

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.	)	

**NOTICE OF ELECTRONIC FILING**

PLEASE TAKE NOTICE that on the 15th day of February, 2013, the undersigned filed its Response to Petitioner's Post Hearing Brief, by electronic filing. A true and correct copy of the same is attached hereto, and a copy submitted via email.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

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**RESPONSE TO PETITIONER'S POST HEARING BRIEF**

Respondent, Illinois Environmental Protection Agency, hereby submits its Response to Petitioner's Post Hearing Brief.

**I. Introduction**

The Board's review of the permit denial in this appeal is a simple matter. The Rock River Water Reclamation District (the "District") carries the burden of proving that granting its April 6, 2012 permit application for construction of a municipal wastewater excess flow basin (the "Permit Application") will not cause or threaten or allow the discharge of any contaminants in violation of Section 12 of the Illinois Environmental Protection Act (the "Act"). The uncontested facts in the record reveal that the proposed excess flow basin will introduce as much as two million (2,000,000) gallons of untreated municipal wastewater, a contaminant, into waters of the State over a forty-eight hour period, at least once per year. The Illinois Environmental Protection Agency ("Illinois EPA") determined the introduction of this contaminant, untreated municipal waste water, into the waters of the State would create a violation of Section 12 of the

Act. This determination is clearly stated in Illinois EPA's August 1, 2012, letter denying the District's permit application (the "Denial Letter").

On appeal, nothing in the record, hearing testimony, or the District's Brief controverts the simple fact that the discharge of untreated municipal waste water into the waters of the State will create a violation of Section 12 of the Act. Therefore, the District cannot meet its burden, and Illinois EPA's denial must be affirmed.

## **II. Background**

The District's concept of a constructed wetland to serve as the excess flow basin for untreated municipal wastewater was generally received as a good idea. Unfortunately, due to the fact that the proposed basin is unlined, the design submitted for the constructed wetland excess flow basin in the Permit Application will cause as much as two million gallons of untreated municipal wastewater to leak from the basin and discharge into waters of the State. Upon review of this design, the Illinois EPA requested that the District include the necessary water pollution control measures in the design of the excess flow basin, i.e., a liner for the basin to prevent leaking. The District chose to disregard the water pollution control measures requested by Illinois EPA. The District's refusal to include the requested pollution control measures, a liner on the basin to prevent leaking, required the Illinois EPA to deny the Permit Application. A review of the facts in the record follows.

### **A. Rock River Water Reclamation District**

The District is a regional wastewater collection and treatment agency. (Pet. Brief at 3). A significant portion of the District's sanitary system is over 80 years old. (Hearing Trans. p.35 at

20-21). The District presently operates its municipal wastewater treatment works pursuant to NPDES Permit No. IL0027201, which allows for two discharge outfalls and requires that the District monitor its influent wastewater for 23 contaminant parameters. (Res. Ex. 3). The age of the District's infrastructure, and the way it was designed, create excess flow issues for the District, which has historically caused the sewer system to back up and overflow. (Hearing Trans. p. 36 at 21).

B. 2002 Violation Notice.

In June, 2002, the District experienced two overflow events where wastewater backed up and overflowed onto the land and into the storm sewers that discharge directly to the Rock River. (Pet. Ex. 5, and the Violation Notice). On September 13, 2002, the Illinois EPA issued Violation Notice W-2002-00140 (the "VN") to the District. (Pet. Brief p. 4). The VN addressed these overflows of the District's sanitary sewers onto the land and into the storm sewers leading to the Rock River. (Pet. Ex. 5). On November 27, 2002, the District submitted a proposed Compliance Commitment Agreement ("CCA") in response to the VN. (Id.). The Illinois EPA accepted the proposed CCA, which required, in part, that the District complete an engineering assessment of the sanitary sewer system to verify the ability to handle a ten-year storm event and identify areas that need to be corrected to enable the District to handle the influent flow volume during a ten-year storm event. (Pet. Ex. 2).

C. Proposed Constructed Wetland Excess Flow Basin Design

The CCA assessment determined that the District would need to construct an excess flow basin to temporarily hold untreated municipal wastewater during high rain events. (Hearing

Trans. pp. 38-39). It was determined in this investigation that during high rain events a peak flow rate at the treatment plant could reach 145 million gallons per day, far exceeding the treatment plant's capacity of 80 million gallons per day. (Hearing Trans. p. 39 at 10-15).

