

STATE OF ILLINOIS
Pollution Control Board

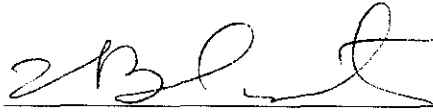
PCB 06-124
(NPDES Permit Appeal)

PCB 06-127
(NPDES Permit Appeal)

NOTICE OF FILING

Date: February 6, 2006

Respectfully submitted,



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**ATTORNEYS FOR RESPONDENT,
PRAIRIE STATE GENERATING COMPANY,
LLC**

CERTIFICATE OF SERVICE


The undersigned hereby certifies that copies of the foregoing **Notice Of Filing** have been deposited in the U.S. Mail, first class postage prepaid, this 6th day of February, 2006, in envelopes addressed to:

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FEB 08 2006

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRAIRIE RIVERS NETWORK and
SIERRA CLUB

Petitioners,

v.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY and PRAIRIE STATE GENERATING
COMPANY, LLC

Respondents

PCB 06-124

(NPDES Permit Appeal)

AMERICAN BOTTOM CONSERVANCY
and DALE WOJTKOWSKI,

Petitioners,

v.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY and PRAIRIE STATE GENERATING
COMPANY, LLC

Respondents

PCB 06-127

(NPDES Permit Appeal)

**RESPONDENT PRAIRIE STATE GENERATING COMPANY, LLC'S
MOTION TO DISMISS**

Respondent, Prairie State Generating Company, LLC ("Prairie State"), hereby moves the Board pursuant to 35 Ill. Admin. Code § 101.506 to dismiss the challenges made by Petitioners, Prairie Rivers Network, Sierra Club, American Bottom Conservancy, and Dale Wojtkowski, to the NPDES permit that is the subject of this proceeding ("Permit") based on the following issues:

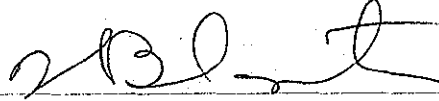
1. Whether the Permit unlawfully allows stormwater discharges before a stormwater prevention plan ("SWPPP") is prepared and implemented.

2. Whether the Permit unlawfully fails to contain necessary effluent limitations for the proposed discharge of stormwater and allows a proposed discharge pursuant to a SWPPP that has not been reviewed by the Illinois Environmental Protection Agency (“IEPA”) and on which the public has not been given an opportunity to comment.
3. Whether IEPA unlawfully did not consider the cumulative impacts on water quality from the entire “Peabody” project, including additional discharges not only from stormwater, but also from “the coal mine” and “the coal waste pile.”
4. Whether IEPA unlawfully failed to adequately consider the impacts to water quality, wildlife, recreation, public water supplies and other uses of the water from the intake of up to 30 million gallons of water per day from the Kaskaskia River by Prairie State and also failed to consider potential drought conditions.
5. Whether, in setting effluent limitations in the Permit, IEPA relied on assumptions related to minimum flows of the Kaskaskia River that failed to consider water withdrawals between the Venedy Station gauge and Outfall 001.

The grounds for this motion are that Petitioners’ challenges to the Permit based upon the issues identified herein are legally insufficient, in that Petitioners have failed to plead facts upon which the Board could conclude either (a) that the terms of the Permit violate the Illinois Environmental Protection Act, 415 ILCS § 5/1, et seq., or any applicable Board regulation or (b) that issuance of the permit by IEPA violated that statute or any applicable Board regulation, all as more fully discussed in Prairie State’s memorandum in support of this motion, filed herewith.

Date: February 6, 2006

Respectfully submitted,



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**ATTORNEYS FOR RESPONDENT,
PRAIRIE STATE GENERATING COMPANY,
LLC**

CERTIFICATE OF SERVICE

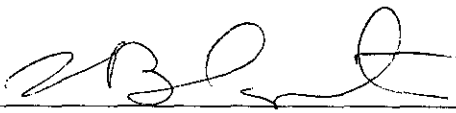
The undersigned hereby certifies that copies of the foregoing **Respondent Prairie State Generating Company, LLC's Motion To Dismiss** have been deposited in the U.S. Mail, first class postage prepaid, this 6th day of February, 2006, in envelopes addressed to:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
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PRAIRIE RIVERS NETWORK and
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ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY and PRAIRIE STATE GENERATING
COMPANY, LLC

Respondents

PCB 06-127
(NPDES Permit Appeal)

**MEMORANDUM IN SUPPORT OF RESPONDENT PRAIRIE STATE GENERATING
COMPANY, LLC'S MOTION TO DISMISS**

Respondent, Prairie State Generating Company, LLC ("Prairie State"), hereby submits its memorandum in support of Respondent Prairie State Generating Company, LLC's Motion to Dismiss ("Motion To Dismiss"), as follows:

I. INTRODUCTION AND OVERVIEW

On January 6, 2006, Prairie Rivers Network and the Sierra Club (collectively, “PRN/Sierra Club”) filed a petition for review of the December 5, 2005 decision of the Illinois Environmental Protection Agency (“IEPA” or “Agency”) to grant a National Pollution Discharge Elimination System (“NPDES”) permit to Prairie State (“Permit”), pursuant to 415 ILCS 5/40(e) (1998) (“PRN/Sierra Club Petition”). On January 8, 2006, American Bottom Conservancy and Dale Wojtkowski (collectively, “ABC”) filed a similar petition for review (“ABC Petition”). This Board consolidated the two cases on January 19, 2006.

Prairie Rivers Network, Sierra Club, American Bottom Conservancy, and Dale Wojtkowski (collectively, “Petitioners”) have attacked IEPA’s issuance of the Permit on several grounds. Among the issues raised by Petitioners are the following:

1. Whether the Permit unlawfully allows storm water discharges before a storm water prevention plan (“SWPPP”) is prepared and implemented. (PRN/Sierra Pet.¹ ¶ 7b; ABC Pet.² ¶ 7b.)
2. Whether the Permit unlawfully fails to contain necessary effluent limitations for the proposed discharge of storm water and allows a proposed discharge pursuant to an SWPPP that has not been reviewed by IEPA and on which the public has not been given an opportunity to comment. (PRN/Sierra Pet. ¶ 7c; ABC Pet. ¶ 7c.)
3. Whether IEPA unlawfully did not consider the cumulative impacts on water quality from the entire “Peabody project,” including additional storm water

¹ Prairie Rivers Network And Sierra Club Petition For Review Of A Decision By The Illinois Environmental Protection Agency, filed January 6, 2006.

² American Bottom Conservancy And Dale Wojtkowski Petition For Review Of A Decision by the Illinois Environmental Protection Agency, filed January 8, 2006.

discharges as well as discharges from “the coal mine” and “the coal waste pile.”

