BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCK RIVER WATER RECLAMATION DISTRICT	)	
Petitioner,	)	
v.	)	PCB No. 13-11 (Permit Appeal-Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY	)	
Respondent.	)	

ORIGINAL

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on **January 24, 2013,** we filed with the Office of the Clerk of the Pollution Control Board – **Petitioner's Post Hearing Brief**, a copy of which is served upon you.

Respectfully submitted,

ROCK RIVER WATER RECLAMATION DISTRICT

By: Roy M Harsch
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Dated: January 24, 2013

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PETITIONER'S POST HEARING BRIEF

Petitioner, Rock River Water Reclamation District ("District"), hereby submits its Post Hearing Brief in the above-captioned matter.

I. QUESTION PRESENTED

The issue presented in this permit appeal is whether the Illinois Environmental Protection Agency ("IEPA" or the "Agency") improperly denied the District's application for a construction permit to build a flow equalization or storage basin adjacent to the headworks of its wastewater treatment plant as part of the District's compliance plan to address sewer overflows and basement backups, which occur during rainfall events resulting in wastewater flows that exceed the capacity of the its wastewater treatment plant.

II. STATEMENT OF LAW

The IEPA has general authority to act upon applications for required construction permits pursuant to Section 39(a) of the Illinois Environmental Protection Act ("Act"). *See* 415 ILCS 5/39(a) (2008). The Act requires IEPA to issue the permit if the permit applicant proves that the requested permit will not cause a violation of the Act or the Board's regulations. *Id.* If IEPA denies a requested permit, the applicant may appeal IEPA's decision to the Board within 35 days

under Section 40(a)(1) of the Act. *See* 415 ILCS 5/40(a)(1) (2008) and implementing procedural regulations at 35 Ill. Adm. Code 105. Subpart B. When IEPA denies a permit under Section 39(a), it is required to timely provide the applicant the reasons for the denial. Those reasons must include the sections of the Act which may be violated if the permit were granted; the provision of the regulations which may be violated if the permit were granted; the specific type of information, if any, which the IEPA deems the applicant did not provide; and a statement of specific reasons why the Act and the regulations might not be met if the permit were granted. *See* 415 ILCS 5/39(a) (2007). The IEPA's denial letter frames the issues on appeal. *See Centralia Environmental Services, Inc. v. IEPA,* PCB 89-170 , slip op. at 8 (Oct. 25, 1990) and *Pulitzer Community Newspapers, Inc. v. IEPA,* PCB 90-142, slip op. at 6 (Dec. 20, 1990). The petitioner has the burden of proof on appeal. *See* 415 ILCS 5/40(a)(1) (2008); and 35 Ill. Adm. Code 105.112. The Board's review of permit appeals is generally limited to information before IEPA during IEPA's statutory review period, and is not based on information developed by the permit applicant or IEPA after IEPA's decision. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987*); Panhandle Eastern Pipe Line Co. v. IEPA*, PCB 98-102, slip op. at 2 (Jan. 21, 1999*), aff'd sub nom Panhandle Eastern Pipe Line Co. v. PCB and IEPA*, 314 Ill.App.3d 296, 724 N.E.2d 18 (4th Dist. 2000); and *American Waste Processing v. IEPA*, PCB 91-38, slip op. at 2 (Oct. 1, 1992). After an appeal of the permit denial is filed, the IEPA is required to file the entire administrative record that it considered including the application, correspondence with the applicant and any other information it relied upon in making its final decision to deny the permit. *See* 35 Ill. Adm. Code 105. Subpart B Section 105.102. The Board's appeal proceeding provides the petitioner with the opportunity to challenge the information relied upon by, and the reasons given by IEPA for denying the permit.

See Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280, citing *IEPA v. PCB,* 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986).

On appeal of the IEPA's denial of a permit, the question before the Board is "whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur if the permit was granted." *See Panhandle*, PCB 98-102, slip op. at 10, quoting *Centralia*, PCB 89-170, slip op. at 9; *see also Browning-Ferris Industries of Illinois, Inc. v. PCB,* 179 Ill. App. 3d 598, 601-602, 534 N.E.2d 616, 619 (2d Dist. 1989); *Joliet Sand & Gravel Co. v. PCB,* 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3d Dist. 1987), citing *IEPA v. PCB*, 118 Ill. App. 3d 772, 455 N.E.2d 188 (1st Dist. 1983).

III. INTRODUCTION

The District is a regional wastewater collection and treatment agency organized under the 1917 Sanitary District Act. The District serves over 230,000 people in seven municipalities. The District owns and operates the entire collection system which includes local lateral sewers. This system consists of over 1,100 miles of sewers, 24,000 manholes, 31 pump stations and 2 wastewater treatment plants ("WWTP")[1]. A significant portion of the system is over 80 years old. (Pet. Ex. 1. at Page 3, Tr. 35). As is unfortunately the case with many publicly owned wastewater treatment systems, given the age and manner in which it was originally constructed, the collection system serving the District's wastewater treatment plant has historically had excess wet weather inflow and infiltration ("I&I") issues. (Pet. Ex. 1. at Page 4, Tr. at 36-37). Because of these I&I problems, flows during some wet weather events have been in excess of that which the District can allow into its wastewater treatment plant and still comply with its NPDES

[1] The Kishwaukee Street Plant is the District's main WWTP and is the plant that is referred to throughout this case.

Permit. This has historically resulted in either basement backups or sewer overflows. Because of the direct public health concerns resulting from basement backups the District historically conducted sewer relief pumping in an effort to stop such backups. Sewer overflows have also occurred from interceptor manholes including ones located north of the WWTP in the area of the proposed basin. (R. 248).

The Agency issued a Violation Notice 2002-00140 on September 13, 2002 ("VN") concerning overflows that occurred on two days in June 2002. (Pet. Ex. 5, Tr. at 3). After discussions with the Agency, the District developed a plan of action on how it would proceed to address these problems. This plan became what the District proposed in its November 27, 2002 response letter to the VN. (Pet. Ex. 5, Tr. 35). The Agency accepted this plan when it approved the requested Compliance Commitment Agreement ("CCA"). (Pet. Ex. 2. Attachment B., Tr. at 38). This CCA required the District to evaluate its interceptor system and treatment plant to determine if they could properly handle a 10 year storm event. (Id.). The District, through the work of its consultant, Black & Veatch, conducted this evaluation while it continued to implement its I&I reduction program first started in the 1980's. To date the District has completed:

93 miles of mainline sewer lining,

77,000 feet of private services repair or replacement,

1,170 manholes given major rehab, or replacement,

50 miles of annual sewer cleaning and televising.

