners did not present any argument in their closing brief except to argue for the adoption of the stipulation and settlement agreement. The Board finds that the Municipal-Environmental petitioners have waived any argument in opposition to the issuance of the permit. See e.g. People v. Economy Plating, PCB 97-69 (May 6, 2004); People v. Clark Refining & Marketing, Inc., PCB 95-163 (Sept. 17, 1998). Therefore, the Board finds that the Municipal-Environmental petitioners have not established that the permit as issued would violate the Act or

Board regulations.

Agency's Antidegradation Analysis

The second issue raised concerns the sufficiency of the Agency's antidegradation analysis. The Board will summarize the arguments of the parties and then analyze the Board's findings.

Slocum's Argument

Slocum argues that the Agency's antidegradation assessment is insufficient and does not comply with relevant rules. 05-58Br. at 8. Slocum asserts that the Agency relied on water quality data from a stream survey conducted on September 15, 1993 (1993 Survey). Id. The 1993 survey found "fair environmental conditions in Wauconda Creek with minor impact from the Wauconda" discharge. R. at 995, 1677; 05-58Br. at 8-9. The 1993 survey identified levels of conductivity, nitrate plus nitrite, phosphorus, sodium, potassium, boron, strontium, and oil downstream of the Wauconda outfall, according to Slocum. R. at 928; 05-58Br. at 9. Slocum maintains that despite the findings of the 1993 Survey, none of the contaminants were evaluated by the Agency as a part of the antidegradation analysis performed in 2003. Id. Slocum further notes that the Agency's 2003 antidegradation assessment indicates that the stream will experience increase in loading over time, because of the discharge. R. at 995; 05-58Br. at 9. Slocum asserts that the relevant data basis date for the antidegradation assessment should be November 28, 1975. 05-58Br. at 9.

Slocum asserts that the water quality was not evaluated based on current data by the Agency and that the engineers hired by the Lake County Forest Preserve District, Lake Barrington and Cuba Township disagree with the Agency's analysis. 05-58Br. at 11. Lake County Forest Preserve hired Baetis Environmental Services, Inc. (Baetis) and Lake Barrington and Cuba Township hired Huff & Huff (Huff). 05-58Br. at 11 and 14. The report prepared by Baetis, which delineates the information used in his review, is located in the record at pages 314-36. The report from Huff is found in the record at pages 2106-7.

Baetis indicated that the effluent is causing downstream oxygen deficits and the proposed limit for dissolved oxygen will not likely be met. R. at 333; 05- 58Br. at 12. Baetis attributed water quality violations for dissolved oxygen to the discharge from the Wauconda plant. R. at 321; 05-58Br. at 12. Baetis further indicated that the Agency's antidegradation assessment did not properly characterize the affected water body. Id. Baetis opined that the additional biochemical oxygen demand wasteloads will degrade the dissolved oxygen resources in the creek beyond existing conditions. Id.

*8 Huff found the same results as Baetis noting that their analysis had found dissolved oxygen levels of 5.0mg/L below the Wauconda outfall and the entire Fiddle Creek. R. at 2106; 05-58Br. at 14. Huff also measured total phosphorus at an average of 3.9mg/L and nitrates were 18.0 mg/L in Fiddle Creek. Id. Huff concludes that the current levels of dissolved oxygen, phosphorus, and nitrates are sufficient to list Fiddle Creek as an impaired stream. R. at 2106-07; 05-58Br. at 14.

Slocum argues that the Agency utilized data that was over ten years old in making the antidegradation assessment. 05-58Br. at 15. Further, Slocum asserts the Agency defers issues on nitrogen and phosphorus because state standards will be adopted in the future. Id. Slocum maintains that the Agency's antidegradation assessment does not comply with the Board's rules. Id. Slocum opines that the Board should scrutinize the insufficient data and require the Agency to conduct additional evaluations of recent data to comply with the antidegradation rules. 05-58Br. at 16.

Slocum asserts that the antidegradation assessment conducted by the Agency was inadequate and inconsistent with the findings and conclusions of other professionals. 05-58Br. at 22. Slocum opines that because of the more recent data reviewed and analyzed, from more current sources, the Board can require the Agency to reinvestigate and to use more current data. Id.