(ABC Pet. ¶ 7d.)

4. Whether IEPA unlawfully failed to adequately consider the impacts to water quality, wildlife, recreation, public water supplies and other uses of the water from the intake of up to 30 million gallons of water per day from the Kaskaskia River (“River”) by Prairie State and also failed to consider potential drought conditions. (ABC Pet. ¶ 7e.)
5. Whether, in setting effluent limitations in the Permit, IEPA relied on assumptions related to minimum flows of the River that failed to consider water withdrawals between the Venedy Station gauge and Outfall 001. (PRN/Sierra Pet. ¶ 7d.)

By its Motion To Dismiss, Prairie State challenges the legal sufficiency of Petitioners’ attacks on the Permit that raise these issues. In short, the Petitioners’ challenges are legally insufficient, for the following reasons:

- Petitioners’ general complaint that the Permit was issued prior to Prairie State’s preparation and implementation of an SWPPP fails because there is no legal requirement that the provisions of an SWPPP be included in an application for an NPDES permit.
- Petitioners’ more specific contention that IEPA’s failure to require the inclusion of the provisions of an SWPPP for the Facility as part of the Permit violates a requirement that the Permit contain all necessary effluent limitations for the Facility at the time of issue and that the public thereby has been denied its right to comment on the SWPPP fails because (a) an SWPPP does not contain any effluent limitations,

and (b) there is no legal requirement that the public be provided an opportunity to comment on a specific SWPPP prior to its development and implementation.

- ABC's complaint that the Permit does not address all discharges associated with activities directly and indirectly relating to the Prairie State facility to which the Permit applies fails because (a) ABC has failed to identify any provision of law allegedly violated by the Permit, and (b) the separate permitting process for each source of such discharges fully complies with Illinois law.
- ABC's contention that IEPA erred in issuing the Permit without adequately considering Prairie State's intake of water from the River under normal and drought conditions fails because (a) ABC again has failed to identify any provision of law allegedly violated by the Permit under such conditions, and (b) the Permit addresses those conditions in complete accordance with all applicable legal requirements.
- PRN/Sierra Club's contention that IEPA relied on assumptions related to minimum flows of the River that failed to consider water withdrawals between the Venedy Station gauge and Outfall 001 fails because (a) PRN/Sierra Club has failed to allege that this will cause the flow of the River to drop below 7Q10 levels,³ and (b) in any event, IEPA did consider these water withdrawals in its determination of the maximum allowable daily water withdrawal amount in Special Condition 1 of the Permit.

³ The 7Q10 flow value is the lowest stream flow for seven consecutive days that would be expected to occur once in ten years. See 40 C.F.R. § 721.91 (defining "7Q10" for purposes of computation of estimated surface water concentrations for significant new uses of chemical substances); 40 C.F.R. § 131.36 (defining "7Q10" for purposes of determining toxics criteria for those states not complying with 33 U.S.C. § 303(c)(2)(B)); EPA, NPDES Permit Writers' Manual: Chapter 6 — Water Quality-Based Effluent Limits (recommending a design upstream flow for chronic aquatic life criteria at 7Q10), available at http://www.epa.gov/npdes/pubs/chapt_06.pdf.

II. FACTS

The “facts” relevant to the issues addressed by Prairie States’ Motion To Dismiss are as follows:⁴

Prairie State plans to build an electric generating facility (“Facility”) in Lively Grove Township, Washington County, which is located approximately four miles east, northeast of Marissa, Illinois. The proposed Facility will generate electricity from steam-driven turbines, supplied by two coal-fueled boilers. The Facility will be a mine-mouth project, and will be constructed adjacent to the proposed Lively Grove Mine (“Mine”). (PRN/Sierra Pet. Ex. F at 3; ABC Pet. Ex. B at 3.)

The Facility is authorized to withdraw up to 30 million gallons of water per day from the River to be used in the coal-fired boiler units and recycled within the Facility for other operational purposes. (PRN/Sierra Pet. Ex. F at 3; ABC Pet. ¶¶ 4, 21; ABC Pet. Ex. B at 3.) This withdrawal has been authorized, subject to certain conditions, by the Illinois Department of Natural Resources (“IDNR”). (PRN/Sierra Pet. Ex. F at 6; ABC Pet. ¶ 4; ABC Pet. Ex. B at 6.) IDNR issued IDNR Permit No. DS2002134 (“Withdrawal Permit”) to Prairie State on September 17, 2002, and amended that permit on June 29, 2005. Additional conditions on this withdrawal are established by Special Condition 1 of the Permit, which mandates that Prairie State shall not withdraw water from the River “such that the river flow drops below the 7Q10 flow value as established by the Illinois State Water Survey for any single day . . . calculated based on the river flow value at the Venedy Station USGS gage [sic].” (PRN/Sierra Pet. Ex. E at 9; ABC Pet. Ex. A at 9.)

⁴ These statements of purported and actual fact are gleaned from Petitioners’ Petitions and the Exhibits thereto. They are provided to place Petitioners’ challenges to the Permit and the issues raised by Prairie State’s Motion To Dismiss in context solely for the purposes of that Motion To Dismiss. By setting forth this statement of “facts” herein, Prairie State does not waive, but hereby expressly preserves, its right to contest any and all assertions of purported fact advanced by Petitioners in the course of these proceedings.

There are ongoing withdrawals of water from the River between the Venedy Station gauge and Outfall 001. (PRN/Sierra Pet. ¶ 24.) There are also contributions to the River stream flow that occur downstream from Venedy Station, from tributaries entering the River. (PRN/Sierra Pet. Ex. F at 7–8; ABC Ex. B at 7–8.)

Facility operation will result in the average discharge of 1.7 million gallons of water per day into the River. In addition, overflow discharges into Mud Creek may occur during extreme wet weather events. (PRN/Sierra Pet. ¶ 4; ABC Pet. ¶ 5.)

On September 19, 2003, Prairie State submitted to IEPA an application for an NPDES permit that would authorize the necessary discharges from the Facility. (Prairie State NPDES Application, Transmittal Letter.) Beginning March 23, 2005, IEPA issued public notice of IEPA's tentative determination to issue an NPDES permit to Prairie State. (PRN/Sierra Pet. Ex. F at 2; ABC Pet. Ex. B. at 2.) In response to public requests for a hearing, IEPA held a public hearing on the draft permit at Marissa High School on May 11, 2005. Approximately 80 people attended the hearing. (PRN/Sierra Pet. Ex. F at 3; ABC Pet. Ex. B. at 3.)