(Pet. Ex. 2. at 4-5, Tr. at 38).

The District continues performing these types of rehabilitation projects and currently budgets 6.3 million dollars annually, which is approximately 40% of the District's entire annual Capital

Improvement Project budget. (Pet. Ex. 2. at 4, Tr. 37). The District believes that this level of work will remain for the next 50 years. (Id. at 4).

Black & Veatch completed the study and prepared a preliminary report that was part of a larger Facility Plan. Despite the improvements listed above, this study identified that the District would need to construct an excess flow basin at the treatment plant because under some conditions, rainfall events would still result in flows exceeding the treatment plant capacity and would result in sewer overflows. (Pet. Ex. 2 at 5, Tr. 38, and R. 105-114). Following submittal of the Facility Plan to IEPA, the District began the process of deciding the appropriate manner by which it would construct the identified basin to which it would temporarily send excess flows in order to prevent the overflows.

The required size of the basin was determined in accordance with normal engineering practices to meet a worst case design basis using very conservative input assumptions based upon flow modeling results incorporating 38 years of actual precipitation and historical flow data. Assuming a maximum treatment plant capacity of 80 million gallons per day ("MGD"), for a 10 year, 24 hour storm event, the District would need to be able to handle a storm event with a peak total flow rate of 145.4 MGD. The design storm event would occur once every ten years, and require 65.4 MGD excess pumping capacity. The basin would be used on average for only one event per year requiring a total of two days during which the basin would be filled and then emptied. (Pet. Ex. 2 at 5, Tr. 38-39). Using a 10 year, 24 hour storm event rather than the minimum 5 year, 24 hour storm event required by IEPA resulted in a projected size basin of 25 MG which was a basin four to five times larger than that which would be required for a 5 year storm. (Tr. 55, and R. 105-114). The previous historical actual monitored flow data does not reflect the District's ongoing I&I reduction effort, which has had a significant impact on

reducing both flow rate and volume of wet weather flows and thus dramatically reduced the need to use the basin. (Tr. at 51-53). As is normally done for IEPA permitting, it was also assumed that only the design maximum flow of 80 MGD of wastewater could be treated in the WWTP with the remaining flows to be sent to the proposed basin. The District is able to treat flows in excess of this design maximum 80 MGD level and has treated flows of between 130 to 135 MGD and still complied with its NPDES Permit limit. (Tr. at 82).

After thoroughly reviewing their recommendation with the District, the Clark Dietz design team prepared a final Preliminary Design Report. As set forth in this report, the District proposed to construct a wetland bottom in the basin that would mitigate certain limiting site constraints. This wetland would be irrigated during dry weather with plant effluent water thus maintaining a healthy wetland treatment system, and reducing the amount of nutrients that the District would discharge to the Rock River. The site for the basin is adjacent to the Rock River with the basin floor elevated three feet above typical river level. The local soils are loose silty/sandy soils, therefore groundwater level in the area nearly matches river level. Given the local river/groundwater hydraulic conditions, the basin floor will be subject to under pressure that will cause flotation of the floor in high river conditions regardless of floor construction. There are two possible solutions to this site constraint: raise the floor by six feet or use a floor design that reacts to under pressure. The cost of raising the floor of the basin six feet was estimated at $1 million. The only floor design that could properly react to the under pressure is a wetland that would allow groundwater migration into the basin. Clay, concrete or synthetic liners would fail because they could not respond to the under pressure. In the end the constructed wetland bottom of the proposed basin provides a sound engineering solution, that will reduce the level of contaminants in the exfiltrating wastewater under a temporary use plan

very similar to a septic system, and is environmentally friendly, sustainable, and aesthetically pleasing.

Recognizing that the District's decision to proceed with a green or sustainable approach to construct the required basin would have potential issues that would need to be addressed as part of the permitting efforts, Mr. James Huff had initial discussions with Mr. Allen Keller, Manager of the Permit Section of the Bureau of Water Pollution in the summer of 2010 "regarding the use of a wetland-type of basin for excess flow temporary storage. Mr. Keller indicated that the Agency had permitted wetlands previously for waste wastewater treatment, and thought that this type of concept could be permitted." (Pet. Ex. 1. at 2, Tr. at 115). Based upon what it believed was a favorable response from the IEPA Permit Section concerning the use of wetlands, the Clark Dietz design team, which included Mr. Huff, proposed the dual function wetland system as its formal submittal to the District's solicitation of proposals in the fall of 2010. The District awarded the Clark Dietz design team the contract to design the equalization basin as they proposed. (Id).

After the District completed reviewing and approving the draft Preliminary Design Report, a meeting was requested with the Permit Section. The Preliminary Design Report, along with extensive supporting materials, was sent to the IEPA Permit Section for review and feedback on March 3, 2011. (Tr. at 45 and R. 12, 21-147). On March 7, 2011 the District sent to Mr. Keller a proposed agenda for the agreed upon meeting. (Tr. at 45, R. 148-150). The District and its consulting team met with the IEPA Permit Section on March 10, 2011 to discuss the proposed project and to listen to and address any IEPA Permit Section concerns. (Pet. Ex. 1, at 4, Tr. 120). A signup sheet for this meeting is found at R. 151. At this meeting, Mr. Keller said that the engineering report would have to address groundwater nitrate issues, but he was not

concerned about fecal coliform because there is not any groundwater standard. (Pet. Ex. 1, at 4, Tr. 120). Mr. Francis Burba, the IEPA Permit Section Review Engineer characterized the basin as a flow equalization basin. (Pet. Ex. 1, at 4, Tr. at 120 and 186). Following the March 10, 2011 meeting, Mr. Droessler, who was the project manager for the Clark Dietz Team, prepared and circulated a set of draft meeting minutes. (Pet. Ex. 3 at 4, Tr. at 98-99, R. 158-161). He received a reply email from Mr. Keller on March 16, 2011 telling him to change the minutes to include a statement that "groundwater nitrate level of 10 mg/L must be met" and that Mr. Keller had forwarded a copy of the electronic version of the draft report to the Groundwater Section for review. (Tr. at 157 and R. 157). Revisions were made and the finalized minutes, which included the IEPA comments, were recirculated on March 24, 2011. (R. 162-165). The District and its consultants responded to all of the Permit Section's questions and concerns at the March 10, 2011 meeting and believed that the "Agency's initial response to the design seemed positive." (Tr. at 120).

