BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

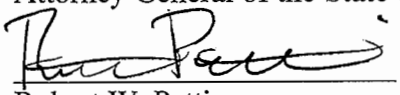
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB Nos. 14-103 and 14-104 Consolidated (NPDES Appeal-Water)

To: Ronald M. Hill
100 East Erie
Chicago, Illinois 60611
Telephone: (312) 751-6588

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 19th day of September, 2014, the undersigned filed the attached Cross-Motion for Summary Judgment and Combined Memorandum in Response to Petitioners' Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment by electronic filing.

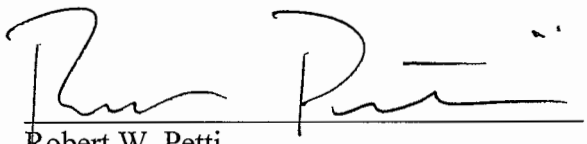
ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,
By LISA MADIGAN
Attorney General of the State of Illinois



Robert W. Petti
Thomas H. Sheperd
Assistant Attorney General
Environmental Bureau
69 W. Washington Street
Suite 1800
Chicago Illinois, 60602
(312)-814-2069
(312)-814-5361

CERTIFICATE OF SERVICE

I, Robert W. Petti, an Assistant Attorney General, certify that on the 19th day of September, 2014, I caused to be served by U.S. Mail, the foregoing Notice of Filing, Cross-Motion for Summary Judgment and Combined Memorandum in Response to Petitioners' Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment to the party named on the Notice of Filing, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.



Robert W. Petti
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
69 W. Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-2069

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB Nos. 14-103 and 14-104 Consolidated (NPDES Appeal-Water)

RESPONDENT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S CROSS-MOTION FOR SUMMARY JUDGMENT

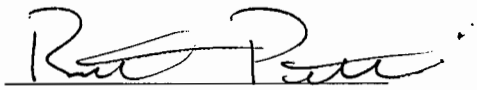
NOW COMES, Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, ("Agency"), by and through Lisa Madigan, Attorney General of the State of Illinois, and, pursuant to 35 Ill. Adm. Code 101.500, 101.508 and 101.516, hereby respectfully moves the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Agency and against the Petitioner, METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO ("Petitioner") in that there exist herein no genuine issues of material fact and that the Petitioner has failed to sustain its burden of proving that the challenged requirements contained in the NPDES permits before the Board in this matter, are not necessary to fulfill the purpose of the Act or Board regulations.

Therefore, Illinois EPA is entitled to judgment as a matter of law and the NPDES permits should be upheld. In support of this Cross-Motion for Summary Judgment and in response to

the Petitioner's Motion for Summary Judgment, the Agency has filed a combined memorandum of law.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By LISA MADIGAN
Attorney General of the State of Illinois



Robert W. Petti
Thomas H. Sheperd
Assistant Attorney General
Environmental Bureau
69 W. Washington Street, Suite 1800
Chicago Illinois, 60602
312-814-2069
312-814-5361
rpetti@atg.state.il.us
tsheperd@atg.state.il.us

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB Nos. 14-103 and 14-104 Consolidated (NPDES Appeal-Water)

AGENCY'S COMBINED MEMORANDUM IN RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENTAND IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

Now Comes, Respondent, Illinois Environmental Protection Agency ("Agency"), by and through its attorney, Lisa Madigan, Attorney General of the State of Illinois, and pursuant to 35 Ill. Adm. Code §101.500, §101.508 and §101.516, hereby respectfully moves the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Agency and against the Metropolitan Water Reclamation District of Greater Chicago ("Petitioner") in that there exist no genuine issues of material fact and that the Petitioner has failed to sustain its burden of proving that certain monitoring requirements in the National Pollutant Discharge Elimination System ("NPDES") permits at issue in this matter, are not necessary to accomplish the purposes of the Illinois Environmental Protection Act ("Act") or Board regulations. The Petitioner's failure to sustain this burden entitles the Agency to judgment as a matter of law, and the NPDES permits must be upheld. In response to Petitioner's Motion for Summary Judgment, and in support of its Cross-Motion for Summary Judgment, the Agency states as follows:

I. INTRODUCTION

In this matter, Petitioner seeks review of the decision by the Agency to include certain monitoring requirements, discussed in detail below, in two NPDES Permits held by the Petitioner. The NPDES Permits before the Board are: 1) Permit No. IL0028061 ("Calumet Permit"); and 2) Permit No. IL0028088 ("O'Brien Permit"), (collectively the "Permits"). (Administrative Record ("R") at 2620-2801 and 3308-3337).