On December 5, 2005, IEPA issued the Permit, which incorporates certain changes to the draft permit not relevant to the issues presented here. (PRN/Sierra Pet. ¶ 8; ABC Pet. ¶ 8.) The Permit authorizes only the discharges resulting from direct operation of the Facility and storm water discharges associated with that industrial activity. Finally, the Permit mandates that an SWPPP "shall be completed [by Prairie State] within 180 days of the effective date of this permit." (PRN/Sierra Pet. Ex. E at 12; ABC Pet. Ex. A at 12.)

III. ARGUMENT

A. Applicable Legal Standard

In this case, the Board must determine whether Petitioners have proven that the Permit will violate the Illinois Environmental Protection Act ("Illinois Act") or any applicable Board regulations.⁵ In Village of Lake Barrington v. IEPA, PCB 05-55 (April 21, 2005), the Board noted that "the petitioners in a third party NPDES permit appeal bear the burden of establishing that the permit as issued would violate the Act or Board regulations . . . [M]ere dislike is not sufficient to satisfy that burden. In this case, the Board finds that petitioners must establish that the permit issued to [the permit applicant] will violate the Act or Board regulations in order for the Board to find for the petitioners in this matter." Id. at 7. With respect to the issues that are the subject of the Motion To Dismiss, then, Petitioners bear the burden of proving that the Permit violates some provision of either the Illinois Act or an applicable Board regulation.

The Board's procedural rules provide that a party may file "motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board" within 30 days after service of the challenged document. 35 Ill. Adm. Code 101.506. A motion to dismiss challenges the legal sufficiency of the Petition by alleging defects on the face of the petition itself. When ruling on a motion to dismiss, the Board must take all well plead facts contained in the pleading as true, and must draw all inferences from those facts in favor of the non-moving party. Lone Star Indus., Inc. v. IEPA, PCB 03-94 at 2 (March 6, 2003); Jarvis v. South Oak Dodge, Inc., 201 Ill. 2d 81, 86, 773 N.E.2d 641, 644 (2002).

⁵ Prairie Rivers Network v. IPCB, 335 Ill. App. 3d 391, 401, 781 N.E.2d 372, 379 (2002) (upholding the Board's determination that a conservation group had the burden of proof in its third-party appeal of an NPDES permit issued to the permit applicant, noting that "a third-party petitioner must show that the permit, as issued, would violate the Act or the Board's regulations"); Prairie Rivers Network v. IEPA, PCB 01-112 at 9 (Aug. 9, 2001) ("As petitioner, Prairie Rivers bears the burden of proving that the permit, as issued, would violate the Act or Board regulations.") (emphasis in original); Village of Lake Barrington v. IEPA, PCB 05-55 at 6 (April 21, 2005) (citing Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (1987)).

B. SWPPP Issues

1. Failure to Include SWPPP in Permit Generally

Petitioners argue that IEPA should not have issued the Permit until an SWPPP had been completed. (PRN/Sierra Pet. ¶ 19; ABC Pet. ¶ 13.) However, Petitioners cite no provision of the Illinois Act or any Board regulation that generally prohibits IEPA from issuing an NPDES permit prior to completion of an SWPPP. Although Petitioners do cite the Illinois Act, 415 ILCS 5/12, and a number of Board regulations, as well as 33 U.S.C. §§ 1311 and 1342, in support of this contention (PRN/Sierra Pet. ¶ 25; ABC Pet. ¶¶ 17, 18), these statutes and regulations do not compel IEPA to require the submission of an SWPPP prior to issuing a storm water permit.

a. Not required by applicable federal and Illinois law

IEPA administers its NPDES permit program pursuant to the approval of that program by the United States Environmental Protection Agency (“USEPA”). See State of Illinois Program for Control of Discharges of Pollutants to Navigable Waters, 44 Fed. Reg. 58,566 (Nov. 10, 1977) (generally approving the Illinois NPDES permit program). As part of its program, IEPA must regulate storm water discharges from industrial activity in conformance with the applicable federal regulations. See 40 C.F.R. § 123.25(a)(9) (requiring state programs to be administered in conformance with 40 C.F.R. § 122.26). See also 415 ILCS 5/4(l) (designating IEPA as “water pollution agency for the state for all purposes” of the Federal Water Pollution Control Act (“Clean Water Act” or “CWA”), as amended). However, IEPA has promulgated no statutes or regulations that directly address the procedures or requirements for applications for storm water discharge permits.

In general, though, the Illinois Act provides that “it would be inappropriate and misleading for the State of Illinois to issue permits to contaminant sources subject to [the CWA],

as well as State law, which do not contain such terms and conditions as are required by federal law, or the issuance of which is contrary to federal law.” 415 ILCS 5/11(a)(4). Therefore, the federal regulations for storm water discharges provide guidance for such permits.

Under 40 C.F.R. § 122.26(c)(1), all dischargers of storm water associated with industrial activity must apply for an individual permit, or must seek coverage under a general permit.⁶ IEPA must regulate discharges from the Facility in conformance with this regulation, because “storm water discharge associated with industrial activity” is defined to specifically include discharges from steam electric power generating facilities. 40 C.F.R. § 122.26(b)(14)(vii). Here, IEPA required Prairie State to obtain an individual permit.⁷ The Permit is, in part, such an individual permit, and was properly issued in conformance with the federal regulations governing such permits.

⁶ The Illinois Act specifically authorizes IEPA to issue general NPDES permits:

The Agency may issue general NPDES permits for discharges from categories of point sources which are subject to the same permit limitations and conditions. Such general permits may be issued without individual applications and shall conform to regulations promulgated under Section 402 of the Federal Water Pollution Control Act, as now or hereafter amended.

415 ILCS 5/39(b). Pursuant to this authority, IEPA has issued general permits in conformity with 40 C.F.R. § 122.28(a)(2), which provides that general permits may be issued to regulate categories of discharges, including storm water point sources, and with 40 C.F.R. § 122.28(b), which provides that general permits may be issued in accordance with either the USEPA regulations contained in Part 124 or corresponding State regulations. See generally 40 C.F.R. pt. 124 (setting forth general procedures for decisionmaking, including procedures for permit application, issuance of a draft permit, notice, and public comment).

⁷ IEPA has issued two general storm water discharge permits pursuant to 40 C.F.R. § 122.28: General NPDES Permit No. ILR10, which authorizes storm water discharges from construction site activities; and General NPDES Permit No. ILR00, which authorizes storm water discharges from industrial activities. However, storm water discharges from the operation of the Facility cannot be authorized by either of these general permits.

First, General NPDES Permit No. ILR10 authorizes only storm water discharges from construction site activities. However, the storm water discharges at issue in this proceeding are discharges that will be associated with the operation of the Facility after construction is complete and after operation begins. Therefore, General NPDES Permit No. ILR10 does not apply to such discharges. (General NPDES Permit No. ILR10 does, of course, cover Prairie State’s construction site activities that will be involved in building the Facility.)