Following the determination that an excess flow basin was necessary, the District began a review of possible plans for construction of the basin. (Hearing Trans. p. 40 at 12-14). The District retained Clark Dietz, Inc.; Mr. James Huff, Senior Vice President of Huff & Huff, Inc.; and Orchard Hiltz & McCliment, Inc., (the "Design Team") to design the excess flow basin project. (Hearing Trans. p.90 at 15-18).

The Design Team settled on the novel concept of a constructed wetland type of basin for the excess flow basin project. (Pet. Ex. 2 p.3). The key elements to the excess flow project include a pump station and a twenty-five million gallon excess flow storage basin. (Hearing Trans. p. 92 at 11-15). The design of the excess flow system calls for the pump station to draw off influent flow of untreated municipal wastewater before it arrives at the District's treatment plant. (Pet. Ex. 2 p.3; and Hearing Trans. p. 58 at 10 – p. 59 at 11). The pump diverts the untreated municipal wastewater to the basin, where it will sit on native soils until the treatment plant has the capacity to receive this raw sewage, which can be as long as forty-eight hours. (Hearing Trans. p. 92 at. 11-22).

Members of the Design Team testified that the municipal wastewater flowing to the excess flow basin received no treatment, other than passing through a screen at the pump. (Pet. Ex. 2, p. 4; Pet. Ex. 1, p. 9; Hearing Trans. p. 161 at 6-20). Indeed, Mr. Gregory Droessler of Clark Dietz, Inc., the project manager for the Design Team, testified that the excess flow basin is really just a "wide section of the pipe" through which the untreated wastewater passes before reaching the treatment works:

- Q. Good morning, Mr. Droessler. If you could refer to page 4 of your written (Page 105) testimony, please. In the bottom, second-to-last paragraph, you state that this -- the excess flow basin as proposed in the permit application does not provide any level of treatment of organic matter. Am I reading that correctly?
- A. Yes.
- Q. So any waste that were to escape this basin through, you know, infiltration of the groundwater would be untreated wastewater, correct?
- A. As defined, we have not designed any level of treatment.
- Q. So that would be a correct statement on my behalf, that it would be untreated wastewater?
- A. In my opinion, yes.
- Q. And you go to great length to state that this is not a waste stabilization pond or an aerated lagoon. How would you define this pond?
- A. In my opinion, this pond is merely a wide spot in the pipe, if you will. It's (Page 106) basically allowing us to temporarily store this flow and then bring it back for treatment through the treatment facility.
- Q. Does the water flow through the pipes unlined? There's no pipe; it just flows through the ground?
- A. No. Each pipe has either clay or concrete or PVC material, yet they all leak, the same as this basin would.
- Q. So you're saying this basin would leak at the same rate as proposed as it would if it was proposed with a concrete liner?
- A. No, sir.
- Q. Or a PVC liner?
- A. No. I'm simply stating that each of those would leak.
- Q. But not at the same rates?
- A. Correct.

Q. If you could prevent those pipes – let me rephrase this. If you could design a system where those pipes leaked at a lower rate or no rate, would that be preferable? (Page 107)

A. Yes. (Hearing Trans. p. 104 at 13 – p. 107 at 1).

The untreated municipal wastewater stored in the basin, like the influent in the sewer lines, contains contaminants including, but not limited to, human waste, suspended solids, oils, grease, and ammonia-nitrate. (Rec. p. 4-10). The Design Team's own calculations reveal that, given the porosity of the native soils and high water table beneath the proposed basin, as much as two million (2,000,000) gallons of untreated municipal wastewater will leak from the excess flow basin into the groundwater during each forty-eight hour storage period. (Rec. 189-193)<sup>1</sup>.

Even with the knowledge that the basin would leak untreated municipal wastewater, and its constituent properties, into the groundwater, the Design Team chose not to utilize a liner of any type to seal the excess flow basin. The bases stated for the decision not to use a liner to prevent water pollution include: the cost savings, and the feasibility for this specific location. (Hearing Trans. p. 44 at 2-8).<sup>2</sup>

D. Discussions Between the District and Illinois EPA leading up to the Permit Application.

Mr. Huff had an initial meeting with Mr. Allen Keller, Manager of the Permit Section of the Bureau of Water Pollution, in the summer of 2010, to discuss the wetland type excess flow basin. (Hearing Trans. p115 at 4-12). According to Mr. Huff's testimony, Mr. Keller relayed to

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<sup>1</sup> Considering the pipe to the excess flow basin is a point source, the discharge of two million gallons of untreated municipal waste may be a violation of the District's NPDES permit. However, this question is not before the Board at this time.

