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)

NOTICE OF FILING

PLEASE TAKE NOTICE that Prairie Rivers Network and Sierra Club have filed the attached RESPONSE TO RESPONDENT PRAIRIE STATE GENERATING COMPANY, LLC'S MOTION TO DISMISS.

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DATED: February 23, 2006

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

The Motion to Dismiss filed by Respondent Prairie State Generating Company (PSGC) largely ignores the relevant federal and Illinois law regarding the requirements for issuance of a valid National Pollutant Discharge Elimination System (NPDES) permit and the rules for appealing the improper issuance of such a permit. Under the law and regulations, the entire Petition of Petitioners Prairie Rivers Network (PRN) and Sierra Club (SC) is clearly proper and sufficient. Further, the Petition details numerous ways in which the NPDES permit issued by the

Illinois Environmental Protection Agency (IEPA) violated the requirements of the federal Clean Water Act (CWA) as implemented under Illinois law. Accordingly, the Board should DENY the Motion.

I. The Board Rules Preclude Dismissal of the Petition

PSGC's Motion to Dismiss attacked the claims raised in paragraphs 7(b), 7(c), and 7(d) of PRN and SC's Petition. PSGC did not move to dismiss the claim PRN and SC raised in paragraph 7(a) (regarding the discharge of harmful chlorinated organics). Moreover, Respondent Illinois Environmental Protection Agency has not moved for dismissal of any of Petitioners' claims. None of PRN and Sierra Club's claims should be dismissed.[1]

A. Motions to Dismiss Have a Very High Burden

For purposes of ruling on a motion to dismiss, all well pled facts contained in the pleading must be taken as true, and all inferences from them must be drawn in favor of the non-movant. *People v. Pattison Assoc.*, PCB 05-181, 2005 Ill. ENV LEXIS 580, at *9 (Sep. 15, 2005). A complaint should not be dismissed for failure to state a claim unless it clearly appears that no set of facts could be proven under the pleadings that would entitle the complainant to relief. *Id.*

B. The Pleading Requirements Applicable to the Petition Are Lenient

The contents of a pleading are governed by PCB rules and precedent. *Lone Star Indust. v. Illinois EPA*, PCB 03-94, 2003 Ill. ENV LEXIS 133, at *6 (Mar. 6, 2003). Case law is consistent in finding that pleading requirements for administrative review are less exacting than for other

[1] PRN and SC filed their Petition in this case on January 6, 2006. PSGC filed its Motion to Dismiss on February 6, 2006, with service by U.S. mail, with service presumed on February 10, 2006. 35 Ill. Admin. Code § 101.300(c). PRN and SC have 14 days from service to file a response. 35 Ill. Admin. Code § 101.500(d). This response is therefore timely.

causes of action. *Sierra Club v. City of Wood River*, PCB 98-43, 1997 Ill. ENV LEXIS 632, at *4 (Nov. 6, 1997). The requirements the PCB has set for the contents of a petition challenging an IEPA permit are that it include:

> a) The Agency's final decision or issued permit;
> b) A statement specifying the date of issuance or service of the Agency's final decision or issued permit . . . ;
> c) A statement specifying the grounds of appeal; and
> d) For petitions under Section 105.204(b) of this Subpart, a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing . . . and a demonstration that the petitioner is so situated as to be affected by the permitted facility.[2]
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> 35 Ill. Admin. Code § 105.210 (emphasis in original removed)

PRN and SC's Petition plainly contains all four elements. In fact, PSGC nowhere claims that the Petition lacks any of the Section 105.210 elements. PSGC instead broadly argues that the Petition is somehow "legally insufficient." Mot. to Dismiss at 3.