Second, General NPDES Permit No. ILR00 is not applicable to storm water discharges subject to the effluent limits in 40 C.F.R. Part 423. See General NPDES Permit No. ILR00 at 3. The Facility will be subject to the effluent limits in 40 C.F.R. Part 423, because those effluent limits apply to coal-fired electricity generating units that generate electricity for distribution and sale and employ a steam water system as the thermodynamic medium, 40 C.F.R. § 423.10, and the Facility contains such units.

Significantly, 40 C.F.R. § 122.26(c)(1)(i) does not require an application for a storm water discharge permit to include a completed SWPPP. Furthermore, no deadline for preparing an SWPPP appears in any of the other federal regulations to which IEPA's permit program must conform. See 40 C.F.R. § 122.21 (requiring compliance with 40 C.F.R. Part 124); 40 C.F.R. § 122.26 (requiring compliance with 40 C.F.R. § 122.21); 40 C.F.R. § 122.41 (listing conditions applicable to all NPDES permits); 40 C.F.R. § 122.44 (listing additional conditions applicable to all NPDES permits); 40 C.F.R. § 123.25 (requiring state programs to conform to certain statutes).

Rather, these regulations mandate only that an NPDES permit include conditions to ensure that the facility follows Best Management Practices ("BMPs"). See 40 C.F.R. § 122.44(k),⁸ 40 C.F.R. § 123.25(a)(15) (requiring state programs to be administered in conformance with 40 C.F.R. § 122.44). The Permit clearly contains such a condition. See PRN/Sierra Pet. Ex. E at 12 and ABC Pet. Ex. A at 12 (stating the condition that the permittee develop a storm water pollution prevention plan that ensures the implementation of practices which are to be used to reduce the pollutants in storm water discharges).

Furthermore, neither USEPA nor IEPA regulations even require submission of an SWPPP for review by the permitting agency; rather, the SWPPP is retained at the construction site. See USEPA, Storm Water Management for Industrial Activities, Developing Pollution Prevention Plans and Best Management Practices at 2-49 (Sept. 1992) ("Plans are required to be maintained onsite of the facility unless the Director . . . requests that the plan be submitted."); see also PRN/Sierra Pet. Ex. E at 12 and ABC Pet. Ex. A at 12 ("The owner or operator of the

⁸ ("[E]ach NPDES shall include conditions meeting the following requirements when applicable: . . . (k) Best management practices (BMPs) to control or abate the discharge of pollutants when: . . . (4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.").

facility shall make a copy of the plan available to the Agency at any reasonable time upon request.") (emphasis added).

This Board has previously held that allowing a permittee 180 days from the effective date of an NPDES permit to develop a similar plan is "not inconsistent with applicable regulations." Prairie Rivers Network v. IEPA, PCB 01-112 at 22-23 (Aug. 9, 2001) ("Black Beauty"). In that case, IEPA issued a permit that allowed the permittee 180 days to develop a plan for monitoring stream flow that would assure that a three-to-one dilution rate was achieved and thus would prevent violations of applicable water quality standards. The Board held that "the 180-day period provides a reasonable amount of time for [the permittee] to develop an appropriate plan to comply with the permit condition based on site-specific factors." Id. at 23. Finally, the Board concluded that the petitioner "failed to demonstrate that the terms of the permit . . . will cause a violation of the Act or of Board regulations." Id.

As in Black Beauty, Petitioners have failed to demonstrate that the terms of the Permit will cause a violation of the Illinois Act or any Board regulation. The Permit requires Prairie State to develop an SWPPP within 180 days of the effective date of the Permit. This will ensure that the SWPPP is completed years before the storm water discharges authorized by the Permit take place.

In addition, any storm water discharges associated with construction of the Facility must satisfy General NPDES Permit No. ILR10, which requires only that an SWPPP must be prepared for each construction site "prior to the start of the construction to be covered under this permit." See General NPDES Permit No. ILR10 at 4. Prairie State has not yet filed a Notice of Intent to be covered under this General Permit, as Petitioners observe. (PRN/Sierra Pet. ¶ 21.) But it also has not yet commenced construction of the Facility. Significantly,

Petitioners have not alleged that Prairie State plans to commence construction prior to filing such notice. In any event, Petitioners' reference to the requirements of General NPDES Permit No. ILR10 only confuses the issue — storm water discharges from the Facility construction site are not authorized by the Permit. Rather, such discharges will be authorized by the separate Illinois construction storm water general permit.⁹

b. Not required by Illinois and federal law cited by Petitioners

The federal statutes cited by Petitioners merely prohibit any person from discharging any contaminant into the environment except as in compliance with federal law or with the terms of an NPDES permit. See 33 U.S.C. § 1311 (noting that the discharge of any pollutant by any person shall be unlawful, except as in compliance with certain other sections of the Clean Water Act, including the NPDES permit provision); 33 U.S.C. § 1342 (authorizing the Administrator to issue a permit for the discharge of a pollutant upon the condition that the discharge meets all applicable requirements under the Act). These general provisions therefore authorize discharges pursuant to a valid NPDES permit so long as the discharge will comply with “such conditions as the Administrator determines are necessary to carry out the provisions” of the Clean Water Act. 33 U.S.C. § 1342(a)(1)(B). Nothing in the text of either 33 U.S.C. § 1311 or 33 U.S.C. § 1342 requires the preparation of an SWPPP prior to the time at which a permit is issued.

Likewise, the provision of the Illinois Act cited by Petitioner, 415 ILCS 5/12, simply provides that no person shall cause a discharge of any contaminant except as in compliance with state law or with the terms of an NPDES permit. See 415 ILCS 5/12(a) (providing that no person shall “cause or threaten or allow the discharge of any contaminants into the environment . . . so as to cause water pollution in Illinois . . . or so as to violate regulations or

⁹ Notably, Petitioners do not contend that Prairie State must obtain an individual permit that authorizes any storm water discharges from the Facility construction site.

standards adopted by the Pollution Control Board under this Act.”); 415 ILCS 5/12(f) (providing that no person shall “cause, threaten or allow the discharge of any contaminant into the waters of the state . . . without an NPDES permit for point source discharges . . . or in violation of any term or condition imposed by such permit.”). Nothing therein specifically requires that an SWPPP be completed prior to the time at which a permit is issued.

35 Ill. Adm. Code 309.141(d) requires only that the terms and conditions of an NPDES permit must ensure compliance with any more stringent limitation necessary to meet any applicable water quality standards. In other words, this regulation ensures that even those discharges that would otherwise comply with applicable effluent regulations will not violate more restrictive water quality standards.