Petitioner's Motion for Summary Judgment argues that, based on the facts in the Administrative Record before the Board, certain monitoring conditions of the Permits are not necessary to achieve the purpose of the Act or Board regulations. Specifically, the Petitioner asserts that the Board should: 1) replace the requirement for daily sampling of fecal coliform in the Permits with a five-day per week sampling requirement; and 2) replace the sample type and frequency requiring continuous monitoring of dissolved oxygen in the O'Brien Permit with a daily grab sampling requirement. However, daily monitoring of fecal coliform was determined to be necessary given that the variation between the daily average flow rate and the daily maximum flow rate is more than double the daily average for both Facilities; and the record demonstrates that continuous monitoring is necessary to achieve compliance with the dissolved oxygen requirements of the O'Brien Permit.

Contemporaneous with this Memorandum, the Agency has filed its Cross-Motion for Summary Judgment. While the Agency agrees that there are no genuine issues of material fact in the Administrative Record, the Petitioner fails to meet the burden necessary for the Board to order a modification of the specific conditions challenged in this appeal. Instead, the Administrative Record before the Board demonstrates that the monitoring requirements for fecal coliform in the Permits, and the continuous sampling type and frequency for dissolved oxygen in

the O'Brien Permit, necessarily fulfill the purpose of the Act and Board regulations, including the site specific requirements found in the Permits.

Because the Petitioner fails to meet its burden on summary judgment, the Agency respectfully requests that the Board enter an order denying Petitioner's Motion for Summary Judgment, granting the Agency's Cross-Motion for Summary Judgment, and dismissing the Petitioner's consolidated appeals.

II. SUMMARY OF FACTS

The facts before the Board are not in dispute. In August 2006, Petitioner applied to the Agency for reissuance of its existing NPDES permits for the facilities specific to this appeal: the Terrence J. O'Brien Water Reclamation Plant located at 3500 West Howard Street, Skokie, Illinois ("O'Brien Facility"); and the Calumet Water Reclamation Plant located at 400 East 130th Street, Chicago, Illinois ("Calumet Facility") (collectively the "Facilities") (R. at 3308-3337 and 2680-2801 respectively). According to the application submitted by the Petitioner for the O'Brien Facility, in the year preceding the application the facility serviced 1,345,392 people, and had an average daily flow rate of 226.5 million gallons per day, with a peak daily flow of 466 million gallons in one day. (R. at 2687). Also, according to the application submitted by the Petitioner for the Calumet Facility, in the year preceding the application the facility serviced 1,053,154 people, and had an average daily flow rate of 224 million gallons per day, with a peak daily flow of 467 million gallons in one day. (R. at 2188-2193).[1]

In November 2009, the Agency issued draft permits and fact sheets for the Facilities. (R. at 2500-2506, and 3043-3065). Beginning January 19, 2010, the Agency issued over 100 public hearing notices. (R. at 1326). On March 9, 2010, two public hearings were held, and public

[1] Based on the flow rate at the Facilities, they are the second and third largest facilities in the State of Illinois.

comments were received, on the draft permits. (R. at 1327, and 3348-3502). Petitioner participated in the comment period and the public hearings. (R. at 1321-1365). On April 8, 2010, Kevin Pierard, Chief of the NPDES Programs Branch with the United States Environmental Protection Agency ("U.S. EPA"), sent a letter to the Petitioner requesting additional information for consideration in its review of the draft permits. (R. at 463).

In March, 2013, the Agency issued revised draft permits. (R. at 2596 and 3288). The Petitioner was afforded the opportunity to comment on the revised draft permits. (R. at 2596 and 3288). In two separate letters to the Agency, each dated April 1, 2013, Petitioner provided additional comments on the Agency's revised draft permits. (R. at 2597 and 3289). Both letters, one concerning the O'Brien Facility and the other concerning the Calumet Facility, include identical comments on the continuous fecal coliform monitoring at the facility, each requesting that the monitoring frequency be reduced from daily, to a 5 day per week frequency. (R. at 2597 and 3289). The Petitioner's letter relating to the O'Brien facility sought clarification of the sampling type and frequency for dissolved oxygen, because the revised draft listed the sample frequency as "continuous" and the sample type as "grab," and the two are incompatible. (R. at 3289).

The Petitioner's April 1, 2013, comments were received and reviewed by both the Agency and U.S. EPA. (R. at 1303-1310). In May, 2013, the U.S. EPA provided the Agency with comments and objections to the revised permits and the Petitioner's comments. (R. at 1303-1310). Specifically, the U.S. EPA and the Agency determined the dissolved oxygen monitoring requirements should be "continuous" for both sampling frequency and type to ensure compliance with the minimum concentration limits for dissolved oxygen stated in the O'Brien Permit. (R. at

1309 and 3308). The U.S. EPA and the Agency also determined that the daily monitoring requirement for fecal coliform would remain in the permits, citing three additional 'major' facilities in U.S. EPA Region 5 that are required to adhere to the same sampling frequency and type for fecal coliform. (R. at 1304).