II. The Petition Properly Alleges that Issuance of the NPDES Permit at Issue Violated Applicable Law

A. The Clean Water Act

Illinois law requires that permits only be issued with limitations that conform to the requirements of the federal Clean Water Act. 415 ILCS §5/12; 35 Ill. Adm. Code § 309.141(d). Under the CWA, 33 U.S.C. § 1251 *et seq.*, stormwater permits, like all NPDES permits, must contain various provisions to protect the chemical, physical, and biological health of receiving waters. 33 U.S.C. § 1342(p). Some stormwater permittees are allowed to discharge after filing notices of intent to comply with a properly issued general permit. As PSGC acknowledges, however, its proposed facility is ineligible for coverage under any general permit and must receive an individual permit. *See* Mot. to Dismiss at 9, n. 7 and General NPDES Permit No.

[2] This Petition was brought under 35 Ill. Admin. Code § 105.204(b), so subsection (d) applies.

ILR00 at 3.

In their Petition, PRN and SC state that:

> By allowing stormwater discharges before a SWPPP is implemented, the permit violates 33 U.S.C. § 1311 and 415 ILCS § 5/12. The procedures used in the issuance of the permit prevent meaningful public participation in the review of the SWPPP, and fail to give notice of proposed effluent limits in violation of 35 Ill. Adm. Code §§ 309.108(b) and 309.113. Further, by failing to contain an adequate SWPPP, the permit fails to contain necessary effluent limits and monitoring in violation of 35 Ill. Adm. Code §§ 309.141(d) and 309.146. See also 33 U.S.C. § 1342.

PSGC urges dismissal of PRN and SC's claims related to the Stormwater Pollution Prevention Plan (SWPPP) that is required as part of Permit No. IL0076996. PSGC's arguments are all essentially variations on a single theme: PSGC believes that CWA's oversight and public review provisions apply to SWPPPs only if the words "stormwater pollution prevention plan" explicitly appear in the statute. In fact the Clean Water Act and Illinois law implementing the CWA require all permit elements – SWPPPs and otherwise – to be reviewed by the permitting authority and subject to public review prior to permit issuance. No parts of the permit are exempted in the laws or the regulations from the requirements of being approved by the agency after allowing public participation. Certainly, a SWPPP is not properly seen as some separate element of little consequence of the NPDES permit but is an integral part of the pollution control limits. See *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) (plaintiff's 60-day notice letter regarding defendant's failure to comply with "good housekeeping" provisions in SWPPP sufficient for district court to exercise jurisdiction).

B. Failure to Include the Stormwater Pollution Prevention Plan in the Permit

The CWA requires NPDES permits to "apply, and insure compliance with, any applicable requirements" and further provides that the EPA "shall prescribe conditions for such

permits to assure compliance with [all applicable requirements]." 33 U.S.C. § 1342(a)(2) and (b)(1)(A). There are many applicable requirements for industrial stormwater discharges, so Permit No. IL0076996 must, to comply with the CWA, ensure compliance with them. The permit does not, and indeed it could not ensure compliance since there is nothing in the record to demonstrate compliance with any of the requirements. PSGC believes that SWPPPs can be excluded from a permit and are exempt from agency review requirements, but there is nothing in the CWA to indicate so and relevant case law resoundingly rejects such a position.

1. The CWA requires the SWPPP be subject to IEPA oversight and in the permit

a. NPDES permits must ensure compliance with stormwater requirements

The CWA demands regulation in fact, not only in principle. "Under the [CWA], permits... may issue only where such permits ensure that every discharge of pollutants will comply with all applicable effluent limitations and standards." *Waterkeeper Alliance v. U.S. EPA*, 399 F.3d 486, at 498 (2nd Cir. 2005) (emphasis in original). For example, state NPDES programs must issue permits that "apply, and insure compliance with, any applicable requirements." 33 U.S.C. § 1342(b)(1)(A) (emphasis added). The CWA further provides that the EPA "shall prescribe conditions for such permits to assure compliance with [all applicable requirements]." 33 U.S.C. § 1342(a)(2) (emphasis added).