However, completion of an SWPPP will not impose any such “more stringent limitations” on Prairie State’s discharge. First, Petitioners have presented no evidence that those discharges pursuant to the effluent regulations embodied in the Permit’s terms will violate a water quality standard, so this regulation does not apply. Moreover, the SWPPP, once completed, will not contain “more stringent limitations” regarding the allowable concentration of contaminants in Prairie State’s effluent, since an SWPPP is not designed to impose limitations on the concentration of contaminants in an effluent stream. Rather, an SWPPP identifies potential sources of pollutants, and describes the storm water management controls that will be implemented by the permitted facility.

35 Ill. Adm. Code 309.146 only mandates that IEPA must require the holder of every NPDES permit to comply with certain monitoring and reporting requirements. Specifically, the permit holder must establish and maintain records; make reports adequate to determine compliance with all effluent limits and special permit conditions; use and maintain monitoring

equipment and methods; take samples of effluent; and provide such other information as may reasonably be required. 35 Ill. Adm. Code 309.146(a). The regulation also requires each such requirement to be included in the permit as a permit condition. 35 Ill. Adm. Code 309.146(b). The terms of the Permit clearly fulfill these requirements. Numerous provisions of the Permit provide that “the effluent of the following discharge(s) shall be monitored and limited at all times.” (PRN/Sierra Pet. Ex. E. at 2–8; ABC Pet. Ex. A at 2–8.) Furthermore, Special Condition 20 requires Prairie State to record monitoring results on Discharge Monitoring Report Forms and submit the completed forms to IEPA. (PRN/Sierra Pet. Ex. E. at 11; ABC Pet. Ex. A at 11.)

In short, Petitioners have failed to identify any provision of the Illinois Act or any applicable Board regulation allegedly violated with respect to this complaint. Therefore, they have failed to establish any legal basis for their contention that an SWPPP had to be completed before IEPA issued the Permit.

c. Not necessary to assure Petitioners’ interests

Assuming for the sake of argument that Petitioners are entitled to notice of the SWPPP provisions so that they might request IEPA to compel changes in the SWPPP before it is implemented by Prairie State in connection with its operation of the Facility, the Permit provides Petitioners that opportunity. Paragraph I of Special Condition 21 of the Permit, which addresses the required SWPPP for the Facility, provides:

The plan [SWPPP] is considered a report that shall be available to the public under Section 308(b) of the CWA. The permittee may claim portions of the plan [SWPPP] as confidential business information, including any portion describing facility security measures.

(PRN/Sierra Pet. Ex. E. at 12; ABC Pet. Ex. A at 12.) In addition, Paragraph C of Special Condition 21 provides:

The permittee may be notified by the Agency at any time that the plan does not meet the requirements of this condition. After such notification, the permittee shall make changes to the plan and shall submit a written certification that the requested changes have been made. Unless otherwise provided, the permittee shall have 30 days after such notification to make the changes.

(PRN/Sierra Pet. Ex. E. at 12; ABC Pet. Ex. A at 12.)

Here, Prairie State's SWPPP for the Facility must be completed 180 days from the effective date of the Permit, i.e., December 5, 2005. Thereafter, Petitioners and all other members of the public have a right to review the provisions of the SWPPP. If they are dissatisfied with any of those provisions, they may request IEPA to require Prairie State to make changes to the plan. If the Agency refuses to do so, anyone who made such a request may petition this Board for review of IEPA's decision. 415 ILCS 5/5(d) (granting the Board authority to conduct hearings on petitions for review of final determinations which are made pursuant to the Act or Board rule); 35 Ill. Adm. Code 105.204(f) ("If the Agency's final decision is to deny or to conditionally grant or approve, the person who applied for or otherwise requested the Agency decision, or the person to whom the Agency directs its final decision, may petition the Board for review of the Agency's final decision.").

Because all of this can be accomplished years before construction of the Facility could be completed and the SWPPP implemented, the Permit effectively places Petitioners in the same position they would occupy if this challenge to the Permit were successful. Thus, the Permit as issued provides Petitioners the right of review of Prairie State's SWPPP for the Facility that Petitioners seek in this appeal, albeit via a different process than that sought here. Consequently, there has been no harm to any interest of Petitioners with respect to the matters that are the subject of this particular challenge to the Permit. For this reason, too, IEPA's requirement that

an SWPPP must be completed within 180 days of the effective date of the Permit fully complies with applicable state and federal law.

2. Failure to Include SWPPP in Permit as Purported Denial of Public Participation.

Petitioners further contend that IEPA's failure to require Prairie State to submit an SWPPP as part of its application for the Permit prevents meaningful public participation in the review of that SWPPP and fails to give the public notice of proposed effluent limitations in violation of 35 Ill. Admin. Code 309.108(b) and 309.113. (PRN/Sierra Pet. ¶ 25; ABC Pet. ¶ 19.) They assert that this violates the federal Clean Water Act's mandate in 33 U.S.C. § 1342(b)(3) that state NPDES permit programs must "insure that the public . . . receive[s] notice of each application for a permit and . . . an opportunity for public hearing before a ruling on each such application." (PRN/Sierra Pet. ¶ 22; ABC Pet. ¶ 15.) These contentions are without merit.

a. No violation of applicable Illinois or federal law

As noted above, preparation of an SWPPP and review by IEPA prior to the effective date of the Permit is not required by state or federal law. The federal regulations with which IEPA's permit program must conform mandate only that the Permit must include conditions to ensure that the Facility follows BMPs. 40 C.F.R. § 122.44(d)(4).

Also, as discussed above, an SWPPP is considered a report that shall be available to the public. (PRN/Sierra Pet. Ex. E. at 14; ABC Pet. Ex. A. at 14.) Therefore, Petitioners may review Prairie State's SWPPP once it is complete and may comment on it at that time. However, Petitioners had no legal right to review such an SWPPP prior to issuance of the Permit.

b. No violation of Illinois or federal law cited by Petitioners

The laws cited by Petitioners in support of the contention that the permit application must contain a completed SWPPP also fail to support Petitioners' argument. First, 35 Ill. Adm. Code 309.108(b) does not require submission of an SWPPP prior to the time at which a permit is issued. That regulation requires only that IEPA's tentative determination regarding its decision to issue a draft permit must contain proposed effluent limitations consistent with federal and state requirements, a proposed schedule of compliance, and a brief description of any other proposed special conditions that will have a significant impact on the discharge.