Following this meeting, on April 22, 2011 Ms. Dragovich sent Mr. Droessler and the others who were at the March 11, 2011 meeting an email containing the comments from the Agency's Groundwater Section and forwarded a draft memo prepared by Mr. William Buscher from the Groundwater Section. (R. at 166-175). In her email, Ms. Dragovich states that "They do have concerns regarding the facility's ability to comply with groundwater standards." (R. 166). Mr. Buscher's draft memo raised for the first time issues concerning demonstrating that the proposed project would not result in an increase in the concentration of pollutants in the groundwater and stated the draft plan provided "no consideration for meeting the non-degradation requirements of 35 IL Adm. Code Part 620.301 at a distance of 25 feet from the edge of the impoundment". (R. at 168-169 and Respondent Exhibit 4). Mr. Buscher's memo

also stated that the District must develop a contingency plan to show how any increases in groundwater concentrations resulting from the use of the basin would be returned to the original background concentration existing prior to the use of the basin. (R. 169).

When discussions with the Permit Section were unable to resolve these issues, Mr. Roy Harsch, on behalf of the District, had a telephone conversation on May 13, 2011 with Ms. Marcia Willhite, Director of the Bureau of Water to discuss the District's proposed project and the Groundwater Section's insistence that the non-degradation requirements of 35 IL Adm. Code Part 620.301 ("non-degradation provisions") required that no increase in groundwater concentrations occur, and what this potential decision would mean in terms of the approvability of the many other types of projects that the IEPA had routinely approved that result in increased groundwater concentrations of various contaminants. (R. 178). Ms. Willhite sent an email to Mr. Harsch which stated she had discussed the topic with her staff and they had groundwater degradation concerns related to holding sanitary sewage as well as stormwater in an unlined basin, and that the District would have to demonstrate "that the pollutant load in the basin is unlikely to cause groundwater degradation in the absence of a liner." (R. 179). She also stated that while they recognized the existence of a groundwater ordinance in place in the area, "it is related to VOC contamination, not nitrates, chlorides or other sewage constituents that may act differently in the groundwater." (Id.) Finally, she stated that they welcomed a meeting and wanted the District to know these concerns in advance so as to be able to prepare for a meeting and provide helpful information. (Id.).

A meeting was held on June 6, 2011 to address these concerns in general and Mr. Buscher's April Draft Memorandum. (Tr. at 122). A signup sheet showing who attended the meeting is found at R. 183. Mr. Buscher said that the District would have to show that the

project would not result in increased groundwater concentration above background of all Section 620 parameters, including chlorides, sulfates and Total Dissolved Solids, not just nitrate and fecal coliform. (Tr. at 122-123). Mr. Buscher passed out copies of the testimony that Mr. Richard Cobb presented in R 08-18 at a hearing held in May 2008 stating that the testimony would provide the District with an understanding of the non-degradation standard the District would be held to for permitting this project. (Tr. at 123). A copy of this handout is found as Attachment 3 to Petitioner Exhibit 1. (Id.). When Mr. Huff asked if the District could apply for a groundwater management zone, Mr. Buscher responded that the Agency would never establish one prior to discovering the impacts. (Tr. at 123). Mr. Huff then presented a copy of a 2006 construction permit for a truck wash that used percolation ponds to treat the wash water and stormwater. (Pet. Ex 1, Attachment 4 and R. 299 and 300). Mr. Huff pointed out that the District had hoped that the Agency would impose similar conditions in their permit, as they had included in this permit, that would apply if monitoring showed an exceedance of groundwater standard parameters in a down gradient monitoring well and would allow asking for a groundwater management zone or seeking regulatory relief as appropriate contingency measures. (Id. and Tr. at 299-300). It was agreed that resolution would require that Mr. Huff and Mr. Buscher have an additional discussion and the District would then need to provide a written response to the questions raised at the meeting and to Mr. Buscher's April 2011 Memorandum.

A subsequent call was conducted during which Mr. Huff explained to Mr. Buscher that it was not possible for the District to monitor groundwater and not show that there would be an increase in groundwater concentrations of various pollutants, but that it would be able to show that actual groundwater regulations would be always met 25 feet from the basin. Mr. Buscher continued to insist that the District would have to conduct the groundwater monitoring program

he had presented at the June 6th meeting to be able to show no increase in groundwater concentrations. The District notified Mr. Keller that it had asked Mr. Huff to prepare a comprehensive response to the questions raised at the June 6th meeting and present its position with respect to groundwater modeling. (R. 25-26). Mr. Huff sent this response to Mr. Keller on June 28, 2011. (Tr. at 126, R. 265-305).

In that response, Mr. Huff included a brief history of the proposed project since submittal of the Preliminary Design Report in February 2011, the six concerns raised by Mr. Buscher in his April Memorandum, a summary of design of the project and a final summary of the District's concerns with the various Agency concerns. (Tr. at 126-130). Mr. Huff explained in his letter that the entire area around the project is served by City water supply. (R. at 266). Because the basin would be constructed immediately adjacent to the Rock River, the groundwater is correlated directly to the level in the river so that during low flow periods, the groundwater flow is into the Rock River and at high river stages the groundwater flow is away from the river. (See also R. 14-15 and 226). He explained that the hydraulic head on the basin is not the depth of water in the basin, but rather the adjacent river elevation, and presented the findings from the District's groundwater monitoring effort in Attachment A to his letter to show the groundwater direct response to the river level. He explained that, as shown in Attachment B to his letter, monitoring of the Rock River immediately upstream shows that during and immediately after rain events the fecal coliform count in the Rock River exceeds the water quality standard as is typical of all streams in Illinois. (Tr. at 126). Therefore, fecal coliform would be in the groundwater whenever the groundwater is recharging from the river. (Id.) He pointed out that the location of the basin is within the Southeast Rockford contaminant plume for chlorinated solvents and there exists a ban on using groundwater in the area. To try and put the project into

perspective, he presented his calculations that on an annual basis the project would equate to the raw waste BOD5 load of 5 people, which would be less than one head of cattle. (R. 267). Based upon the information in Attachment C, the nitrogen impact would be similar. (Tr. at 126 and R 266-267).

Mr. Huff's letter also responded to the points raised in Mr. Buscher's Memorandum:

1. Monitoring Wells. The Preliminary Design included monitoring wells and the District has no objections to monitoring. (R. 267)

2. Testing Wells for Host of Inorganic Prior to Startup. Many of the listed parameters are not associated with municipal wastewater or storm water and are not parameters that the District is required to monitor on its effluent. If wells are installed prior to constructing the basin, they will be destroyed during construction and would have to be replaced. The District has no problem with testing for parameters associated with municipal wastewater.