What are these requirements? In general, the CWA requires states to ensure that NPDES permits include certain provisions, such as requirements related to limits on discharges, monitoring, inspection, and so on. 33 U.S.C. § 1342(b) and (c). Specifically in the case of stormwater, dischargers meet the bulk of these requirements through developing an SWPPP. It is only in the SWPPP that steps to "ensure the implementation of practices . . . to reduce the pollutants in storm water discharges" are actually developed. *See* NPDES Permit No.

IL0076996, Special Condition 21(A), p. 12.

Most specific to the case at hand, individual permits for stormwater discharges from industrial sites have extensive requirements. These requirements include:

> (A) A site map showing topography . . . of the facility including: each of its drainage and discharge structures; the drainage area of each storm water outfall; paved areas and buildings . . . , each past or present area used for outdoor storage or disposal of significant materials, each existing structural control measure to reduce pollutants in storm water runoff, materials loading and access areas, areas where pesticides, herbicides, soil conditioners and fertilizers are applied, each of its hazardous waste treatment, storage or disposal facilities . . . ; each well where fluids from the facility are injected underground; springs, and other surface water bodies which receive storm water discharges from the facility;
>
> (B) An estimate of the area of impervious surfaces . . . and the total area drained by each outfall . . . and a narrative description of the following: Significant materials that . . . have been treated, stored or disposed in a manner to allow exposure to storm water; method of treatment, storage or disposal of such materials; materials management practices employed . . . to minimize contact by these materials with storm water runoff; materials loading and access areas; the location, manner and frequency in which pesticides, herbicides, soil conditioners and fertilizers are applied; the location and a description of existing structural and non-structural control measures to reduce pollutants in storm water runoff; and a description of the treatment the storm water receives . . . ;
>
> (C) A certification that all outfalls . . . have been tested or evaluated for the presence of non-storm water discharges . . . The certification shall include a description of the method used, the date of any testing, and the on-site drainage points that were directly observed during a test;
>
> (D) Existing information regarding significant leaks or spills of toxic or hazardous pollutants at the facility . . . ;
>
> (E) Quantitative data based on samples collected during storm events . . . from all outfalls containing a storm water discharge associated with industrial activity for the following parameters:
>
> > (1) Any pollutant limited in an effluent guideline . . . ;
> >
> > (2) Any pollutant listed in the facility's NPDES permit for its process wastewater . . . ;
> >
> > (3) Oil and grease, pH, BOD5, COD, TSS, total phosphorus, total Kjeldahl nitrogen, and nitrate plus nitrite nitrogen; . . .
> >
> > (5) Flow measurements or estimates of the flow rate, and the total amount of discharge for the storm event(s) sampled, and the

> method of flow measurement or estimation; and
>
> (6) The date and duration (in hours) of the storm event(s) sampled, rainfall measurements or estimates of the storm event . . . ; . . .
>
> (G) Operators of new sources or new discharges . . . must include estimates for the pollutants or parameters listed in paragraph (c)(1)(i)(E) of this section instead of actual sampling data, along with the source of each estimate. Operators of new sources or new discharges . . . must provide quantitative data for the parameters listed in paragraph (c)(1)(i)(E) of this section within two years after commencement of discharge, . . .

40 CFR § 126.22(c)(1) (emphasis added). These requirements are in addition to further requirements in 40 CFR § 122.21 and elsewhere. Even a cursory glance at these requirements reveals that they are substantial, detailed, and the very heart of the stormwater permitting program. PSGC will fulfill these requirements, if at all, by developing an SWPPP that includes the necessary limits, monitoring, and tests.

b. Permit No. IL0076996 does not ensure compliance with stormwater requirements

Under the CWA, therefore, IEPA must "insure compliance" with each of the requirements noted above as well as with any other applicable requirements.[3] In the case at hand, however, IEPA has already issued Permit No. IL0076996 without any provisions to ensure compliance with these requirements; IEPA has also failed to review any plans, documents, or other information to see if the preceding requirements will be fulfilled or not. In fact, there is no