Nor will such a plan, once prepared, contain any additional "effluent limitations." Rather, an SWPPP only "includes site descriptions, descriptions of appropriate control measures, copies of approved State, Tribal or local requirements, maintenance procedures, inspection procedures, and identification of non-storm water discharges." See 40 C.F.R. § 122.44(s)(1)(iii) (describing the elements of an SWPPP for a permit authorizing storm water discharges from construction sites). That is because the purpose of an SWPPP is to require facilities to perform planning and organizing, to perform source assessment, and to develop and adhere to BMPs, which include schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution in runoff from a site. See USEPA, Storm Water Management for Industrial Activities: Developing Pollution Prevention Plans and Best Management Practices — Summary Guidance at 1 (Oct. 1992).¹⁰ Therefore, that the provisions of an SWPPP are not incorporated into the Permit does not violate any state or federal law requiring effluent limitations and monitoring of such effluents.

Petitioners' argument that the Permit violates 35 Ill. Adm. Code 309.113 fails for the same reasons discussed above. That regulation merely requires IEPA to publish a fact sheet with

¹⁰ This document is available online at <http://www.epa.gov/npdes/pubs/owm0236a.pdf>.

respect to each NPDES permit application following public notice of that permit, and provides that the contents of that fact sheet must contain a quantitative description of the proposed discharge described in the permit, as well as the tentative determinations required under Section 309.108. This argument essentially piggy-backs on Petitioners' previous argument — that the tentative determination prepared under Section 309.108 was inadequate. Because IEPA's tentative determination with respect to Prairie State's permit application fulfilled the requirements of Section 309.108, IEPA's issuance of the Permit also did not violate this regulation.

C. Multiple Permit Issue

ABC additionally complains that IEPA failed to consider the cumulative impacts of the Facility by issuing the Permit "in a piecemealing fashion" and that "[d]espite the fact that all permits could have been considered together," IEPA failed to consider the cumulative impacts of those permits. (ABC Pet. ¶ 20.) However, ABC has made no attempt to demonstrate that the Permit thereby violates either the Illinois Act or any applicable Board regulation. Therefore, this ABC contention is legally insufficient on its face. Furthermore, IEPA's process of separately addressing discharges from the Facility, the Mine, and the coal combustion waste disposal site ("CCW site"), as well as its process of separately addressing discharges associated with industrial activity and those associated with construction activity at the Facility, fully comports with applicable law.

Petitioners have identified a total of four NPDES permits that may be related in some way to operation of the Facility:

- (1) the Permit, which authorizes both discharges of water utilized in the operation of the Facility, and discharges of storm water associated with operation of the Facility;
- (2) the general permit for construction activity discharges that will apply to construction of the Facility;
- (3) an NPDES permit to be issued for discharges at the Mine; and
- (4) an NPDES permit covering discharges from the CCW site, which may receive coal combustion waste from the Facility.

Obtaining a single NPDES permit for all of the discharges to be covered by the permits listed above is not feasible because the applicable regulations require permit applicants to follow different standards and procedures for these discharges.

The Permit authorizes Prairie State to discharge certain waters associated with industrial activity at the Facility. Illinois regulations provide specific application procedures for such a permit. Specifically, Section 309.103 requires that a permit applicant "shall file an application . . . on forms provided by the Illinois Environmental Protection Agency." 35 Ill. Adm. Code 309.103(a)(1).

In contrast, Illinois regulations clearly establish that if mining activities are to be carried out at a facility for which an NPDES permit is required, the applicant must submit a permit application as required by 35 Ill. Adm. Code 403.103, 403.104, and 405.104. 35 Ill. Adm. Code 309.103(c). Section 403.103 requires that persons required to obtain an NPDES permit for facilities where mining activities take place must file an application for a permit pursuant to Section 405.104 on forms provided by IEPA or USEPA. 35 Ill. Adm. Code 403.103(a). Section 403.104 provides that no "person" shall construct a mine-related facility for which an

NPDES permit is required unless “[t]he person holds an NPDES permit” containing certain conditions. 35 Ill. Adm. Code 403.104. Finally, Section 405.104 lists elements that any NPDES permit for a mining facility must contain — elements that are neither required nor appropriate for inclusion in the Permit.

These regulations governing discharges from facilities at which mining activities are to be carried out clearly apply to discharges from the Mine. The Mine is an underground coal mine, and any discharges from the Mine are properly characterized as “mine discharge.” See 35 Ill. Adm. Code 402.101 (defining “mine discharge” to include “any point source discharge, whether natural or man made, from a mine related facility”); id. (defining “mine related facility” to include the “mine”). “Production of a mine discharge” is a type of “mining activity,” id., and an application for discharges from the Mine therefore must comply with the procedures set forth in 35 Ill. Adm. Code Sections 403.103, 403.104, and 405.104, none of which are applicable to the discharges authorized by the Permit.

The Mine’s NPDES permit will also authorize discharges of storm water associated with industrial activity. See 40 C.F.R. § 122.26(b)(14)(iii) (including active mining operations in the definition of facilities engaging in “industrial activity”). However, given the separate procedures established by Illinois regulations governing permit applications, this point alone is insufficient to justify requiring Prairie State to obtain a single NPDES permit for the discharges associated with both the Facility and the Mine.

Discharges from the CCW site also cannot be authorized by the Permit under Illinois law. Like the discharges from the Mine, discharges from the CCW site are discharges that must be authorized pursuant to the Board’s regulations for mining activities. See 415 ILCS 5/3.330(r) (providing in pertinent part that no person shall “cause or allow the storage or disposal of coal

combustion waste unless: . . . (3) such waste is stored or disposed of at a site or facility which is operating under NPDES and Subtitle D permits issued by the Agency pursuant to regulations adopted by the Board for mine-related water pollution”) (emphasis added). As discussed above, an application for discharges from the Mine therefore must comply with the procedures set forth in 35 Ill. Adm. Code Sections 403.103, 403.104, and 405.104, none of which are applicable to the discharges authorized by the Permit.

The general NPDES permit that authorizes discharges of storm water associated with industrial activity from construction sites, General NPDES Permit No. ILR10, only authorizes discharges that will take place before the facility is operational. In contrast, the Permit addresses storm water discharges due to industrial activity, i.e., discharges that will take place during actual operation of the Facility. Given the differing nature of these discharges and the fact that they will occur sequentially, not simultaneously, there is no reason for the construction storm water discharges to be covered by the Permit rather than the applicable general permit.

Moreover, there will be no cumulative effects from these discharges. The Board’s effluent limitations set forth the maximum concentrations of various contaminants that may be discharged to the waters of the State. 35 Ill. Adm. Code 304.101(a). Thus, the regulation limits the number of milligrams of each contaminant that can be present in each liter of water. See generally 35 Ill. Adm. Code pt. 304. As a matter of basic mathematics, combining various effluent streams cannot result in an overall increase in the concentration of a given contaminant, because both the number of milligrams of the contaminant and the total volume of water in liters will increase when the discharges are considered together.