3. Statistical Approach to Establish Background. This request is only included to allow the Agency to apply the interpretation that non-degradation means that no net increase in background is allowed as set forth in Mr. Cobb's testimony in R 08-18, in which he clearly states that he disagrees with the Board's interpretation on non-degradation. Mr. Huff pointed out that, under Mr. Cobb's interpretation, many of man's activities would have to be prohibited because they contribute to increased levels of some contaminate in the groundwater. Mr. Huff also explained spray irrigation, leach fields for dilute brine fields, and constructed wetlands, all of which have been permitted using compliance with groundwater standards, as a condition, not the non-degradation interpretation being requested of the District. Mr. Huff concluded by pointing out that the basin would not result in the impairment of the use of groundwater or violate any

groundwater standard. He also explained that the Agency could impose a groundwater management zone and that it would be of a limited size.

4. Two Foot Minimum Clay Liner. Mr. Huff stated that a clay liner would not allow deep rooted wetland plants to grow. The required clay would have to be imported resulting in considerable air pollution due to the necessary truck traffic. The liner would have to be protected from the hydraulic pressure resulting from the river elevation.

5. Model to Show Background will be Achieved 25 Feet from the Basin. Mr. Huff explained that for parameters like chlorides with no retardation, modeling would always show an increase in concentration. However, any increase would be temporary, and any applicable standard would always be met within 25 feet of the basin.

6. Contingency Plan. A Groundwater Management Zone is appropriate and they have been commonly used throughout Illinois. In fact, the site is in one for chlorinated solvents in Southwest Rockford. (R at 267-270, Tr. at 126-130).

After waiting for a response to Mr. Huff's June 28, 2011 submittal, the District had a number of telephone calls with the Permit Section. When it became clear that the Agency would not budge from the position that the District would have to show that the proposed basin would not result in an increase in concentration over background of any groundwater constituent, the District authorized the Clark Dietz team to finalize the design and prepare a permit application. The District chose this approach because, as stated by Mr. Huff in his June 28, 2011 letter, it did not believe Mr. Buscher's position to be consistent with the Board regulations and in fact, that position had been expressly rejected in the Second Notice Board Opinion and Order In the Matter of Groundwater Quality Standards, R 89-14 (A) and (B), July 25, 1991, which states at page 17: "The Board today declines to generally extend non-degradation beyond the prohibition

against loss of use." (R. 267). The District also believed that Mr. Buscher's position was inconsistent with the IEPA's longstanding routine permitting or approval of many other types of projects and activities. Although the District was hopeful that when required to actually act on a formal construction permit application, the IEPA would reconsider and issue the requested permit, the District had informed the Agency that it was prepared to appeal any denial to the Board. (R. 271).

Recognizing that an appeal would possibly be necessary, that any appeal would be limited to the information before the IEPA and that the District would have the burden of proof, the District made sure that all of the information previously submitted to and discussed with the Agency was included along with the application itself. (Tr. at 93). The application package was submitted and received by the Agency on April 6, 2012. (Tr. at 93, R. 216-839). A list of the various items submitted with the application is found at R. 216. The District provided the Permit Section with a requested limited extension of time to enable them to complete their consideration. (R 842-44). Mr. Burba sent Mr. Droessler an email on July 12, 2012 stating that the major concern the Agency had with the application was that the basin does not have a seal "as required per Section 370.930 d) 2) D) of the Illinois Recommended Standards for Sewage Works." (R. 844). On August 1, 2012 the Agency formally denied the application for a construction permit. (R. 845-847). The District timely filed this present permit appeal on August 31, 2012.

IV. STATEMENT OF THE CASE

This is not the simple case the IEPA hopes that the Board will be convinced it is. It is not simply one involving only Section 12 and a failure to adhere to the construction standards. Nor is it a case where the Board is reviewing a permit application that would allow the District to

discharge a substantial amount of raw untreated sewage on a regular basis into the groundwater beneath the unlined lagoon, which would subsequently be discharged directly into the Rock River without any treatment, which the IEPA considers to be, *per se*, water pollution. This is a case where the Board must look beyond what the IEPA claims is irrelevant because it is not set forth in the denial letter. As will be shown, the Agency Groundwater Section raised concerns that clearly became the basis for the Agency's cited specific basis for the denial, namely, the failure to adhere to two subsections of a design standard that on its face and in its heading does not apply to the type of project at issue. Indeed, the Agency has admitted that these subsections do not apply. The Agency would have the Board ignore that the denial is in fact based upon the Groundwater Section's attempt to apply its own interpretation of the Board's Groundwater regulations notwithstanding that the Board has formally previously rejected the Groundwater Section's interpretation of the non-degradation rule. The record shows that this was the only basis raised to support the Agency's denial. The IEPA cannot now make it disappear by asserting that by not including it in the denial letter, the Agency has waived the non-degradation issue and therefore claim it is not relevant.

This is a case where the District has met its burden and has provided ample evidence in the Record before the Agency to show that the proposed project will not result in a violation of the Act or any other applicable standard. Therefore, for the reasons set forth above and the arguments that follow, the Board should overturn IEPA's denial.

The only documents contained in the Permit Record filed in this appeal that are not copies of those submitted as part of the District's Application submitted on April 6, 2012 are either subsequent emails or letters to or from the District; a handful of internal emails regarding review of the Preliminary Design Report and the March 2011 meeting, those responding to the

telephone discussion between Ms. Willhite and Mr. Harsch and the subsequent June 2011 meeting; a copy of a June 2012 USEPA webinar broadcast a month before the denial; and four draft documents prepared by Mr. Buscher regarding District submittals.

In addition to Mr. Buscher's draft April 2011 Memorandum which was provided to the District, there are three draft memos he wrote that were not so provided, thus there are no District responses. Mr. Buscher's draft Memorandum to Mr. Cobb dated May 9, 2011 (This date may be a typo as it appears that it should be June 9, 2011.) references the call with Mr. Huff and Mr. Buscher's continuing concerns over application of the Groundwater non-degradation provisions and cites the application of 35 Ill Adm. Code § 370.930(d)(2)(D) (requiring a seal on the pond bottom) and § 370.930(b)(4) (requiring a groundwater monitoring system). (R. 176-177). He included excerpts from Section 370.930 Waste Stabilization Pond and Aerated Lagoons in this second memo. (Id). A third document which was not included in the original record filed in this case and which is pending a ruling on the State's November 2, 2012 Motion to Supplement the Record, is apparently Mr. Buscher's draft response to Mr. Huff's June 24, 2011 submittal. (R. 867-872). This document simply repeats the design parameters provided by the District and sets forth the language from Section 370.930 with the subparts concerning monitoring and seals highlighted. The fourth document not provided to the District from Mr. Buscher is his Draft Memorandum addressed to Mr. Keller dated May 16, 2012, which on its face references his review of the March 17, 2012 permit application. (R.841). He comments that a monitoring system required by 370.930 b) 4) and a seal by 370.930. d) 2) D). (R. 841) are needed for Class 1 groundwater. (Id).