Residents' Arguments

The Residents argue that where an existing use is established, that use must be protected even if the use is not listed in the water quality standards as a designated use. 05-59Br. at 26, 28. Residents assert that in no case may water quality be lowered to a level which would interfere with an existing use. 05- 59Br. at 28. Residents maintain that the antidegradation analysis was insufficient because the analysis failed to address baseline requirements from November 28, 1975. Id. Further, Residents argue that the antidegradation analysis failed to evaluate anticipated benefits to the residents in the Fiddle Creek wetlands, if any. 05-59Br. at 29.

The Residents also take issue with the Agency's use of water quality data from the 1993 Survey. 05-59Br. at 29. The Residents note that the 1993 Survey found fair conductivity, nitrate plus nitrate, phosphorus, sodium, potassium, boron, strontium, and oil downstream of the Wauconda outfall. R. at 995-1001; 05-59Br. at 29. Yet, the Agency did not evaluate any of these contaminants, according to the Residents. 05-59Br. at 29.

The Residents argue that a wetland specialist with the Illinois Department of Natural Resources (IDNR) advised the Agency that the amount of additional water volume added to the wetland from the increased discharge would be detrimental to the wetland. R. at 1990; 05-59Br. at 30. The Residents assert that the Agency then sought another opinion from a non-IDNR wetland specialist who was "skeptical" of the IDNR assessment. 05-59Br. at 30. According to the Residents, IDNR thought Fiddle Creek Wetlands had threatened and endangered species. R. at 1990; 05-59Br. at 30.

Wauconda's Arguments

*9 Wauconda argues that the Agency revised the permit in response to concerns about the antidegradation analysis that were raised during the hearing and public comment before the Agency. R. at 2186-2262;WBr. at 11-14. Specifically Wauconda points out that the Agency modified the permit by: (1) adding phosphorus removal as a permit condition; (2) adding a permit condition that Wauconda conduct a study of dissolved oxygen nutrients in Fiddle Creek; and (3) adding dissolved oxygen limits as a permit condition. Id. Furthermore, Wauconda asserts that the Agency correctly noted that

the technical reports submitted by Wauconda adequately demonstrate that the NPDES discharge has not had an adverse impact on the downstream wetlands. R. at 2232; WBr. at 12. Wauconda points out that the Agency also concluded that the discharge will not impact the Fox River. R. at 2240; WBr. at 13.

Agency's Argument

The Agency agrees that the existing uses of Fiddle Creek, as of November 28, 1975, must be protected pursuant to the Board's regulations on antidegradation. Ag.Br. at 22. However, the Agency asserts that the Board regulations do not require the Agency to compare physical, chemical, or biological data that existed on or after November 28, 1975. Id. The Agency claims that the regulations mandate that the uses actually attained on or after November 28, 1975, must be maintained and protected, not that the physical, chemical, or biological data be identical. Id. Thus, the Agency maintains that Residents and Slocum must prove that the Wauconda effluent, as permitted, would impair the existing uses of Fiddle Creek and Residents and Slocum have not done so. Ag.Br. at 22-23.

As to the claim that the permitted discharge from the Wauconda plant will impair the existing uses of Fiddle Creek, the Agency asserts that the Residents and Slocum did not delineate how this conclusion was made. Ag.Br. at 22. Furthermore, the Agency notes that the Residents and Slocum rely on the KOT Environmental Consulting, Inc. report (KOT report) (R. at 470-78); however, according to the Agency that report also does not list any assumptions or calculations leading to the conclusion in the report. Id.

The Agency believes that the loss of wetlands discussed by the Residents, Slocum, and in the KOT report is more likely a result of restoration of the drainage canal in 1997. Ag.Br. at 23. The drainage canal was restored to allow for better drainage of the wetlands, according to the Agency. Id. Therefore, the Agency argues that the loss of 180 acres of wetlands is more probably the result of the drainage canal than any discharge by Wauconda. Id. The Agency also consulted with IDNR and an independent wetlands specialist to explore other possible impacts of the discharge pertaining to nutrient loading and hydraulic flow, and determined an ecological risk assessment was not warranted. R. at 1433-34.