<sup>2</sup> Petitioners brief, at page 6, discusses a cost analysis of installing a liner to seal the excess flow basin if this specific site were to be used. However, no citation to the record or the hearing transcript was provided.

him at this 2010 meeting that a wetland type excess flow basin may be possible. (Hearing Trans. p. 115 at 11-13).<sup>3</sup>

Following Mr. Huff's meeting with Mr. Keller, the Design Team was assembled and began a preliminary engineering report for the constructed wetland design of the excess flow basin described above. (Hearing Trans. p. 115 at 13-23). The District set a meeting with Mr. Keller for March 10, 2011, to discuss the preliminary engineering report for the excess flow basin. (Rec. p. 21).<sup>4</sup> During the meeting, Mr. Keller informed the Design Team that the Illinois EPA's Groundwater Section would need to review the preliminary engineering report and provide comments. (Pet. Ex. 1 p. 4). The preliminary engineering report was submitted to the Groundwater Section on March 14, 2011. (Rec. p. 155). The preliminary engineering report was reviewed by Bill Buscher and Amy Dragovich, with the Illinois EPA Division of Water Pollution Control, and comments were provided in a memorandum from Mr. Buscher April 11, 2011 (the "Buscher Memo"). (Rec. 164-174).

The Buscher Memo addresses water pollution concerns, groundwater monitoring and the applicability of non-degradation requirements of 35 Ill. Adm. Code Part 620 relating to the design of the constructed wetland model for the District's excess overflow basin. (Rec. 168-169). More specifically, the Buscher Memo discusses the need for a seal, or "liner", to prevent or slow the rate at which untreated municipal wastewater would leak from the excess flow basin into the groundwater. (Id.) Referencing the standards for similar holding basins, the Buscher Memo requests that the District provide a 2 foot minimum thickness compacted clay layer, or similar material in order to assure protection of the groundwater under the excess flow basin.

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<sup>3</sup> Mr. Keller did not present any testimony in this matter and any assertion of Mr. Keller's positions in this matter are the hearsay testimony of Mr. Huff.

<sup>4</sup> The March 10, 2011, meeting minutes, prepared by the District's design team, are in the record at pages 152-154.



(Rec. 169). Further, the Buscher Memo requests that the District prepare a groundwater monitoring plan for contaminants listed in an addendum to the Buscher Memo. (Rec. 174). The contaminants listed generally mirror the wastewater influent contaminants the District is required to monitor and report to the Illinois EPA by its NPDES permit. (Rec. 174; Res Ex. 3 p. 6-7). The Buscher Memo was delivered to the Design Team on April 22, 2011. (Rec. 166).

Following delivery of the Buscher Memo, a second meeting between the Design Team and the Illinois EPA took place on June 6, 2011. (Rec 181). At the hearing Mr. Huff offered testimony regarding the June 6, 2011 meeting. (Hearing Trans. p 122-23). According to Mr. Huff's testimony, he and Mr. Buscher discussed the applicability of the non-degradation standards, the possibility that the District might apply for creation of a groundwater management zone, and the feasibility of the installation of a liner for the excess flow basin at its proposed location. (Id.).

On June 28, 2011, Mr. Huff submitted a letter to the Illinois EPA (the "Huff Letter") addressing the Buscher Memo. (Rec. 189-193). In addressing the concerns of the Buscher Memo, the Huff Letter provides calculations for the volume of untreated municipal waste water that will leak from the excess flow basin and discharge into the groundwater. (Id.) The Huff Letter states, as referenced above, that during a forty-eight hour period of use, the proposed excess flow basin will leak two million (2,000,000) gallons of untreated wastewater during its use in a high rain event. (Id.).

On April 6, 2012, the District submitted its Permit Application package to the Illinois EPA. (Rec. 216-839). The design submitted to the Illinois EPA did not include water pollution controls to prevent the basin from leaking, and did not include the groundwater monitoring program requested by Illinois EPA. (Id.).

E. August, 2012, Denial of the Permit Application.

Following receipt of the Permit Application, the Illinois EPA issued the Denial Letter.