Not a single Agency document in the record raises any concern that the District's proposed unlined flow equalization basin will cause pollution of the Rock River. Not a single

document shows that there will be a violation of any groundwater standard. There are several documents that do ask the District to address the potential issue of groundwater pollution first raised by Mr. Allen Keller at the March 2011 meeting to discuss the Preliminary Design Report, where he said that he wanted the District to address possible groundwater concerns over nitrates and chlorides and in addition, would be sending the proposal to the Groundwater Section for their input. The Record contains much information submitted by the District that the project will not cause any groundwater problem including responses to various concerns and questions raised by the Agency at the March and June 2011 meetings and in the Ms. Willhite memo. There are no Agency documents regarding their review of any of this information or regarding the District's responses to specific questions or comments raised. In actuality, all of the other documents contained in the Record as submitted that mention groundwater are based upon the concerns over the non-degradation issue first raised in Mr. Buscher's draft April 2011 memorandum. There is not a single document in the Record as provided that shows that the Agency ever abandoned this concern.

The only Agency documents in the Record as filed that concern the application of Section 370.930 and the two subparts cited in the denial as specific reasons for the denial are those prepared by Mr. Buscher with two exceptions. The first exception is the July 12, 2012 email from Mr. Burba to Mr. Droessler stating that the Agency's main concern is the lack of the seal that references Section 370.930. (R.844). The second exception is the actual denial letter. (R. 846-847). There are no Agency documents in the Record as filed that reference the Agency's distribution or internal review of any of Mr. Buscher's draft memoranda and other draft documents except for distribution of his April 2011 draft. Finally, except for Mr. Bucher's Draft Memorandum addressed to Mr. Keller dated May 16, 2012, found at R. 841, there are no

documents in the Record reflecting any dissemination of the District's Permit application for review or the results of any review of the application.

V. BURDEN OF PROOF AND STANDARD OF REVIEW

In this appeal, the District contests the Agency's denial of its construction permit application to build the dual purpose flow equalization and wetland polishing basin. Section 39(a) of the Act sets forth the standard concerning IEPA's authority to act upon permit applications. "When the Board has by regulation required a permit for the construction, installation, or operation of any type of facility, equipment, vehicle, vessel, or aircraft, the applicant shall apply to the Agency for such permit and it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of this Act or of regulations hereunder." 415 ILCS 5/39(a)(2007). As is evidenced by the record, the District believes that it has shown that no violations of the Act will occur if the Agency approves its request for a permit for the flow equalization basin.

The Act prescribes what the Agency must do when it determines that an applicant has not shown that a violation of the Act will not occur:

> If the Agency denies any permit under this Section, the Agency shall transmit to the applicant within the time limitations of this Section specific, detailed statements as to the reasons the permit application was denied. Such statements shall include, but not be limited to the following:
>
> (i) the Sections of this Act which may be violated if the permit were granted;
>
> (ii) the provision of the regulations, promulgated under this Act, which may be violated if the permit were granted;
>
> (iii) the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and
>
> (iv) a statement of specific reasons why the Act and the regulations might

be met if the permit were granted.

415 ILCS 5/39(a)(2007)

Section 40(a)(1) of the Act and Section 105.112(a) of the Board rules place the burden of proof on the petitioner in permit appeals. 415 *ILCS* 5/40(a)(1)(2007); *Browning-Ferris Industries of Illinois, Inc. v. PCB*, 179 Ill. App. 3d 598, 534 N.E. 2d 616 (2d Dist. 1989). "The only issues relevant on appeal from denial of a permit are those related to whether the Agency correctly interpreted and administered the regulations when it denied Petitioners' permit and application." *City of Decatur and Sanitary District of Decatur v. Environmental Protection Agency*, 23 IPCB 127, 130 (July 22, 1976).

In making its determination, the Board's scope of review is limited to the record before the Agency when it made the decision. 415 ILCS 5/40(e)(3)(2007); *Citizens Utilities Company v. Illinois Environmental Protection Agency,* PCB 85-140 (Slip. Op. 3 March 9, 1989). The Board may not consider information developed by IEPA or the permit applicant after IEPA's decision. *Alton Packaging Corp.*, 162 Ill.App.3d at 738, 516 N.E.2d at 280. As set forth herein, the record strongly supports that the District met its burden to submit an application that shows that the basin would not result in a violation of the Act or any applicable standard. On appeal, the District has met its burden to show that the record so established this and that the Agency improperly denied the application. The following sections pertain to various issues where the Agency has failed to carry out the requirements placed upon it in acting on the District's application. Accordingly, the Board should overturn the decision to deny the District's permit application and direct that the Agency issue the requested permit.

VI. ARGUMENT – IEPA MISAPPLIED ILLINOIS LAW WHEN IT DENIED THE DISTRICT'S PERMIT

A. The reference to Section 370.930 is wrong.

1. Section 370.930 does not apply.

As required by Section 39(a) of the Act, the Agency set forth a specific statutory provision as the basis for its denial. In particular, the Agency stated that the District's permit application for the flow equalization basin did not demonstrate that it would comply with certain sections of Illinois Recommended Standards for Sewage Works, specifically: 35 Ill Adm. Code § 370.930(d)(2)(D) (requiring a seal on the pond bottom) and § 370.930(b)(4) (requiring a groundwater monitoring system). Section 370.930 is titled, "Waste Stabilization Ponds and Aerated Lagoons." Neither "waste stabilization pond" nor "aerated lagoon" is defined in the Act or the Water Pollution Regulations. Section 370.110e) of the Illinois Recommended Standards for Sewage Works states that the standards and definition of terms are to be consistent with The Glossary-Water and Wastewater Pollution Control Engineering which is incorporated by reference. (Tr. 96). In this document the term "waste stabilization" is defined as the "treatment of organic matter so as to make it innocuous". (Tr. 96 and Pet. Ex. 4, Attachment 2). Undefined regulatory terms are to be given their plain meaning. *Paszkowski v. Metro Water Reclamation Dist.*, 789 N.E.2d 342, 344 (Ill. App. Ct. 2003). Mr. Huff provided a similar USEPA definition of waste stabilization pond from USEPA Document 430-9-767-012. (Tr. 132). On its online Terminology Services, the USEPA defines an aerated lagoon as "A holding and/or treatment pond that speeds up the natural process of biological decomposition of organic waste by stimulating the growth and activity of bacteria that degrade organic waste" and defines a stabilization pond as a "large earthen basin used for the treatment of wastewater by natural processes involving the use of both algae and bacteria".

http://iaspub.epa.gov/sor_internet/registry/termreg/searchandretrieve/termsandacronyms/search.do.