The Agency, in performing the antidegradation analysis, used as much data as was available within the Agency, provided by the applicant or the public. Ag.Br. at 23. The Agency states that at no point did the Agency use the 1993 Survey as "the statutory benchmark" for the antidegradation analysis. Id. The Agency notes that the Residents and Slocum point to findings in the 1993 Survey concerning several parameters; however, the Residents and Slocum do not demonstrate that the parameters violated the applicable water quality standards. Id. Thus, even given the existence of those parameters, the Agency asserts that the Residents and Slocum have not met their burden of proof and established that the permit would violate the Act or Board regulations. Id. Furthermore, the Agency argues that the concentrations of the parameters are typical of domestic wastewater plants throughout the State and the concentrations of the parameters do not violate the water quality standards. Ag.Br. at

24.

*10 The Agency next addresses the issue of dissolved oxygen levels. Ag.Br. at 24. The Agency states that the Agency reviewed the data in the record and concluded that the low dissolved oxygen levels in the receiving stream were caused by algae. Id. The Agency states that the findings concerning the levels of dissolved oxygen are consistent with streams that pass through wetlands. Id. The Agency added conditions to the permit setting a phosphorus limit and requiring that the dissolved oxygen water quality standard be met at the discharge point. Id. The Agency also added conditions to study dissolved oxygen and nutrient effects downstream from the outfall. The study condition enables the Agency to reopen the permit and add additional controls if warranted. R. at 2189. The Agency asserts that the Residents and Slocum have failed to prove that the discharge from the Wauconda plant will cause or contribute to the violation of the dissolved oxygen water quality standard. Ag.Br. at 25.

Board Analysis

The Board's rules require the Agency to perform an antidegradation review for modified permits. 35 Ill. Adm. Code 302.105(f). The purpose of the antidegradation section is:

> to protect existing uses of all waters of the State of Illinois, maintain the quality of waters with quality that is better than water quality standards, and prevent unnecessary deterioration of waters of the State. 35 Ill. Adm. Code 302.105.

The Board's rules further state that:

> waters of the State whose existing quality is better than any of the established standards of this Part must be maintained in their present high quality, unless the lowering of water quality is necessary to accommodate important economic or social development. 35 Ill. Adm. Code 302.105(c)(1).

Thus, the antidegradation assessment performed by the Agency assures that the existing uses of the receiving stream are protected and water quality that is better than the existing standards is not lowered unless necessary for economic or social development.

As discussed above, in this proceeding the burden is on the Residents and Slocum to establish that the issuance of the NPDES permit will result in a violation of the Act or Board regulations. Thus, to prevail on this issue, Residents and Slocum must demonstrate that the Agency's antidegradation assessment was insufficient and as a result the permitted discharge will not protect the existing uses of the receiving stream. The Board finds that Residents and Slocum have not demonstrated that the permitted discharge will detrimentally affect the existing uses of the receiving waters.

Although the record contains reports from engineers who expressed concerns about the Agency's antidegradation analysis, those concerns were mainly focused on dissolved oxygen and phosphorus. See R. at 333 and 2106. The Agency considered those reports and addressed those issues in the final permit. See R. at 2211. Although the Residents and Slocum also raised concerns about nitrate plus nitrite, phosphorus,

sodium, potassium, boron, strontium, and oil downstream of the Wauconda outfall, the levels of these constituents do not exceed water quality standards. The levels in the Wauconda discharge are consistent with domestic wastewater throughout the State, and the permitted discharge will not increase the concentration of these parameters above water quality standards. R. at 2222. The Board's water quality standards are considered protective of existing uses. Revisions to Antidegradation Rules, R01-13 (June 21, 2001). Finally, Residents and Slocum have presented no evidence and the Board finds nothing in the record that establishes that the existence of these constituents will adversely impact existing uses.

*11 As to the argument that Fiddle Creek should be listed as an impaired water, the Board appreciates the concerns expressed by Residents and Slocum. However, a permit appeal proceeding is not the proper forum to address this issue.

The Board finds that the Agency's antidegradation assessment was sufficient to ensure that that existing uses of the receiving waters were protected. Therefore, the Agency issuance of the NPDES permit was appropriate.

Pretreatment Program

The third issue is the lack of a pretreatment program included in the permit. The Board will summarize the arguments of the parties and then analyze the Board's findings.

