

FEB 27 2006

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

STATE OF 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)

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

Now come Petitioners American Bottom Conservancy (ABC) and Dale Wojtkowski to reply to Respondent Prairie State Generating Company's (PSGC) Motion to Dismiss and respectfully request the Board to DENY the Motion.¹

¹ ABC and Wojtkowski filed their Petition in this case on January 9, 2006. PSGC filed its Motion to Dismiss on February 6, 2006, with service by U.S. mail, with service presumed on February 10, 2006. ABC has 14 days from service to file a response. Therefore, this response is timely filed. 35 Ill. Admin. Code § 101.300(c). 35 Ill. Admin. Code § 101.500(d).

The Motion to Dismiss filed by Respondent Prairie State Generating Company, LLC (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 Petitions of Petitioners ABC and Wojtkowski and Prairie Rivers Network (PRN) and Sierra Club (SC) are clearly proper and sufficient. Further, the Petitions detail 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 to Dismiss.

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 ABC's Petition. PSGC did not move to dismiss the claim ABC and Wojtkowski raised in paragraph 7(a) (regarding the discharge of harmful chlorinated organics). Moreover, respondent Illinois Environmental Protection Agency (IEPA) has not moved for dismissal of any of Petitioners' claims. None of Petitioners' claims should be dismissed.

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 (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 (Mar. 6, 2003). Case law is consistent in finding that pleading requirements for administrative review are less exacting than for other causes of action. *Sierra Club v. City of Wood River*, PCB 98-43 (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

35 Ill. Admin. Code § 105.210 (emphasis in original removed).

ABC and Wojtkowski'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."

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

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

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. ILR00 at 3.

In their Petition, ABC and Wojtkowski 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 Petitioners' claims related to the Stormwater Pollution Prevention Plan (SWPPP) that is that is required as part of Permit 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. This approach ignores the fact that the Clean Water Act requires 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. PSGC Failed to Include the Stormwater Pollution Prevention Plan in the Permit Application

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, since there is nothing in the record to demonstrate compliance with any of the requirements. PSGC incorrectly 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 PSGC did not cite relevant case law to support its position.

Under the CWA, therefore, IEPA must “ensure compliance” with each of the requirements noted above as well as with any other applicable requirements. In the case at hand, however, IEPA has already issued Permit 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 evidence in the record demonstrating PSGC’s intent or ability to comply with any of the requirements.

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

ABC and Wojtkowski’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 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* (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.³

E. Multiple Permit Issue

PSGC misstates ABC’s position with regard to evaluating the cumulative impacts to the Kaskaskia River from the various discharges associated with the facility. PSGC states that “obtaining a single NPDES permit” for all of the discharges, including this permit, the storm water permits, the mine NPDES and the coal combustion waste NPDES “is not feasible because the applicable regulations require permit applicants to follow different standards and procedures for these discharges.” Mot. To Dismiss at 19. ABC did not in its Petition request a “single”

³ 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.

permit, but, rather, requested that all the discharges be considered for their cumulative impact on the River.

The Clean Water Act states: "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." 40 CFR 124.4(a)(1).

Section 2 of the Illinois Environmental Protection Act 415 ILCS 5/1 Section 2a(iii) states that "...air, water, and other resource pollution, public water supply, solid waste disposal, noise and other environmental problems are closely interrelated and must be dealt with as a unified whole in order to safeguard the environment." (emphasis added) The terms and provisions of the Act shall be "liberally construed so as to effectuate the purposes of the Act," i.e., to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." (emphasis added.) See 415 ILCS 5/2(b) and (c).

"Water pollution" is defined in the Act as such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life." (emphasis added) 415 ILCS 5/3.55.

PSGC declares that "there will be no cumulative effects from these discharges" because each will meet water quality standards. While that may be the case in some instances, it is not universally true. Petitioners' pleadings are sufficient to show that the potential to violate water quality standards does indeed exist.

F. Water Withdrawal Issues/Impacts on Water Quality

The permit allows PSGC to withdraw up to 30 million gallons of water per day from the River, while returning 1.7 million gallons per day. It is unlawful for an NPDES permit to increase the effluent loading of a water of the state, without proper analysis. 35 Ill. Adm. Code 302.105 (emphasis added)

PSGC admits that “it is true that IEPA must consider the effects of water withdrawal on water quality when it issues an NPDES permit.” Mot. to Dismiss at 24.

PSGC further states: “IEPA 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.” (emphasis added). Mot. to Dismiss at 25.

IEPA’S anti-degradation analysis that determined that the discharge from the Facility would not otherwise unlawfully adversely affect the quality of the receiving waters was performed before the May 10th public hearing. The permit was issued on December 5, 2005—nearly seven months later. Despite comments from Petitioners that the area was in a drought both during and following the public hearing and despite requests to IEPA from ABC and others to rely on updated drought and river level information, there is nothing in the record to indicate the Agency revisited its anti-degradation assessment in order to consider the extremely low levels of the River beginning on May 10 and continuing until December 5th, the date the permit was issued. Furthermore, the Agency failed to address how water quality at such low levels would be impacted by the PSGC discharges.

ABC and Wojtkowski also question how PSGC’s 16-inch discharge pipe, which is to have two feet of water above the pipe, can function properly when, for most of 2005, beginning on the date of the May 10th public hearing, the river depth at the Venedy Station was three feet or

less. In fact, during much of that time, the river was below two feet deep, according to the USGS Real-Time Water Data website.⁴

G. Failure to Consider Dry Cooling as an Option

Dry cooling is a technology that would have greatly reduced PSGC's need for water withdrawal from the River and thus greatly diminished the PSGC discharge and its potential to violate water quality standards. There is no evidence that IEPA Bureau of Water considered dry cooling for the facility. 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). In fact, at the public hearing, IEPA admitted it that he had not heard of dry cooling. Record at 84. The next reference to dry cooling in the record, other than that from Petitioners and other members of the public, appears to be just days before the permit was issued in an email exchange between the Bureau of Water (BOW) and the Bureau of Air's Chris Romaine, who was asked to provide a reason for the Responsive Summary as to why dry cooling was not considered to be best available technology for the facility. Record at 126. The decision on dry cooling was for the air permit, which is under appeal by ABC and others before U.S.EPA's Environmental Appeals Board (EAB). It was not for the air permit. In fact, ABC submitted its comments on the air permit to IEPA and the Petition to the EAB as part of its public comment on the NPDES permit. Included in the submission was a description of dry cooling and its advantages. The Sierra Club also submitted comment requesting the Agency consider dry cooling. Record at 634. Several commenters suggested dry cooling. But, the BOW does not appear to have considered this technology, which could have greatly reduced the amount of water withdrawal and discharge, and therefore, negative impacts to the River, in both quantity and quality.

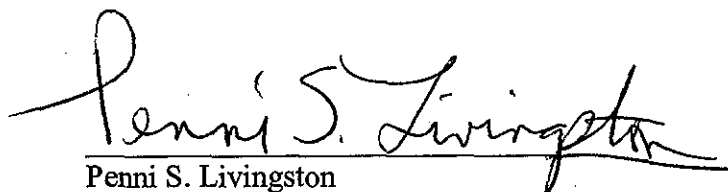
⁴ http://nwis.waterdata.usgs.gov/il/nwis/dv?format=html&period=365&site_no+05594100

III. Conclusion

The petition that ABC and Dale Wojtkowski 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, ABC and Dale Wojtkowski 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 and failure to adequately assess PSGS's potential to violate water quality standards in the Kaskaskia River

ABC and Dale Wojtkowski therefore respectfully request the Board to DENY the Motion to Dismiss.

Respectfully submitted,



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