These definitions contemplate that the stabilization pond or aeration lagoon would be in use 365 days per year for handling and treating untreated wastewater. In contrast, the facility at issue in this appeal is a flow equalization basin, which is anticipated to contain water on average only two day per year. In his testimony, Mr. Larry McFall discussed the design standards used for the basin, and the maximum flow rate, and testified that he would expect the basin to be used less than once a year, perhaps as seldom as once every two-or-five years depending upon conditions. He further stated that based on flows actually received, the basin would not have been used at all in the prior two years, if it had been built. (Tr. at 82-83).

The testimony of all District witnesses clearly supports that the flow equalization basin is not a waste stabilization pond or aerated lagoon. (Tr. at 49, 93, 100, and 132). Mr. Burba stated on direct examination that he understood the facility to be a flow equalization basin and not an extended aeration basin or a waste stabilization project. (Tr. at 186-187). Ms. Dragovich testified that she agreed with Mr. Burba that the equalization basin is not a waste stabilization pond or aeration lagoon. (Tr. at 198).

There can be no question that the cited basis in the denial letter is to a rule that does not apply to flow equalization basins. As a result, the Agency denial letter fails to fulfill the requirements of Section 39 in that it does not properly provide which "regulations, promulgated under this Act, which may be violated if the permit were granted" or "a statement of specific reasons why the Act and the regulations might not be met in the permit were granted". 415 ILCS 5/39(a)(ii) and (iv)(2007).

2. The Agency improperly applied Section 370.930 by analogy.

Mr. Burba admitted that, despite the fact that the proposed facility is neither a waste stabilization pond nor an aerated lagoon, he applied Section 370.930 by analogy. (Tr. at 188-189 and 239-240). Ms. Dragovich testified that it was an Agency group decision to apply Section 370.930 liner and monitoring system requirements. (Tr. at 1981). Mr. Burba's response that the Groundwater Section was involved in the determination is more than consistent; it is really a basic admission that this was a permitting decision made by the Groundwater Section. (Tr. at 192). That fact is truly apparent when the entire Record is examined. It is clear that it was Mr. Buscher in his draft memos from the very start who stated a conclusion that Section 370 applied. The Record is completely devoid of any review or any consideration of any of the information provided by the District and its consultants. There is nothing contained in the Record to show any group consideration or decision. In fact, the opposite is true. Mr. Burba's own actions demonstrated his belief that Section 370.930 did not apply. The District proposed a groundwater monitoring system in its application, but Mr. Burba did not review it, yet a failure to have a groundwater monitoring system is one of the cited deficiencies in the denial. (Tr. at 246). Ms. Dragovich testified that she was not aware of any internal documents regarding the anti-degradation issue and Mr. Huff's June 2011 response to Mr. Buscher memorandum. (Tr. at 203).

Even had the Record shown that the Agency actually made a group determination that despite knowing that Section 370 did not apply they were going to apply a portion of its requirements with regard to a liner and a groundwater monitoring system because of some concern over the impact of infiltration from the proposed unlined basin, this determination was not what they listed in the actual denial letter, and is not what is reflected in the Record. The Agency simply regurgitated what Mr. Buscher had set forth regarding Section 370 in his memos. Those memos clearly were based upon his opinions that the anti-degradation rules applied, and

that the District must show that there would be no increase above background caused by the infiltration from the basin. Mr. Buscher's determination that a liner and a monitoring program were required was based on these erroneous opinions. Apart from the documents transmitting the first of the four Mr. Buscher's memos, there is nothing in the Record to document that the Permit Section ever considered the memos, let alone actually made a determination by analogy that a liner and monitoring system were required. (Tr. at 203). In fact, while the permit engineer was aware that the application contained a proposed monitoring system, he never reviewed it. (Tr. at 246).

3. The Agency does not have the statutory authority to apply Section 370.930 by analogy.

The regulations cited by the Agency in support of its denial of the District permit application contain no mention of a facility in the nature of the flow equalization basin at issue here. The Agency cannot apply those regulations by analogy or in any other way expand the meaning of the regulations. "In construing administrative rules, the same rules that apply to statutory construction apply. *Ohio Grain Co. v. IEPA,* PCB 90-143, slip op. at 16 (Oct. 16, 1992); citing *May v. PCB*, 35 Ill. App. 3d 930, 342 N.E.2d 784 (1976). The initial source for determining intent is the plain meaning of the language used, and where unambiguous, the plain meaning of the language controls. *Village of Woodridge v. DuPage County*, 144 Ill. App. 3d 953; 494 N.E.2d 1262." *Board of Trustees of Southern Illinois University Governing Southern Illinois University, Edwardsville v. Illinois EPA*, 2005 Ill. ENV LEXIS 466 (August 4, 2005).

It is clear from the plain language of the statute that Section 370.930 applies to waste stabilization ponds and aerated lagoons only, and does not apply to flow equalization basins. If the Record actually supported a determination to apply Section 370 by analogy, which it does

not, then the Agency would be engaging in *de facto* rule-making and would be exceeding its statutory authority under the Act. By applying Section 370 in this way, the Agency is expanding the meaning of the provisions in a way that amounts to the implementation of policy affecting the rights of entities outside the agency, thereby constituting a "rule" under the Illinois Administrative Procedures Act ("APA"). *See, City of Joliet,* 2009 Ill. ENV LEXIS 165 at *53. This expanded application of Section 370 was never subject to the APA's rulemaking requirements of public notice and comment. In basing its denial of the District's permit on this section, the Agency has misinterpreted and misapplied the regulation and has relied upon an unpromulgated rule in violation of the Illinois Administrative Procedures Act. Id., citing *Illinois Ayers Oil Co. v. IEPA,* PCB 03-214, slip op. at 15-16 (Apr. 1, 2004). "Unless a rule is promulgated in conformity with the APA, 'it is not valid or effective against any person or party and may not be invoked by an administrative agency for any purpose.'" Id., citing *Sparks & Wiewel Construction Co. v. Martin,* 250 Ill. App. 3d 955, 967, 620 N.E. 2d 533, 542 (4th Dist. 1993).