Slocum's Argument

Slocum argues that the NPDES permit issued by the Agency to Wauconda should include provisions implementing a pretreatment program. 05-58Br. at 17. Slocum points to an ordinance adopted by Wauconda that a pretreatment program should be established and to a consent decree requiring Wauconda to implement the pretreatment program. 05-58Br. at 16 and 18. Slocum notes that the Illinois Attorney General's Office (AG) in a letter dated October 30, 2003, indicated: (1) that Wauconda had not implemented a pretreatment program, and (2) that the proposed NPDES permit should include provisions that would require Wauconda to demonstrate compliance with the pretreatment program. R. at 1033; 05-58Br. at 17. Slocum concedes that the Agency's record demonstrates that the Unites States Environmental Protection Agency (USEPA) has not required a pretreatment program. R. at 1766; 05-58Br. at 17.

Slocum asserts that the AG filed a complaint against Wauconda on August 17, 2004, alleging violations of the Board's regulations. 05-58Br. at 18. On December 10, 2004, a consent order was entered which requires Wauconda to implement a pretreatment program. Id.

Slocum argues in the reply that Slocum is seeking to have Wauconda's pretreatment ordinance enforced. 05-58Reply at 2. Slocum asserts that the Agency is attempting to shift the Board's focus from the required ordinance. Id.

Residents' Arguments

The Residents express concern with the possibility of contamination of wells due to the existence of a Superfund site and the leachate from that site being processed by the Wauconda plant. 05-59Br. at 12-13. Residents argue that most members are in daily, intimate contact with the Fiddle Creek Wetlands and many of the wells in the area use a very shallow aquifer. 05-59Br. at 12. The Residents maintain that the discharge from the Wauconda plant is a "clear and present danger to health and safety of downstream Residents, their families, their wells and the environment." 05-59Br. at 13.

The Residents assert that the NPDES permit application submitted by Wauconda included false information and the Agency was aware of the falsehoods. 05-59Br. at 14. Specifically, the Residents maintain that the NPDES permit application did not include the Superfund site even though Wauconda receives wastewater from the Superfund site. 05-59Br. at 17.

Wauconda's Arguments

*12 Wauconda concedes that the NPDES permit does not include a pretreatment program for Wauconda's industrial dischargers; however, the Agency did include a requirement for an annual industrial user survey. WBr. at 14-15. The annual industrial user survey will allow the need for a pretreatment program to be reevaluated, according to Wauconda. WBr. at 15. Wauconda further points out that the Residents and Slocum' concern about groundwater is irrelevant to the issuance of a NPDES permit allowing discharge to surface water. WReply at 3.

Wauconda also concedes that the application for the NPDES permit did not recognize that Wauconda received leachate from a Superfund site. WBr. at 15. However, Wauconda argues that the record establishes that the Agency was aware of the fact, because other documents submitted by Wauconda indicated the acceptance of leachate from a Superfund site. Id. Thus, Wauconda maintains that the oversight was not intentional nor was the oversight material. Id.

Agency's Arguments

Before addressing the specific issue of pretreatment, the Agency notes that the Residents and Slocum believe that Wauconda should monitor for every contaminant found at the Superfund site. Ag.Br. at 28. The Residents and Slocum included in their briefs reports that four volatile compounds were found in the discharge from the Wauconda plant. Ag.Br. at 28. The Agency asserts that the Residents did not provide the results of the analysis to the Agency during the comment period or any other time before the permit was issued and thus the Board should not consider the information in making the Board's decision. Id. In any event, the Agency argues the data does not establish a violation of the Act or Board regulations as none of the four volatile compounds detected exceed the acute water quality standards for the compounds. Id. And only one compound exceeded the chronic water quality criteria and the Agency asserts that this is not a violation of the Act or Board regulations. Ag.Br. at 28-29.

The Agency states that the determination to monitor for contaminants was based on

the analysis of whether or not the effluent had a reasonable potential to exceed water quality standards. Ag.Br. at 29. The Agency performed additional testing after these same concerns were raised at public hearings and the Agency determined that only copper had a reasonable potential to exceed the water quality standard. Id. Therefore, the Agency points out a copper limit was included in the final permit. Id.

As to the argument that the Agency failed to require a pretreatment program, the Agency maintains that the Agency does not have delegated authority to operate a pretreatment program. Ag.Br. at 31. Therefore, the Agency asserts that the USEPA operates the pretreatment program and USEPA has determined that Wauconda in not required to maintain a pretreatment program at this time. Id. The Agency has modified the permit to require submission of an industrial user survey on an annual basis, which will allow the USEPA to review and reconsider the need for a pretreatment program. Id.