(Resp. Ex. 1). In the Denial Letter the Illinois EPA states:

Sections 12 and 39 of the Environmental Protection Act (Act), 415 ILCS 5/12 and 39, prohibit the Agency from issuing a permit for any facility which would threaten, cause or allow the discharge of contaminants which might cause or tend to cause water pollution in Illinois. (Resp. Ex. 1).

The Denial Letter continues, stating that “[i]n addition to the Sections for the Act cited, the permit does not fulfill the requirements of 35 Ill. Adm. Code 309.241.” (Resp. Ex. 1). Further, the Denial Letter states that a seal is required for the bottom of the excess flow basin, and provides the construction standards for this seal by reference to Section 370.930(d)(2)(D) of the Illinois Recommended Standards for Sewage Works. (Id.). The Denial Letter cites the absence of this seal as a specific reason why requirements of the Act will not be met. (Id.). Finally, the Denial Letter references that an appropriate groundwater monitoring system must be proposed in accord with 35 Ill. Adm. Code 370.930(b)(4). The Denial Letter does not reference the non-degradation requirements of 35 Ill. Adm. Code Part 620.

The Denial Letter also affords the District the opportunity to resubmit the application with corrections to the deficiencies noted in the Denial Letter. (Id.). The District did not resubmit the Permit Application, and this appeal followed. On November 28, 2012, a hearing was held in this matter before the Board.

### **III. Argument**

A. The District Has Not Met its Burden of Proof.

The District, as permit applicant, carries the burden of showing that approval of the Permit Application for the construction of the excess flow basin would not cause or threaten to

cause a violation of Section 12 of the Act or the Board's water quality regulations. *Alton Packaging Corp. v. Pollution Control Board*, 162 Ill.App.3d 731, 736 (Ill. App. 5<sup>th</sup> 1987). Upon appeal to the Board from the Illinois EPA's denial of the Permit Application, the burden of proof is again with the District. *Id.*; citing *Environmental Protection Agency v. Pollution Control Board*, 118 Ill.App.3d 772 (1983). To carry its burden, the District must demonstrate that all of the reasons for denial detailed in the Denial Letter are inadequate to support a finding that approval of the Permit Application would cause or tend to cause a violation of the Act. *Jack Pease v. Illinois Environmental Protection Agency*, PCB 95-118 (May 18, 1995).

Here, the Illinois EPA bases its denial of the Permit Application on Section 12 of the Act, and specifically on the District's failure to prove that approval of the Permit Application for the excess flow basin would not "threaten, cause or allow the discharge of contaminants which might cause or tend to cause water pollution in Illinois." (Resp. Ex. 1). The Denial Letter also states that violation of Section 12 of the Act will occur, in part, because the proposed design for the excess flow basin does not contain a seal, or liner, to prevent water pollution. As outlined above, the record reveals that absent a seal on the excess flow basin, the basin will leak as much as two million (2,000,000) gallons of untreated wastewater into the groundwater during a high rain event. Thus, it is the District's burden to demonstrate that the discharge of two million gallons of untreated wastewater, a contaminant, into the groundwater will not cause or tend to cause a violation of Section 12 of the Act.

This leaves two very basic questions for review: 1) will the discharge of untreated municipal wastewater into the groundwater cause or threaten to cause water pollution; and 2) did the Illinois EPA's Denial Letter properly identify the basis for its denial of the Permit

Application as a potential violation of Section 12 of the Act. The answer to each of these questions is, unequivocally, yes.

B. The Discharge of Two Million Gallons of Untreated Municipal Wastewater into the Groundwater Will Cause a Violation of Section 12 of the Act.

The District argues that the introduction of untreated municipal wastewater into the groundwater beneath the proposed basin cannot be water pollution because “to qualify as water pollution under the statutory definition, a contaminant discharge must interfere with the use of the water.” (Pet. Brief at 29).<sup>5</sup> The District argues that because the untreated municipal wastewater discharges into groundwater that is already contaminated by a Superfund VOC plume, and because the groundwater in the plume is not presently being used, then no water pollution can occur. Essentially, the District’s appeal relies on this proposition: if waters of the State are contaminated, and if the contaminated waters are not presently in use, the discharge of additional contaminants cannot be water pollution. This self-serving assertion is unsupported by any statute or case law.

The proper definition and interpretation of water pollution can be found in the Act and case law interpreting the Act. Section 12(a) of the Act states:

No person shall . . .

(a) cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act. 415 ILCS 5/12(a) (2010).