[3] Some may claim that PRN and SC are here requesting IEPA to perform an impossible feat, *i.e.*, to write a permit in the present that ensures compliance in the future with all requirements. Clearly, that cannot be done, and we do not claim otherwise. However, it is still very possible – and indeed is required by the plain language of the CWA – for IEPA to write a permit in the present that includes requirements that, if followed, will lead to compliance in the future. Any ruling that allows IEPA to omit requirements needed for compliance renders meaningless CWA's mandate that permits "apply, and insure compliance with, any applicable requirements" and "assure compliance" with NPDES provisions. 33 U.S.C. § 1342(a)(2), (b)(1)(A). Under the CWA, requiring stormwater monitoring and reduction in a permit is no different than requiring effluent monitoring and reduction.

evidence in the record demonstrating PSGC's intent or ability to comply with any of the requirements. The approach that PSGC advocates is tantamount to saying "If you issue us a CWA permit now, we promise to develop a plan to comply with the CWA later." This is precisely the sort of self-regulation that courts have rejected as incompatible with CWA's stormwater permitting requirements.[4] In issuing Permit No. IL0076996, IEPA had no idea whether compliance would occur – and certainly did not "insure compliance" with the requirements as the CWA mandates. For all IEPA knows, PSGC might choose never to develop an SWPPP. Or it might develop an SWPPP that omits some or most of the requirements noted above. Because IEPA never asked for information on these points before issuing the permit, and because it need never review the SWPPP in the future,[5] it may never find out.

PSGC replies that the public is free to request a copy of the SWPPP in the future and petition the IEPA to intervene if the SWPPP is deficient. Mot. to Dismiss at 14-15. But this is not enough to satisfy the CWA. The CWA requires IEPA to "insure compliance" now, in the present; it does not allow IEPA to omit review of the permit's operational provisions and hope that citizens will later follow up to see if the applicant actually complied with the law. Certainly, by declining to ask for the SWPPP and by making its own review optional, IEPA has not "insured" that PSGC's stormwater plans comply with the law – or even exist.

2. Case law requires the SWPPP be subject to IEPA oversight and in the permit

PSGC's claim that provisions related to stormwater monitoring and reduction are exempt from the CWA's oversight requirements for NPDES permits is completely without support and

[4] See *Environmental Defense Center v. U.S. EPA*, 344 F.3d 832 (9th Cir. 2003) and *Waterkeeper Alliance v. U.S. EPA*, 399 F.3d 486 (2nd Cir. 2005), both discussed below, as well as *NRDC v. EPA*, 966 F.2d 1292 at 1305 (9th Cir. 1992).

[5] The permit only provides that the SWPPP shall be made available to IEPA "upon request." NPDES Permit No. IL0076996, Special Condition 21(B), p. 12.

contradicted by relevant case law.

a. Environmental Defense Center

In *Environmental Defense Center v. U.S. EPA*, 344 F.3d 832 (9th Cir. 2003), the Ninth Circuit considered the United States Environmental Protection Agency (U.S. EPA) "Phase II" stormwater rule establishing NPDES requirements for stormwater discharges from small municipal separate storm sewer systems and small construction sites between one and five acres. One provision of the rule would have allowed dischargers to be covered under a general permit without the permitting agency ever reviewing the substantive materials[6] – a situation extremely similar to the present case. Environmental groups filed suit, protesting that the rule impermissibly allowed the development of stormwater pollution control plans without adequate review by the permitting agency or public participation. *Id.* at 852.[7]

The court agreed with the environmental plaintiffs and struck down the provision because it provided insufficient oversight by the permitting agency. *Id.* at 856. Specifically, the court held that "stormwater management programs . . . must, in every instance, be subject to meaningful review by an appropriate regulating entity."[8] *Id.* (emphasis added). In the absence of agency review, the court feared, "nothing prevents the operator . . . [from] proposing a set of minimum