***13** The Agency argues that the Agency is not required under the Act to report false answers on the application and the Agency had no reason to believe that Wauconda lied on the application. Ag.Br. at 30. The Agency asserts that the Board rules do not require the applicant or the Agency to correct or amend applications as long as all pertinent information is before the Agency when the permit decision is made. Id.

As to the issue of groundwater contamination, the Agency argues that the contamination in unlikely to be a result of Wauconda's discharge. Ag.Br. at 32. Also, the Agency asserts, the information from the Residents on well contamination was not provided to the Agency prior to the issuance of the permit and, in fact, the well was tested nine days after the permit issued. Id.

Board Analysis

The Residents and Slocum have failed to demonstrate that the lack of a pretreatment program as a part of this NPDES permit violates the Act or Board regulations. The record establishes that the USEPA has determined that at this time a pretreatment program is not required. R. at 1559; 2221. The Agency, to ensure that the USEPA remains appraised of industrial users, has required annual submission of an industrial user survey. Thus, if a need should develop for a pretreatment program, the USEPA will have the information needed to establish the program.

As to the ordinance adopted by Wauconda requiring a pretreatment program, the Board finds that a condition in a permit is not necessary to ensure that the Act or Board regulations will not be violated. Wauconda may adopt ordinance that Wauconda believes appropriate; however, that does not mean that the ordinance should be included in a permit. Furthermore, the fact that the AG filed an enforcement after the issuance of the permit that resulted in a consent order requiring pretreatment is not relevant in this proceeding. The August 17, 2004 complaint was filed after the close of this record and therefore is not appropriate information for Board consideration. See Prairie Rivers Network PCB 01-112; Alton Packaging, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280.

Finally, the Board shares the concerns expressed about potential groundwater contamination. However, the record is devoid of any indication that the discharge by Wauconda affects the groundwater in the area. Rather, the record establishes that the Agency carefully examined this concern, but found that the wells would not be affected by the discharge. See R. at 2189; 2216-17; 2236-37

Prior Permit Violations

The fourth issue raised is the Agency's evaluation of prior permit violations in determining to issue a permit. The Board will summarize the arguments of the parties and then analyze the Board's findings.

Slocum's Argument

Slocum asserts that the Agency has knowledge of "many violations of the current NPDES permit" by Wauconda; however, the Agency did not consider those past violations when issuing the modified NPDES permit. 05-58Br. at 22. Slocum argues that if there are violations when the permit allowed for less wasteload to enter the watershed, the violations should be considered with the increased wasteload. Id. Slocum maintains that in response to prior violations a consent order was entered which prohibited further violations of the Act and Board regulations. 05-58Br. at 23. However, Slocum maintains that a review of public records available from USEPA establishes that Wauconda's effluent continues to violate the Act and Board regulations. 05-58Br. at 23-24.

***14** Slocum argues that the Board has the authority to "devise additional methods and conditions to ensure" Wauconda's compliance. 05-58Br. at 26. Slocum asks the Board to deny the issuance of the permit until additional data is compiled. Id.

Residents' Arguments

The Residents argue that the Agency issued the NPDES permit to Wauconda even though there had been a prior enforcement action. 05-59Br. at 21-22. Furthermore, the Residents assert that the Agency issued the permit at issue seven days after another enforcement action was filed against Wauconda. Id. The Residents maintain that the Agency records show that Wauconda "constantly violates" the Wauconda ordinance [FN2] for boron and total dissolved solids. R. at 1766; 05-59Br. at 23.

Wauconda's Arguments

Wauconda argues that an Agency permit decision cannot be used as a substitute for an enforcement action under the Act. WReply at 3, citing IEPA v. PCB, 252 Ill. App. 3d 828, 830 624 N.E.2d 402, 404 (1993). Wauconda notes that the Residents and Slocum rely on Section 39(a) of the Act (415 ILCS 5/39(a)(2002)) to support the argument that the Agency should have considered prior and current enforcement actions brought against Wauconda. Wauconda asserts that the language of Section 39(a) of the Act (415 ILCS 5/39(a)(2002)) actually provides that the Agency may consider prior adjudications of noncompliance and impose reasonable conditions related to the past history. WReply at 4. Wauconda argues that the past violations were already resolved by

improvements to the Wauconda plant and Agency consideration of the complaint that had not yet been filed would have been inappropriate. WReply at 4-5.