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<sup>5</sup> The District completely misstates the record on page 28 of its Brief, asserting that Illinois EPA takes the position “that water pollution is anything that increases the contaminant levels of the receiving waters above existing conditions.” The citation to the Hearing Transcript in the District’s Brief, is to testimony of Mr. Jim Huff, not any member or agent of the Illinois EPA. This argument must be disregarded.

Water pollution is defined in the Act as follows:

“Water pollution” is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into 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 (2010).

Nothing in this definition remotely suggests that water pollution only occurs when a contaminant discharge interferes with the use of the water, as the District suggests.

In fact, an argument nearly identical to the District’s proposition was addressed, and rejected, by the Illinois Supreme Court in *Central Illinois Public Service Company v. Pollution Control Board*, 116 Ill.2d 397 (1987). In *Central Illinois*, the Central Illinois Public Service Company (CIPS) appealed a Board decision denying CIPS’ request for modification of standards for four groundwater contaminants. *Id.* at 408. CIPS argued that an adjustment of the groundwater standards would not result in water pollution, suggesting “that under the statutory definition no pollution has occurred unless actual harm to humans or crops will occur as a result of the contamination, and that thus there is no pollution if any harmful effects can be avoided by not using the water.” *Id.* at 409 (emphasis added). CIPS concluded its argument with the assertion that because there is not likely to be a need for the particular groundwater they would be using, no water pollution would occur. *Id.* The Supreme Court declined to endorse this definition.

Instead, the Supreme Court accepted the Board’s interpretation of the definition of water pollution that “there is no need to show that actual harm *will* occur, only that harm *would* occur if the contaminated water were to be used.” *Id.* at 409 (emphasis original). The Court agreed with

the Board's interpretation, expressly rejecting CIPS' assertion that water rendered unusable by prior contamination could not be further polluted by subsequent contamination. *Id.* at 410.

As demonstrated by *Central Illinois*, the proposition that water pollution only occurs if the discharged contaminants interfere with the water's use has been rejected by the Illinois Supreme Court. Applying the proper interpretation of "water pollution" to the present matter, it is clear the District's argument, and ultimately this appeal, must fail.

Further, the untreated municipal wastewater that will leak from the excess flow basin and discharge into the groundwater is a "contaminant" as that term is defined in the Act. The Act defines a "contaminant" as "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." 415 ILCS 5/3.165 (2010).

Here, the record reveals that the influent wastewater stored in the excess flow basin contains, at a minimum, human waste, suspended solids, grease, oil, and ammonia-nitrates. (Rec. p 4-10: Hearing Trans. 216 and 217). Clearly, the wastewater is a contaminant. In fact, the Illinois Appellate Court has found that wastewater containing suspended solids, oil and grease was properly determined to be "highly contaminated" wastewater. See *Allaert Rendering, Inc. v. Illinois Pollution Control Board*, 91 Ill.App.3d 153 at 155 (1980). Indeed, it is nonsensical to argue that untreated municipal wastewater is not a contaminant.<sup>6</sup>

Applying the proper definitions of "water pollution" and "contaminant" to the present matter, the record clearly supports Illinois EPA's determination that the excess flow basin will

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<sup>6</sup> 35 Ill. Adm. Code 301.425 of the Board Water Pollution Regulations defines Wastewater as "sewage . . . ." Sewage is named as a pollutant or contaminant under Federal statutes and regulations (*see*, 33 U.S.C. § 1362[6]; 36 C.F.R. § 327.9). It also falls within the definition of hazardous waste under Federal legislation (*see*, 42 U.S.C. § 6903[5][B] [defining hazardous waste as "a solid wastes, or combination of solid waste, which because of its quantity, concentration, or physical, chemical, or *infectious characteristics* may \* \* \* pose a substantial present or potential hazard to human health" (emphasis supplied) ] ). See *Inc. Vill. of Cedarhurst v. Hanover Ins. Co.*, 675 N.E.2d 822, 828 (1996).

cause or threaten to cause a violation of Section 12 of the Act. As previously discussed, the proposed excess flow basin will leak as much as two million (2,000,000) gallons of untreated municipal wastewater during a high rain event. Mr. Huff confirmed this calculation during his hearing testimony. (Hearing Trans. p. 207 at 18-23). This untreated municipal wastewater discharging to the groundwater is a “contaminant.” 415 ILCS 5/3.165 (2012). Groundwater is included in the definition of “waters”. 415 ILCS 5/3.550 (2010). Section 12(a) of the Act provides that no person shall “cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources.” 415 ILCS 5/12(a) (2010). “Water pollution” includes the discharge of any contaminant into the any waters of the State, as will or is likely to render the groundwater harmful or detrimental to public health, safety or welfare. 415 ILCS 5/3.545 (2010).