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[6] Because the rule addressed a general permitting scheme, the relevant document at issue was the Notice of Intent ("NOI") to be covered by the general permit. In the present case, since PCGS is ineligible for coverage under the general permit, the relevant document is the SWPPP. However, the reasoning used by the Ninth Circuit would apply no less to an SWPPP than to an NOI. Indeed, the case is more compelling in the context of an individual permit, because the reasons one court cited for not requiring review of an SWPPP (see discussion of *Texas Independent Producers and Royalty Owners Assoc.* below) apply only to general permits.

[7] The portion of *Environmental Defense Center* that addresses public participation is discussed below.

[8] It is primarily for this reason that PSGC's attempt to invoke *Prairie Rivers Network v. IEPA*, PCB 01-112, 2001 Ill. ENV LEXIS 366 (Aug. 9, 2001), is unconvincing. That decision, which predates both *Environmental Defense Center* and *Waterkeeper Alliance* (see below), fails to consider the CWA mandate that permits ensure compliance with applicable regulations and therefore require agency review of relevant provisions such as SWPPPs.

[stormwater control] measures that would reduce discharges by far less than the maximum extent practicable," and thereby violate the CWA.[9] *Id.* at 855. Because "no one will review that operator's decision [on stormwater controls] to make sure that it was reasonable, or even good faith," the rule was "contrary to the clear intent of Congress" in the CWA. *Id.* at 855-56.

The court also held that the mere fact that the permitting agency might review the program in the future was not enough to satisfy the CWA. Noting that the CWA requires "every permit" to comply with applicable standards, the court held that unless every program is reviewed by the permitting agency, "there is no way to ensure that such compliance has been achieved." *Id.* at 855, n. 32.

b. Waterkeeper Alliance

In *Waterkeeper Alliance*, the Second Circuit considered a challenge to a U.S. EPA rule for concentrated animal feeding operations (CAFOs). The rule required CAFOs to develop nutrient management plans to control how and when livestock waste would be spread over farm fields. These plans are intended in large part to reduce polluted stormwater runoff after rain events and are, in that sense, very similar to the SWPPP at issue here.[10]

As in *Environmental Defense Center*, the CAFO rule proposed to allow permit coverage to applicants without U.S. EPA or the state agencies ever needing to review the nutrient management plans or including them in the permit. The plaintiffs sued, claiming that the CWA requires meaningful review of the plans and the inclusion of the plans in the NPDES permit, as

[9] The "maximum extent practicable" language does not apply to PSGC, since it is peculiar to CWA requirements for discharges from small municipal separate storm sewer systems. The underlying point is the same, however: absent EPA review, a regulated entity might develop a stormwater plan that falls short of CWA standards.

[10] In fact, the Second Circuit held that, for its analysis, the distinction between stormwater management plans and nutrient management plans was a "distinction without a difference." *Waterkeeper Alliance*, 399 F.3d at 500, n. 18.

well as adequate public participation. *Waterkeeper Alliance*, 399 F.3d at 498, 503.[11]

The court agreed with the plaintiffs, holding that "[b]y failing to provide for permitting authority review" of the plans, the rule "plainly violates these statutory commandments and is otherwise arbitrary and capricious."[12] *Id.* at 499 (emphasis added). In other words, the court found that U.S. EPA could not fulfill its statutory duty of ensuring compliance with all applicable CWA requirements if it never reviewed the nutrient management plans to see whether they contained all the necessary elements. In the absence of mandatory agency review, "the CAFO Rule does nothing to ensure that each Large CAFO has, in fact developed a nutrient management plan that satisfies [CWA] requirements." *Id* (emphasis in original). The court further held that the only real restrictions on discharges under the CAFO rule were the restrictions imposed by the nutrient management plan itself, meaning that the plans were in effect non-numeric effluent limitations that must be included in the NPDES permit itself. *Id.* at 502.