Agency's Argument

The Agency argues that Section 39(a) of the Act (415 ILCS 5/39(a) (2002)) does not impose a mandatory duty on the Agency to consider prior adjudicated violations. Ag.Br. at 33. The Agency asserts that the Act requires the Agency to consider prior violations so that, if necessary, conditions can be imposed on a permit. Id. Furthermore, the Agency claims that Wauconda's prior adjudication of noncompliance was considered. Id. The Agency determined that the planned expansion of the plant would address the issues that led to the violations of the Act covered by the December 13, 2000 consent order. Id.

Board Analysis

First as discussed above, the complaint filed on August 17, 2004, is not relevant in this proceeding. As to the Agency's review of the prior adjudicated violations, the Board agrees with Wauconda and the Agency that the Act does not require the Agency to consider the violations. However, the Agency did consider the prior violations and determined that the proposed modifications to the Wauconda plant would address those violations. Thus, a condition is not necessary to address the prior adjudicated violations. Therefore, the Board finds that the Agency did properly consider the prior adjudicated violations against Wauconda.

*15 The Board notes that the permit process cannot be used in lieu of an enforcement action for past violations of the Act or Board regulations. See Panhandle Eastern Pipe Line Co. v. IEPA and PCB, 314 Ill. App. 3d 296, 303; 734 N.E.2d 18, 24 (4th Dist. 2000), citing IEPA v. PCB, 252 Ill. App. 3d 828, 830 624 N.E.2d 402, 404. The Residents and Slocum have provided no evidence that the permit as issued will cause a violation of the Act or Board regulations. Therefore, the Residents and Slocum have not met their burden of proof.

Due Process

A fifth issue raised by the Residents concerns whether the Agency denied due process to the Residents. The Board will summarize the arguments of the parties and then analyze the Board's findings.

Residents' Argument

The Residents argue that the Agency has "institutionalized practices and procedures" that result in the "systematic denial" of due process. 05-59Br. at 5, citing People ex rel Robert J. Klaeren II et al. v. Village of Lisle et al., 202 Ill. 2d 164; 781 N.E.2d 223, (2002). The Residents assert that the issuance of the permit will result in a wasteload that will contribute to the reduction of the Fiddle Creek Wetlands. 05-59Br. at 6. This will result in the loss of riparian rights, according to the Residents. Id. The Residents also assert that the Agency failed to comply with public participation requirements. 05-59Br. at 28.

Wauconda' Arguments

Wauconda argues that the Residents rely on a local zoning case (Klaeren II) in challenging the procedural sufficiency of the Agency proceeding. WBr. at 6. Wauconda asserts that reliance is misplaced. Id. Wauconda asserts that the procedural sufficiency of the NPDES permit application process is well established. Id. Wauconda cites to several cases that Wauconda believes establish that the Agency's procedures are sufficient. WBr. at 6-7.

Agency's Arguments

The Agency agrees with Wauconda that reliance on Klaeren II is misplaced. Ag.Br. at 16-17, 18. The Agency notes that the issue before the Illinois Supreme Court in Klaeren II was whether a landowner could cross-examine witnesses at a public hearing on rezoning. Ag.Br. at 17. The Agency asserts that the hearing in Klaeren II was held under the Illinois Municipal Code (65 ILCS 5/1-1-1 et seq. (2002)). Ag.Br. at 17. The Agency argues that due process is a flexible concept and requires only such protections as fundamental principles of justice and a situation demand. Ag.Br. at 17, citing Abrahamson v. Illinois Department of Professional Regulation, 153 Ill. 2d 76, 92; 606 N.E.2d 1111 (1992). The Agency contends that the permit process before the Agency has none of the characteristics of an adversarial process and the Agency fully complied with the requirements of the Act. Ag.Br. at 19-20.

Board Analysis

The Illinois Supreme Court noted that procedures under Sections 39(a) and 40(a)(1) of the Act 415 ILCS 5/39(a) and 40(a)(1) (2002)) do not require the Agency to conduct a hearing. The court further noted:

*16 Consequently, no procedures, such as cross-examination, are available for the applicant to test the validity of the information the Agency relies upon in denying its application. As the appellate court noted, the procedure before the Agency has none of the characteristics of an adversary proceeding. The safeguards of a due process hearing are absent until the hearing before the Board. IEPA v. PCB, 115 Ill. 2d 65, 70; 503 N.E.2d 343, 345 (1986).