The Permit, as will each other permit at issue, expressly establishes limitations for certain effluents known to have the potential to adversely affect water quality. Because each source’s

discharges will comply with all applicable water quality standards, the “cumulative” discharges also will comply, as explained above.

In addition, the Board’s regulations also establish water quality standards that must be met notwithstanding a discharge’s compliance with the applicable effluent regulations. See generally 35 Ill. Adm. Code 302, Subpart B. Furthermore, Special Condition 14 of the Permit specifically provides:

The effluent, alone or in combination with other sources, shall not cause a violation of any applicable water quality standard outlined in 35 Ill. Adm. Code 302.

(ABC Pet. Ex. A. at 11.) (Emphasis added.) This absolute prohibition ensures that effluent from the Facility, even in combination with other sources, will not violate an applicable standard established by Board regulations.

Furthermore, IEPA has conducted an anti-degradation analysis and determined that the discharge from the Facility will not otherwise unlawfully adversely affect the quality of the receiving waters. (ABC Pet. Ex. B at 11.) This analysis takes into account the condition of the River and the additive effects of each proposed discharge. See 35 Ill. Adm. Code 301.205(f)(2) (requiring IEPA to consider the physical, chemical, and biological characteristics of the water body, and identification and quantification of the proposed load increase for each contaminant).

In any case, although applying for multiple permits through a consolidated permit application process is authorized by the CWA, the statute does not require applicants to use the consolidated process. See 40 C.F.R. § 124.4(a)(1) (“Whenever a facility or activity requires a permit under more than one statute covered by these regulations, processing of two or more applications for those permits may be consolidated.”) (emphasis added).

In summary, ABC’s complaints about Prairie State’s purportedly “piecemeal” permits are nothing more than general complaints about the structure of the permitting process itself. ABC’s

complaints are completely unsupported by any effort to try to show that IEPA issued the Permit in violation of the Illinois Act or any applicable Board regulation and therefore fail on the face of the petition. Furthermore, all of the NPDES permits either directly or indirectly related to operations at the Facility have been, are being, or will be developed in full compliance with the procedural and substantive requirements of applicable law. Finally, the underlying requirement that the discharges comply with effluent limitations and water quality standards ensures that there will be no cumulative impacts from these discharges.

ABC therefore has failed to identify any provision of the Permit that would allow discharges in violation of the applicable effluent limitations, water quality standards, or anti-degradation principles. Thus, ABC's unsubstantiated assertion that the cumulative effects of the authorized discharges will violate such regulations when the individual discharges themselves do not violate the regulations cannot be sustained on the undisputed facts. Consequently, ABC's challenge to the Permit based on its contention that all discharges in question should be addressed in a single NPDES permit must be dismissed.

D. Water Withdrawal Issues

1. Withdrawal of up to 30 Million Gallons of Water Per Day

ABC also contends that Prairie State's withdrawal of up to 30 million gallons of water per day from the River fails to adequately consider the effect on water quality, habitat, wildlife, public water supplies, recreation, and navigation during drought conditions. (ABC Pet. ¶¶ 21-25.) Once again, though, ABC makes no effort to demonstrate that the Permit therefore purportedly violates some provision of the Illinois Act or some applicable Board regulation. Consequently, this ABC challenge to the Permit also is legally insufficient on its

face. Furthermore, this ABC challenge fails on the merits, as the Permit is fully consistent with Illinois law as to this issue.

Special Condition 1 of the Permit imposes conditions on Prairie State's ability to withdraw water from the River.

[T]he permittee shall not withdraw river water such that the river flow drops below the 7Q10 flow value as established by the Illinois State Water Survey for any single day. This will be calculated based on the river flow at the Venedy Station USGS gage [sic] where the 7Q10 flow is 74 cfs [cubic feet per second].

(ABC Pet. Ex. A at 9.) This Special Condition limits Prairie State's water withdrawal "in addition to the conditions specified under IDNR Permit No. DS2002134" (ABC Pet. Ex. A at 9), which authorizes Prairie State to construct a water intake structure in the River and to withdraw water from the River, subject to certain conditions.¹¹ ABC nonetheless contends that this Board should revisit the Agency's determination regarding the appropriate volume of water Prairie State may withdraw in this proceeding, arguing that, "because water quantity affects water quality . . . water quantity is appropriately addressed through this appeal." (ABC Pet. ¶ 21.)

However, ABC overlooks the basic nature of the NPDES permit program, which is to ensure that any discharges of contaminants or pollutants will not exceed water quality standards set by state and federal law. See 35 Ill. Adm. Code 309.102(a) and 42 U.S.C. § 1342 (prohibiting discharges of pollutants except in compliance with law and with the provisions of the required NPDES permit). Although it is true that IEPA must consider the effects of water withdrawal on water quality when it issues an NPDES permit, the scope of the Agency's consideration of such effects is limited.

¹¹ Thus, the Permit conditions are more stringent than those imposed by IDNR in the Withdrawal Permit, which authorizes Prairie State to withdraw water when 7Q10 levels at the Facility intake point are above 69 cfs. This condition reflects IDNR's determination that this limitation on the amount of water Prairie State may withdraw will ensure that Prairie State's water usage will not contribute to degradation of stream quality when the River stream flow is low. Neither ABC nor anyone else timely challenged this determination.

The Permit, of course, sets limitations for certain effluents; and these limitations are based upon considered determinations as to the potential impact of each effluent on the receiving waters. Additionally, as noted above, the Board's regulations establish water quality standards that must be met notwithstanding a discharge's compliance with the applicable effluent regulations. See generally 35 Ill. Adm. Code 302, Subpart B.

Furthermore, as noted above, Special Condition 14 of the Permit provides:

The effluent, alone or in combination with other sources, shall not cause a violation of any applicable water quality standard outlined in 35 Ill. Adm. Code 302.

(ABC Pet. Ex. A. at 11.) This absolute prohibition applies under all conditions that might exist in the River, including drought conditions. The Permit thus ensures that all authorized discharges will comply with the applicable water quality standards.

In addition, as noted above, no discharge may unlawfully adversely affect an existing use of a water body even if it complies with all effluent limitations and water quality standards. 35 Ill. Adm. Code 302.105. ABC has failed to identify any provision of the Permit that would allow discharges in violation of this regulation.