C. Failure to Provide for Public Review or a Public Hearing on the Stormwater Pollution Prevention Plan

When the CWA states that every state NPDES program must ensure that "the public . . . receive notice of each application for a permit and . . . provide an opportunity for public hearing before a ruling on each application," 33 U.S.C. § 1342(b)(3), there is no exception. No parts of the permit application – whether they are related to SWPPPs, monitoring, effluent limits, or any other matter – are carved out from this overarching requirement. Permit No. IL0076996 provided no such public notice or opportunity for a public hearing on the SWPPP provisions and therefore failed to meet CWA requirements. Case law also finds that public review should apply in cases

[11] The portion of *Waterkeeper Alliance* that addresses public participation is discussed below.
[12] By "these statutory commandments," the court was referring to parts of the CWA that require NPDES permits to assure compliance with applicable regulations.

such as this. This result is also dictated by the Board's regulations that require that the terms and limitations of draft permits be subject to public comments and potentially a public hearing. 35 Ill. Admin. Code §§ 309.108(b), 309.113.

1. The CWA requires public review and a public hearing on the SWPPP

a. NPDES permits must ensure compliance with public participation requirements

Congress clearly intended to guarantee the public a meaningful role in the implementation of the CWA. *Waterkeeper Alliance*, 399 F.3d at 503. For example, the CWA strongly states that "public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program . . . under this Act shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e) (emphasis added). More specifically, in the context of NPDES permits, the CWA requires that there be an "opportunity for public hearing" before any NPDES permit issues, 33 U.S.C. § 1342(a)(1), (b)(3) and that a "copy of each permit application and each permit issued under [Section 1342] shall be available to the public," 33 U.S.C. § 1342(j).

As explained above, Permit No. IL0076996 must include an SWPPP in order to ensure compliance with all applicable requirements, as the CWA mandates. As a necessary part of the NPDES, the SWPPP is subject to public participation and hearing requirements just like every other part of the NPDES permit. Indeed, for a stormwater NPDES permit, it is more important to solicit public review of the SWPPP than any other part of the permit, for it is only in the SWPPP that the steps to "ensure the implementation of practices . . . to reduce the pollutants in storm water discharges" are described. To exempt the SWPPP from public scrutiny and leave its development until after permit issuance would be like exempting effluent limits in an NPDES permit from public review with an explanation that the applicant would develop the limits on its

own later.

b. Permit No. IL0076996 does not ensure compliance with public participation requirements

An SWPPP must therefore be available for public review and a public hearing before permit issuance, and indeed is the most important element of a stormwater permit. In the case at hand, however, IEPA has already issued Permit IL No. 0076996 without making an SWPPP available for review or a hearing. In fact, IEPA could not have done so because there was no SWPPP in the record.

By shielding the SWPPP from public scrutiny, IEPA prevented the public from knowing what stormwater controls would be used to reduce stormwater pollution at PSGC's facility, much less whether those controls would be adequate or appropriate. This clearly frustrated the CWA's intent that the public be involved in developing permits and plans. It meant little that the public was allowed review and a hearing on Permit No. IL0076996 without the SWPPP, for the SWPPP is the substance of Permit No. IL0076996's stormwater provisions.

PSGC replies that there has been no harm because the public is free to request a copy of the SWPPP in the future and petition the IEPA to intervene if the SWPPP is deficient. Mot. to Dismiss at 14-15. But this misses the point. The CWA requires public participation prior to permit issuance because that is the point at which review and comments can be most effective. The PSGC approach would relegate public participation to a *post hoc* attempt to remedy mistakes rather than the integrated and proactive input that the CWA envisions. Courts recognize that technical issues relating to NPDES permits should be decided in "the most open, accessible forum possible, and at a stage where the [permitting authority] has the greatest flexibility to make appropriate modifications to the permit." *Environmental Defense Center*, 344 F.3d at 856-57 (citing 44 Fed. Reg. 32854 at 885 (June 7, 1979)). Withholding important terms of the draft

permit from public review is not allowed under the Board regulations developed to implement the federal requirements. These terms must be part of the permit seen by the public. 35 Ill. Admin. Code §§ 309.108(b), 113, 146(c).