Thus, the Illinois Supreme Court has found that the safeguards of due process, in the permitting process, are found before the Board.

The Residents relied on Klaeren II to support their argument. However, Klaeren II is clearly not applicable. The issue in Klaeren II involved a landowner whose property abutted land subject to annexation and rezoning. Klaeren II 202 Ill. 2d at 167; 781 N.E.2d at 224. The court found that property rights of the interested parties were at issue in the zoning hearing and the parties must be afforded due process. Klaeren II 202 Ill. 2d at 184; 781 N.E.2d at 234. However, the Illinois Supreme Court also noted that:

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associate with the judicial process. On the other hand, when

governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Klaeren II 202 Ill. 2d at 1184; 781 N.E.2d at 234.

The Board has reviewed Klaeren II and the court's reasoning is consistent with IEPA v. PCB, 115 Ill. 2d 65, 70; 503 N.E.2d 343, 345. The process before the Agency is fact-finding investigation, while the process before the Board is an adjudication that directly affects the legal rights of an individual. Thus, the court's decision in IEPA v. PCB, 115 Ill. 2d 65, 70; 503 N.E.2d 343, 345, that the safeguards of a due process hearing are absent until the hearing before the Board, is consistent with the court's decision in Klaeren II, that a zoning hearing can affect the rights of interested parties and due process must be afforded. Therefore, the Board finds that the Residents' arguments that the Agency denied the Residents due process are without merit.

Residents also argue that the issuance of the permit will result in a loss of riparian rights. The Board is not persuaded by this argument. The Illinois Supreme Court in Landfill, Inc. v. PCB, 74 Ill. 2d 541; 387 N.E.2d 258 (1978) noted that the constitutional argument lacked merit "in light of the statutorily established mechanism for persons not directly involved in the permit-application process to protect their interests." Landfill, Inc. 74 Ill. 2d at 559; 387 N.E.2d at 265. The Appellate Court followed that reasoning in Prairie Rivers, finding that Prairie Rivers' constitutional arguments lacked merit in light of 35 Ill. Adm. Code 309. Prairie Rivers, 335 Ill. App. 3d at 405; 781 N.E.2d at 383. The Board finds that reasoning also applies in this case. Residents have been given ample opportunity to participate in this proceeding and actually chose not to exercise their right to call witnesses and cross-examine the Agency before the Board. Therefore, the Board finds the constitutional arguments of Residents are without merit.

CONCLUSION

*17 The Board finds that the petitioners have failed to establish that the permit as issued would violate the Act and Board regulations. Also, the Board finds that acceptance of a stipulation and settlement is not appropriate in this proceeding. The Board further finds that the Agency's antidegradation assessment was sufficient and the Agency's evaluation of prior adjudicated violations was adequate. The Board agrees that a pretreatment program is unnecessary to ensure that the permit will not violate the Act or Board regulations. The Board finds the arguments that petitioners were not afforded due process are without merit. Therefore, the Board finds that the Agency appropriately issued the NPDES permit to Wauconda and the Board affirms the Agency's decision.

ORDER

The Board affirms the Illinois Environmental Protection Agency's issuance of a National Pollutant Discharge Elimination System permit to the Village of Wauconda.

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 5/31(a) (2002); 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.

G.T. Girard

FN1. The Municipal-Environmental petitioners brief will be cited as "05-55Br." and the reply will be cited as "05-55Reply". The Slocum brief will be cited as "05-58Br." and the reply will be cited as "05-58Reply". The Residents brief will be cited as "05-59Br." and the reply will be cited as "05-59Reply". The Wauconda brief will be cited as "WBr." and the reply will be cited as "WReply". The Agency brief will be cited as "Ag.Br." and the reply will be cited as "Ag.Reply".

FN2. The Village of Wauconda has adopted an ordinance (2000-0-31, adopted Sept. 19, 2000) requiring a pretreatment program be developed for the Wauconda plant. R. at 1766; 05-59Br. at 23.

2005 WL 946593 (Ill.Pol.Control.Bd.)

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