IEPA also adequately considered the impact of the volume Prairie State's withdrawal of water from the River to the extent that such consideration is required by the Clean Water Act and its implementing regulations. The CWA requires that "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing the adverse environmental impact" from such structures. 33 U.S.C. § 1326(b). To comply with this mandate, the owner or operator of a new facility that uses a cooling water intake structure must comply with certain regulations limiting the intake velocity and flow, and requiring that the facility implement design and construction technologies designed to minimize fish mortality and entrainment. 40 C.F.R. § 125.84. But that regulation provides only that the facility cooling

water intake structure must be designed and constructed so such that the total design intake flow for an intake in a freshwater river must be “no greater that five (5) percent of the source water annual mean flow.” 40 C.F.R. § 125.84(b)(3)(i); 40 C.F.R. § 125.84(d)(2)(i) (emphasis added).

ABC asserts that Prairie State’s withdrawal will at times be as much as 25% of the actual daily flow. (ABC Pet. ¶ 21.) However, the relevant regulation does not limit the maximum daily water withdrawal amount. Thus, IEPA issued the Permit in conformance with that regulation. See 40 C.F.R. § 123.25(36) (requiring compliance with Subpart I of part 125).¹²

In short, Prairie State’s right to withdraw water from the River is not unlimited. Rather, it may do so only so long as its stream flow is greater than its 7Q10 level at Prairie State’s intake point. Thus, contrary to ABC’s suggestion, extreme drought conditions will not result in Prairie State withdrawals from the River lowering its stream flow below its 7Q10 level at any location. Rather, such conditions will result in Prairie State’s withdrawals from the River being restricted or precluded entirely to avoid that possibility. Thus, there is no factual basis to support this ABC challenge. Furthermore, Prairie State may only withdraw water and so long as its withdrawal does not violate any applicable effluent limitation or water quality standard or otherwise unlawfully adversely affect any existing use, so the Permit conditions ensure compliance with these applicable regulations.

In summary, ABC has stated no legal basis for its request that IEPA be required to place limits on Prairie State’s water withdrawal more stringent than those in Special Condition 1 of the Permit. Furthermore, ABC has failed to allege any facts that would suggest that Prairie State’s discharges pursuant to the Permit will violate any applicable water quality standard or otherwise

¹² Prairie State’s cooling water intake structure for the Facility will be designed and constructed such that the total design intake flow from the River will be only approximately 1.2% of the average annual flow, consistent with the IDNR and IEPA authorizations. (NPDES Application, EPA 316(b) Analysis.)

violate any provision of the Illinois Act or any applicable Board regulation. Therefore, this ABC challenge to the Permit is legally insufficient.

2. Use of 7Q10 Data from Venedy Station Gauge

PRN/Sierra Club also argues that, “[i]n setting effluent limits, the draft permit relied on assumptions related to minimum flows of the Kaskaskia River that failed to consider water withdrawals between the Venedy Station gauge and outfall 001.” (PRN/Sierra Pet. ¶ 7d.) In connection with this contention, PRN/Sierra Club further asserts that Special Condition 1 is inadequate because its calculations for determining a maximum allowed daily withdrawal amount when the stream flow of the River at the Venedy Station gauge is at 7Q10 levels “do not account for water withdrawals by other parties between the Venedy Station gauge and outfall 001 that could lower the river flow below 7Q10 levels at outfall 001.” (PRN/Sierra Pet. ¶ 24.) (Emphasis added.) According to PRN/Sierra Club, then, Special Condition 1 in the Permit “may result in violations of the permit limits at outfall 001 as well as violations of permit limits for downstream discharges.” (PRN/Sierra Pet. ¶ 24.) (Emphasis added.)

Notably, PRN/Sierra Club does not assert that the maximum daily withdrawal amount authorized by Special Condition 1 of the Permit will lower the stream flow of the River below 7Q10 levels at Outfall 001 or that Prairie State’s discharges in compliance with the Permit will thus cause violations of such permit limits to occur. PRN/Sierra Club’s claim is therefore legally insufficient on its face, because, as noted above, PRN/Sierra Club bears the burden of proving that the Permit as issued will violate some substantive provision of either the Illinois Act or some applicable Board regulation.¹³

¹³ In any event, IEPA did account for these water withdrawals between the Venedy Station gauge and Outfall 001. (PRN/Sierra Pet. Ex. F at 7–8.) In its Responsiveness Summary, IEPA stated that “[t]he flows from the tributary streams downstream of the Venedy station gauge will make up the difference in 7Q10 flow in the Kaskaskia River at

IV. CONCLUSION

For the reasons discussed above, Petitioners' challenges to the Permit addressed above are legally insufficient to demonstrate that the Permit as issued violates either any provision of the Illinois Act or any Board regulation applicable to the Permit. Therefore, the Board should dismiss both the PRN/Sierra Club Petition and the ABC Petition to the extent they challenge IEPA's issuance of the Permit on the grounds addressed above.

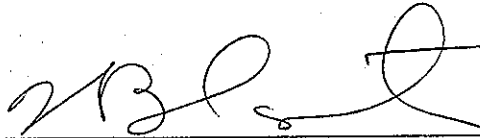
WHEREFORE, Respondent Prairie State Generating Company, LLC respectfully requests the Board to grant its Motion To Dismiss, to dismiss Petitioners' challenges to the Permit addressed herein, and to award it such other relief as Board deems just.

the plant intake and discharge site. If these streams are flowing at least 7Q10 flows, the 7Q10 of the Kaskaskia River will be maintained downstream." (PRN/Sierra Pet. Ex. F at 7-8.) (Emphasis added.)

The Illinois State Water Survey map of the 7Q10 flows in the Kaskaskia Region, which Prairie State believes to be part of the agency record, illustrates the 7Q10 flow at various points along the River. See Illinois State Water Survey, Map 7 Kaskaskia Region: Kaskaskia River and Mississippi River Drainage Between the Illinois and Kaskaskia (rev. Oct. 2002). The map shows two withdrawals of water between the Venedy Station gauge and Outfall 001 due to municipal water use, which reduce the River flow by 3.45 cfs. The map also shows four increases in River flow between the Venedy Station gauge and Outfall 001 due to confluences with tributary streams, as well as two increases due to outfalls from other dischargers, which adds approximately 21.5 cfs to the volume of water in the River. This results in a net increase in River flow of approximately 18 cfs between the Venedy Station gauge and Outfall 001. By calculating Prairie State's allowed maximum daily water withdrawal amount on the basis of the River flow at the Venedy Station gauge, the limitations IEPA has imposed on Prairie State's water withdrawal are actually more strict than if IEPA had calculated the allowable withdrawal amount on the basis of the River flow at Outfall 001.

Date: February 6, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **Memorandum In Support Of Respondent Prairie State Generating Company, LLC's Motion To Dismiss** have been deposited in the U.S. Mail, first class postage prepaid, this 6th day of February, 2006, in envelopes addressed to:

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