2. Case law requires public review and a public hearing on the SWPPP

PSGC believes that provisions related to stormwater monitoring and reduction are somehow exempt from the CWA's public participation requirements for NPDES permits. Relevant case law, however, takes the opposite position.

a. Environmental Defense Center

In *Environmental Defense Center*, the Ninth Circuit also considered whether the U.S. EPA "Phase II" stormwater rule allowed the development of stormwater pollution control plans without adequate public participation. 344 F.3d at 852. After reviewing CWA's public participation requirements, the court agreed with plaintiffs and struck down the provision as failing to guarantee sufficient public participation. *Id.* at 858. Specifically, the court held that "clear Congressional intent requires that [stormwater] NOIs be subject to the Clean Water Act's public availability and public hearings requirements."[13] *Id.* at 856 (emphasis added). Finding that public participation rights are a "critical means of advancing the goals of the Clean Water Act," the court overturned U.S. EPA's attempt to exempt NOIs from public review and hearing provisions. *Id.* at 856-57. The court also cited the U.S. Supreme Court's holding that the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program." *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 216 (1980).

[13] Again, in *Environmental Defense Center* the oversight of the program was to occur through review of the NOI and in the present case it is to occur through review of the SWPPP, but the principle is the same in each case.

b. Waterkeeper Alliance

The Second Circuit also considered the adequacy of public participation in the CAFO rule at issue in *Waterkeeper Alliance*. 399 F.3d at 503-04. In a rebuke of U.S. EPA's attempt to allow NPDES permit coverage without submitting nutrient management plans to public review, the court wrote "[t]he CAFO Rule deprives the public of the opportunity for the sort of regulatory participation that the Act guarantees because the Rule effectively shields the nutrient management plans from public scrutiny and comment." *Id.* at 503 (emphasis added). Such an approach frustrates the CWA's public involvement goals and "forestalls – rather than 'provides for, encourages, and assist[s]' – public participation in the development of nutrient management plans." *Id.* at 504, quoting 33 U.S.C. § 1251(e). In fact, the Second Circuit held that the nutrient management plans constituted non-numeric effluent limits that must be subject to public review.[14] *Id.* at 502.

c. Texas Independent Producers and Royalty Owners Association

The Seventh Circuit recently issued a decision that, while coming to a different conclusion than *Environmental Defense Center* and *Waterkeeper Alliance*, did so for a reason inapplicable to the present case. In *Texas Independent Producers and Royalty Owners Assoc. v. EPA*, 410 F.3d 964 (7th Cir. 2005), the court considered a challenge to a U.S. EPA rule permitting stormwater discharges from construction sites without public availability and a public hearing for notices of intent (NOIs) and SWPPPs.[15] The court held that the CWA was ambiguous as to whether NOIs and SWPPPs were subject to public participation requirements. The court

[14] This refutes PSGC's argument that SWPPPs do not contain "effluent limitations." Mot. to Dismiss at 17. The Second Circuit cogently demonstrates that the substantive provisions of nutrient management plans, much like SWPPPs, meet the CWA definition of "effluent limitation."

[15] The plaintiffs also appeared to raise the question of insufficient permitting agency oversight, *id.* at 969-70, but the court's opinion never addresses that issue.

therefore deferred to the judgment of U.S. EPA that the requirements did not apply because to have them apply would undermine the administrative efficiency inherent in the general permitting concept. *Id.* at 978. However, that rationale does not apply here. Permit No. IL0076996 is an individual permit, not a general permit, and applying public participation requirements in this case would not affect the efficiency of a general permitting scheme.[16]

D. Failure to Account for Withdrawals from the Kaskaskia River between the Venedy Station Gauge and Outfall No. 001

PSGC makes much of the fact that PRN and SC's Petition states that Kaskaskia River withdrawals below the Venedy Station Gauge "may" (rather than "will") result in violations of permit limits. Mot. to Dismiss at 27. PSGC, focusing on semantics rather than substance, erroneously states that the word "may" renders the claim legally insufficient.