The District’s red herrings regarding background levels and the non-degradation standards cannot change the simple conclusion that the discharge of contaminated municipal wastewater into the groundwater is “water pollution” as defined by the Act, and supported by the Illinois Supreme Court’s interpretation of “water pollution.” Thus, it is indisputable that the excess flow basin would “threaten, cause or allow the discharge of contaminants which might cause or tend to cause water pollution in Illinois.” The discharge of untreated wastewater, or sewage, into the waters of the State is water pollution, and Illinois EPA’s denial of the Permit Application on the basis that it will violate Section 12 of the Act, is supported by the record.

C. The Denial Letter Properly Advised the District of the Agency's Basis for Denial

The District erroneously asserts that the Illinois EPA should not be allowed to argue that the Permit Application was denied for the potential violation of Section 12 and 39 of the Act. The District argues that because the language citing Section 12 and 39 of the Act is "boilerplate" the Board must ignore any consideration of this language.

This argument was conclusively rejected by the Board, in *City of Joliet v. Illinois Environmental Protection Agency*, PCB 09-25 (May 7, 2009).<sup>7</sup> In *City of Joliet*, the Board found that it cannot simply ignore the language of a denial letter, picking and choosing which words of the letter to give effect. *Id.* at 23. Whether or not the language in the denial letter being addressed in *City of Joliet* was "boilerplate" or not, was found to be of no moment when considering the reasons stated for denial. *Id.*

The District attempts to distinguish the *City of Joliet* matter from the present matter based on the fact that Mr. Don Burba and Ms. Amy Dragovich testified that the referenced language in the Denial Letter could be considered boilerplate. (Pet. Brief at 25). The testimony of Mr. Burba and Ms. Dragovich, however, is not a relevant distinction for this issue. Instead, as the Board held in *City of Joliet*, whether or not a language in a denial letter is boilerplate is of no moment, as the Board cannot simply ignore it.

Further, Mr. Burba and Ms. Dragovich each testified that the language was appropriately included in the Denial Letter. First, Ms. Dragovich testified that when a permit is denied for potential violations of Section 12 or 39 of the Act, the language utilized in the Denial Letter is sufficient. (Hearing Trans. p. 200 at 7-13). Likewise, Mr. Burba testified that the denial of a permit application for violations of Section 12 and 39 would not need anything more included other than the language found in the Denial Letter. (Hearing Trans. p. 194 at 20 – 195 at 6).

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<sup>7</sup> The District's Brief offers an incorrect citation to the referenced case. The correct citation is included here.



The Board is required to give effect to every word of the denial letter, and cannot simply ignore passages or pick and choose the words of the letter to give effect. *City of Joliet* at 23. Thus, the Illinois EPA may rely on, and the Board must consider, the Denial Letter's language referencing denial of the permit on the basis of Sections 12 and 39 of the Act.

D. The Regulations Cited in the Denial Letter are the Most Applicable Standards.

Finally, the District notes that the Denial Letter requests corrections to the design of the excess flow basin. The corrections requested by the Illinois EPA are the inclusion of a seal for the basin pursuant to Section 370.930(d)(2)(D) and a groundwater monitoring system pursuant to 370.930(b)(4) of the Illinois Recommended Standards for Sewage Works ("Standards"). These construction standards are found in the Standards under a section designated for a waste stabilization pond or an aerated lagoon. It is acknowledged by the Illinois EPA that the excess flow basin is not a waste stabilization pond or an aerated lagoon. (Hearing Trans. at 188).

The District argues that the Illinois EPA cannot rely on these standards for denial of the Permit Application, because they do not directly apply to the construction of an excess flow basin. Whether or not these standards are a basis for denial of the Permit Application is irrelevant considering the Permit Application was properly denied for its clear violation of Section 12 of the Act discussed above. However, reference to the Standards in the Denial letter was proper because the Standards offer guidance for the prevention of water pollution in the construction of a basin that will ultimately hold contaminated wastewater.