In summary, the District has met its burden of showing that the stated basis in the denial was incorrect, not supported by the Record and exceeded the authority of the Agency. The Agency denial does not comply with Section 39 and should be overturned.

B. The references to Sections 12(a) and 39 of the Act in the Denial are not proper bases for denial.

1. The Agency improperly alleges that the references to Sections 12 and 39 independently support the denial of the District's Permit Application.

The Agency has misapplied Illinois law in its interpretation of Sections 12 and 39 of the Act, 415 ILCS 5/12 and 39, as independent bases for denial of the District's permit. Section 12 is boilerplate and does not support the Agency's decision to deny the requested permit modification. The District is raising this argument although it is aware that the Board has previously refused to accept it in *City of Joliet v. Illinois Environmental Protection Agency*, PCB 06-023 Slip Op. at 23 (May 7, 2007). In the *Joliet* case, after finding that Joliet had shown that the specific cited basis for the denial was not proper, the Board nevertheless refused to accept Joliet's argument regarding boilerplate stating that "the Board cannot simply ignore it, picking and choosing which words to give effect". (Id.) In the *Joliet* case the Board went on to presume a meaning absent any other apparent explanation. (Id.) No one from the Agency appeared at the *Joliet* hearing and thus no one from the Agency was available to testify. This was not the case in the present appeal where both the permit engineer and his supervisor attended and were called as witnesses by the District.

Contrary to the State's assertion that Sections 12(a) and 39 represent an independent determination that the proposed basin would cause water pollution, the paragraphs citing to these statutory sections are routinely included in IEPA denial letters as "stock language", according to Mr. Burba. (Tr. at 190). Ms. Dragovich, who is Mr. Burba's supervisor, agreed that the citation of these provisions is a boilerplate denial. (Tr. at 199-200). By definition, boilerplate is "uniform language used normally in legal documents that has a definite, unvarying meaning in

the same context that denotes that the words have not been individually fashioned to address the legal issue presented." *See,* http://legal-dictionary.thefreedictionary.com/Boilerplate. Such language does not connote a decision based on a review of the facts and evidence presented and, therefore, is not a proper basis for denial of the District's permit application.

2. If the Board does not accept that references to Section 12(a) and 39 are boilerplate, there exists a rational basis that they do not constitute a finding of discharging contaminants that would cause water pollution.

If the Board continues to reject the direct testimony of the Agency Permit Section personnel, there nevertheless is a rational basis to support the District's argument. Section 12 contains two prohibitions. The first is that alleged by the State which is that no one can discharge contaminants that pollute the water. The second prohibition is that no one can cause a violation of the Act or a regulation or standard adopted by the Board.

The previous Board decision in *Joliet* is not controlling on this point. In the *Joliet* case discussed above the Agency specifically referred the MOA as the basis for denial. The Board held that the MOA was not a proper basis for a permit denial because it was not a regulation or standard. In this case, the Agency cites two provisions of Section 370 as the basis for the denial.

Contrary to the denial in *Joliet*, the present denial letter clearly states that the District's application does not show that Section 370 is going to be met. This is a regulation or standard adopted by the Board. Section 12(a) prohibits violation of any regulation or standard adopted by the Board. Section 39 likewise can be read to preclude the Agency from issuing a permit where the applicant has not shown compliance with such regulations or standards. Reference to 35 Ill. Adm. Code 309.241(a) states the basis for issuing required permits and repeats the statutory prohibition of violating the Act or the Water Pollution Regulations. Since the Agency specifically cites that the District's application does not show that the basin would comply with

two subparts of Section 370, reading the denial in this matter is a proper interpretation that does not require the Board to presume an issue of discharging contaminants that would result in water pollution. And since, as established above, Section 370 does not apply to the proposed basin, there remains no proper basis for the Agency's denial of the District's permit application.

3. IEPA misapplied the statutory definition of water pollution.

For argument's sake, assuming that the Board accepts the Agency's position that Sections 12(a) and 39 of the Act independently apply in this case, the Record shows that the Groundwater Section's insistence that the District prove non-degradation, not valid concerns about the release of contaminants and their possible impact, controlled the review and ultimately the denial. The Agency is prohibited by those two cited Sections of the Act from issuing a permit for any facility that would threaten, cause or allow the discharge of contaminants which might cause water pollution in Illinois. Section 3.545 of the Act defines water pollution as "such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life." 415 ILCS 5/3.545.

Rather than apply the foregoing definition in its review of the District's permit application which included the Preliminary Engineering Report as well as Mr. Huff's June 2011 letter explaining why the proposed flow equalization basin would not in fact cause any environmental problem, the State is apparently arguing that somehow this statutory definition can be ignored and they can ignore facts because this case involve is something that is "*per se*"

water pollution. Water pollution *per se* is not a permissible application of the standard, and is not supported by the actual record in this appeal.

Despite the IEPA's attempt to hide this issue from consideration, it is clear that the Groundwater Section applied its own standard, stating that water pollution is anything that increases the contaminant levels of the receiving waters above existing conditions, and that this is prohibited. (Tr. at 141). This standard clearly varies from the plain language of the statutory definition of water pollution and does not comport with a plain meaning interpretation of that definition. In basing its denial of the District's permit on this standard, the Agency has misinterpreted and misapplied Sections 12 and 39 of the Act. If the correct definition were applied to the District's proposed basin permit application, water pollution would not be an issue.

A review of the Record coupled with the transcript from the hearing shows that the District has proven the negative by showing that its flow equalization basin will not cause water pollution as shown by both the Preliminary Engineering Report and Mr. Huff's June 2011 letter. Mr. Huff testified at the permit appeal hearing that the permit application used very conservative assumptions to address the Agency's concerns about impacted groundwater and concluded that the Class 1 groundwater standards would be achieved 25 feet from the proposed flow equalization basin, in compliance with Illinois requirements. (R. 168, Tr. at 139 and 141). These conservative assumptions assumed six inches per day for two days, or one foot of infiltration over 7.67 acres, which yields a maximum calculated 2.4 million gallons possible infiltration. (Tr. at 143). He explained at the hearing that the information in the application shows that the infiltration rate is a function of the hydraulic head caused by the difference in elevation between the Rock River and the proposed basin. Under low Rock River levels coupled with an excessive wet weather event necessitating use of the basin, the infiltration will flow

toward the River. With such an excessive wet weather event it would be reasonable that the River's elevation will become higher than that of the basin, causing a significant portion of the water infiltrated out of the basin to reverse direction and leach back into the basin. (Tr. at 143, 146). In fact, the 2.4 million gallons that was predicted to exfiltrate would re-infiltrate back into the basin. (Tr. at 141-146). The water that is hydraulically pushed back into the flow equalization basin would then be captured and pumped to the wastewater treatment plant for treatment. Thus, there would be no impact upon the Rock River in violation of Illinois water quality standards.