A claim that a threat exists of a future violation, however, is entirely cognizable under Illinois law and Board precedent. PRN and SC's Petition alleges a violation of 35 Ill. Admin. Code § 309.142, which requires the IEPA to have "determined and verified" that the discharge will not violate water quality standards. Failing to evaluate an important factor (the flow of the Kaskaskia River at the point of discharge) that, if too low, could easily cause a violation of water quality standards is obviously a failure to determine and verify that no such violations will occur. Nothing in this section requires Petitioners to prove or even allege that such violations will certainly occur; all that is needed is a showing that IEPA failed to determine and verify that they will not occur. In addition, Petitioners allege a violation of 415 ILCS § 5/12 which states that no one shall "cause or threaten or allow the discharge of any contaminants into the environment . . . so as to cause or tend to cause water pollution . . . or so as to violate regulations or standards

[16] PRN and SC do not agree with the Seventh Circuit's conclusion that the CWA does not clearly subject SWPPPs developed under general permits to public participation requirements, but, in any event, that conclusion is not relevant to the individual permit at issue here.

adopted by the Pollution Control Board under this Act. " 415 ILCS § 5/12 (emphasis added). Again, nothing in this section requires Petitioners to prove or allege a certainty of violations; alleging a violation "may" occur is enough. *See People v. Pattison*, 2005 Ill. ENV LEXIS at *13-16 (rejecting a motion to dismiss where the People had not alleged that respondent had actually caused air pollution but instead alleged that the respondent had "caused or threatened to cause the discharge of asbestos . . . so as to tend to cause air pollution" (emphasis in original)). Petitioners have clearly raised a cognizable claim in their Petition.[17]

[17] PSGC also attempts to argue that IEPA really did consider such withdrawals and, at any rate, that the withdrawals will be offset by other inputs to the River. Mot. to Dismiss at 27-28, n. 13. Such arguments are, of course, factual disputes that cannot be resolved (and are not supposed to be raised) in a motion to dismiss. In a motion to dismiss, all facts are to be construed in favor of the non-moving party.

III. Conclusion

The Petition that PRN and SC filed meets all the requirements for a pleading under 35 Ill. Admin. Code § 105.210. PSGC's arguments that the Petition is somehow otherwise legally insufficient fail. The CWA unambiguously mandates that NPDES permits ensure compliance with all applicable requirements, including public participation requirements, and case law clearly supports these CWA mandates. Finally, PRN and SC have adequately pled all that is necessary to show a violation relating to IEPA's failure to consider water withdrawals downstream of the Venedy Station Gauge.

PRN and SC therefore respectfully request the Board to DENY the Motion to Dismiss.

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DATED: February 23, 2006

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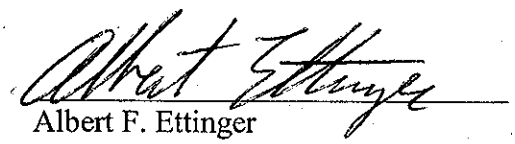
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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)

CERTIFICATE OF SERVICE

I, Albert F. Ettinger, certify that on January 6, 2006, I filed the attached RESPONSE TO RESPONDENT PRAIRIE STATE GENERATING COMPANY, LLC'S MOTION TO DISMISS. An original and 9 copies was filed, on recycled paper, with the Illinois Pollution Control Board, James R. Thompson Center, 100 West Randolph, Suite 11-500, Chicago, IL

60601, and copies were served via United States Mail to those individuals on the included service list.



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