The design of a constructed wetland to serve as an excess flow basin is unconventional, and there are no specific regulations for its design or construction. Given that the purpose of the excess flow basin is to build a basin large enough to hold, and contain, the excess flow of

untreated wastewater, the Illinois EPA applied the most applicable construction standards. (Hearing Trans. p. 188 at 9 - 189 at 5). In fact, Mr. Burba performed a detailed review of the project, and after determining water pollution would occur absent a seal to contain the excess flow, he made the determination that the Standards were the most applicable water pollution control measures, even if the excess flow basin did not neatly fit the title of the Standards section. (Hearing Trans. p. 189-193).

The District provides no support for its contention that Illinois EPA is barred from applying by analogy a construction standard clearly on point with its proposed, unconventional excess flow basin. Moreover, no such argument can succeed. The Standards themselves contemplate Illinois EPA's review and selection of an appropriate standard. Section 370.110 of the Standards, 35 Ill. Adm Code 370.110 provides, in pertinent part:

Scope and Applicability

- a) These design criteria apply to conventional design concepts for wastewater collection and treatment systems. Where non-conventional concepts or approaches to collection and treatment, particularly for very small systems, are being considered, the Agency should be contacted for any design guidance that may be available. (emphasis supplied).

Here, Illinois EPA exercised its discretion in applying by analogy the design standard for waste stabilization and treatment ponds. Application of this standard is unquestionably reasonable as stabilization and treatment ponds serve essentially the same purpose as the excess flow basin proposed by the District: holding untreated wastewater for a period of time prior to sending the wastewater for final treatment. In addition, the two types of basins (if in fact they are considered different in any material respect) pose the same threat to the environment: the uncontrolled migration and contamination of groundwater in the vicinity of the basins. As

described by Mr. Burba, requiring a liner under the same standard is necessary for both designs to prevent them from leaking untreated wastewater (Hearing Trans. p 192 at 20 – p. 193 at 4).

The position urged by the District, that Illinois EPA can require no construction standard for sewage treatment facilities unless the structure falls into one of the “named” categories, is unsupportable and absurd. Under the District’s rationale, any regulated sewage treatment facility could avoid compliance with reasonable and necessary engineering and construction standards simply by designing a system in such fashion as to avoid fitting into a defined category. The Board must avoid such an absurd result, and Illinois EPA must be allowed reasonable discretion in application of the Standards to regulate sewage treatment facilities to ensure compliance with the Act and the Board Regulations.

#### **IV. Conclusion**

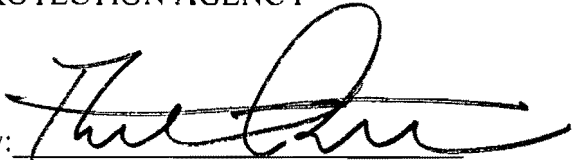
In this appeal, the District has the burden of demonstrating that approval of its Permit Application would not cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause a violation of Section 12 of the Act. The District fails to carry this burden.

The District submitted the Permit Application for construction of a wetland type excess flow basin to hold untreated municipal wastewater before it enters the District’s treatment works. The District characterized this wetland type of excess flow basin as a “wide section of the pipe” before the untreated wastewater enters the treatment plant. However, unlike the 1,100 miles of pipe that make up the District’s sanitary sewers, this basin will not be lined with concrete, PVC or clay, leaving it more akin to a broken section of the pipe.

The record and hearing testimony confirm that use of the unlined excess flow basin will result in the discharge of two million (2,000,000) gallons of untreated municipal wastewater into the groundwater during a high rain event. Following review of this design, Illinois EPA determined that the discharge of untreated wastewater into the groundwater will cause or tend to cause a violation of Section 12 of the Act. This finding is amply supported by the record and the proper interpretation of the Act discussed above. Accordingly, the Board must affirm the Illinois EPA's decision to deny the District's Permit Application.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: 

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCK RIVER WATER RECLAMATION )  
DISTRICT )  
) )  
Petitioner, )  
) )  
. v. )  
) )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY )  
) )  
Respondent. )

PCB No. 13-11  
(Permit Appeal-Water)

**CERTIFICATE OF SERVICE**

I, ROBERT PETTI, an attorney, do certify that I caused to be served this 15<sup>th</sup> day of February, 2013, the foregoing Response to Petitioner's Post-Hearing Brief, and Notice of Filing, upon the persons listed below, by electronic transmission and by placing same in an envelope bearing sufficient postage with the United States Postal Service located at 100 W. Randolph, Chicago Illinois.



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