At times of low flow in the Rock River, any contaminants that might exfiltrate from the proposed basin would be reduced in concentration by the natural filtration provided by the soils and wetland plants in the basin, thereby further mitigating any concerns about pollution of the groundwater or the Rock River from this source. (Tr. at 145, 150-151 and 162-165). Mr. Buscher testified that he did not have any issue with this testimony by Mr. Huff. (Tr. at 229-230).

To qualify as water pollution under the statutory definition, a contaminant discharge must interfere with the use of the water. Ms. Dragovich testified that the Agency's concerns about leaking from the unlined equalization basin containing untreated wastewater were those concerns expressed in Ms. Willhite's email to Mr. Harsch (Tr. at 107-198). As set forth in Mr. Huff's June 2011 letter that he discussed in his testimony, the District fully responded to these stated concerns and the information was submitted with the permit application. (Tr. at 131 and 150). In the case of the proposed flow equalization basin, the groundwater beneath it is already unfit for public use due to the presence of a Superfund VOC plume. (Tr. at 126 and 140). The surrounding area is served by a public water supply and there are no private wells. (Tr. at 140).

Indeed, the specific property where the basin would be located is owned by the District, which has no intention of installing a water supply well on the property. It is uncontroverted that the groundwater standards will be met by 25 feet from the basin. The District has shown that there is no possible use of the groundwater that might be impacted or impaired by infiltration from the basin. There is nothing in the Record that shows the Agency had any concern over the impact that infiltration into the groundwater will have any impact on the Rock River. Indeed the Record contains documentation that there will be no impact on the Rock River. Therefore, the Record established that any contaminant that might be discharged into the groundwater during the two possible days of use on average per year of the proposed basin will not cause water pollution as defined in 415 ILCS 5/3.545.

VII. CONCLUSION

As the Record shows, the District submitted information that neither Section 12 or Section 39 of the Act would be violated by issuance of the Construction Permit. The Agency decision to deny the application is in fact based upon the Groundwater Section's improper application of the anti degradation rule. The Groundwater Section's insistence that the District must show compliance that the proposed basin will not result with their interpretation of the anti-degradation rules is also improper de facto rule making for the same reasons set forth in Section VI.,A 3 at pages 23 and 24.

In making its determination, the Board's review is limited to the record that was before the Agency when it made the decision. *415 ILCS 5/40(e)(3)(2007)*; *Citizens Utilities Company v. Illinois Environmental Protection Agency,* PCB 85-140 (Slip. Op. 3, March 9, 1989). This means that the District is limited to what is in the record and, likewise, so is the IEPA.

The permit review record is replete with evidence presented by the District, including but by no means limited to that discussed above, demonstrating that the proposed flow equalization basin will have no impact on groundwater or surface water, and that it will not cause water pollution as defined in the Illinois Environmental Protection Act. The District has been working with the Agency to resolve various issues including overflows, has conducted agreed-upon updates of its treatment system, submitted a facility plan, and obtained loans from IEPA to do work including the project at issue here to address the remaining possibility of sewer overflows that have occurred at the treatment plant. All of these efforts have been documented through submittals to IEPA, and excerpts of those submittals were provided to the Agency with the permit application. During this normal project review process prior to submission of the application, the District responded to any concerns raised by the Agency with in-person meetings and conference calls, as well as evidence and documentation demonstrating that ground and surface water standards will be met.

By contrast, the Record is oddly devoid of evidence indicating how the Agency evaluated this permit application and how it reached the conclusions regarding the alleged environmental impact of this proposed basin. There is nothing in the permit review Record to support the stated concerns by Respondent that the District will cause pollution in the Rock River as stated in the opening statement. The Agency's denial letter contains a bald statement that Section 370.930 applies to this project. In testimony, the Agency freely admits that this rule does not apply, yet there is nothing in the Record to show how this determination was made. The permit review record is also devoid of any evidence supporting the Groundwater Section's use of its own interpretation of the anti-degradation standards rather than the statutory definition of water pollution in determining the impact of this project on either groundwater or the Rock River.

This lack of documentation in the Record means either: the Agency did not file a complete record of everything considered during the permit review process, or the Agency did not consider (or failed to document its consideration of) such information as part of the permit review process. In either case, the Agency denial cannot be upheld by relying upon any factors or issues that are not fully documented in the Record. Nor does a reference to "*per se* water pollution" supply the missing support for the denial.

As set forth above, the Agency may deny a permit application when the denial is necessary to accomplish the purpose of the Act. Here, the Agency denied the District's application for a permit, but this denial was not supported in the record before them. In fact, the opposite was true: the District's experts responded to the Agency's stated concerns and there is substantial information in the Record to show that the permit it requested was protective of human health and the environment. However, inexplicably, the Agency chose to ignore the sound scientific evidence in the Record, and it denied the District's permit request based on regulations that are not applicable to the flow equalization basin and based upon the continued interpretation of the non-degradation rules by the Groundwater Section in direct disagreement with a previous interpretation by the Board. The denial of this application is also inconsistent with prior long standing Agency permitting or approval of other projects which result in increased concentration of contaminants in groundwater.

For these reasons, the Board should find that IEPA inappropriately denied the District's request for a permit. The record reflects that the District proved that the requested permit would not cause a violation of the Act and, therefore, the Board should overturn the Agency decision to deny the application.

Respectfully Submitted,

ROCK RIVER WATER RECLAMATION DISTRICT

Roy M Harsch

By its attorney

Date: January 24, 2013

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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing **Petitioner's Post Hearing Brief** were delivered via electronic mail and first class, on **Thursday, January 24, 2013** to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing Petitioner's Post-Hearing Brief was hand delivered to the following on Thursday, January 24, 2013.

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THIS FILING IS BEING SUBMITTED ON RECYCLED PAPER

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