On December 23, 2013, the Agency responded to all significant public comments, including the Petitioner's April 1, 2013 comments, in its Responsiveness Summary and the fact sheets issued with the final Permits. (R. at 2620-2622 and 3308-3310). On that same day, December 23, 2013, the Permits issued and became effective January 1, 2014. (R. at 2620-2649 and 3308-3337). This appeal followed.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Section 101.516 of the Board's Procedural Rules provides, in pertinent part, as follows:

> (b) If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.

35 Ill. Adm. Code Section 101.516(b).

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, *citing Purtill v. Hess*, 111 Ill. 2d 299, 240 (1986). However, a party opposing a motion for summary

judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219 (2d Dist. 1994).

Summary judgment may also be appropriate in a permit appeal when the Agency record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Clayton Chemical Acquisition, LLC v. IEPA*, PCB 98-113 at 3. (March 1, 2001), *citing Outboard Marine Corporation v. Liberty Mutual Ins. Co.*, 154 Ill. 2d 90 (1992).

In the instant case, the record establishes "that there is no genuine issue of material fact" regarding Petitioner's challenge to the Permits, and the Administrative Record supports the Permits as issued. Accordingly, summary judgment is the appropriate means of upholding the Agency's decision to issue the Permits.

IV. BURDEN OF PROOF

A petition for review of permit conditions is authorized by Section 40(a)(1) of the Act (415 ILCS 5/40 (a)(1) (2012)) and 35 Ill. Adm. Code Section 105.204(a). The Board has long held that in permit appeals the burden of proof rests with the petitioner. The petitioner bears the burden of proving that the application, as submitted to the Agency, would not violate the Act or the Board's regulations.

This standard of review was enunciated in *Browning-Ferris Industries of Illinois, Inc. v. PCB*, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (2nd Dist. 1989) and reiterated in *John Sexton Contractors Company v. Illinois,* PCB 88-139 (February 23, 1989). In *Browning-Ferris* the appellate court held that a permit condition that is not necessary to accomplish the purposes of

the Act or Board regulations is arbitrary and unnecessary and must be deleted from the permit. *Browning-Ferris* 170 Ill. App. 3d 598.

Thus, it is Petitioner's burden to establish that the conditions in the Permits are not necessary to accomplish the purposes of the Act or Board regulations. As discussed in detail below, the Petitioner cannot and did not establish the monitoring requirements at issue for fecal coliform and dissolved oxygen are not necessary to accomplish the purposes of the Act and Board regulations, including compliance with the NPDES permits issued pursuant to provisions of the Act and Board regulations.

V. ARGUMENT

Petitioner's Motion asserts that the contested monitoring requirements in the Permits are not necessary to accomplish the purpose of the Act or Board regulations. With regard to the fecal coliform monitoring frequency challenged here, the Petitioner supports its proposition with recitation to the minimum concentration and inapplicable averaging rules for effluent discharges containing fecal coliform colonies. (Pet. Memo. at 8, citing 35 Ill. Admin. Code § 304.224). However, Section 304.224 of the Board regulations does not establish a floor or ceiling on the sampling frequency for fecal coliform and, based on the Administrative Record, the daily sampling frequency is not only permissible pursuant to Section 304.224, but it is necessary.

Next, Petitioner relies on the averaging rules in Section 304.104 of the Board regulations to support the argument that continuous monitoring is not necessary to meet the dissolved oxygen requirements in the O'Brien Permit. (Pet. Mot. p. 10-11, citing 35 Ill. Admin Code § 304.104). Section 304.104 of the Board regulations is not applicable to the dissolved oxygen concentration requirements found in the O'Brien Permit. Accordingly, as discussed below, the

size, volume, and substantial variance in daily flow at the Facilities, and the site specific minimum concentration levels for dissolved oxygen in the O'Brien Permit, necessitate the monitoring requirements included in the Permits to effectively satisfy the purpose of the Act and Board regulations, including compliance with the Permits.

A. The Purpose of the Act and Board Regulations.

Petitioner's Motion argues that certain monitoring requirements in the Permits are not necessary to accomplish the purpose of the Act or Board regulations. To properly discuss these arguments, an understanding of the legislative purpose and intent of the Act and Board regulations is necessary.

The public policy of the State of Illinois concerning pollution, as articulated in the 1970 Constitution, is "to provide and maintain a healthful environment for the benefit of this and future generations." Ill. Const.1970, art. 11, § 1; City *of Chicago v. Krisjon Const. Co.*, 246 Ill. App .3d 950, 957 (1st Dist., 1993). The Constitution of 1970 further stated that the "General Assembly shall provide by law for the implementation and enforcement of this public policy." Ill. Const. art. XI, § 1. To implement this Constitutional policy, the General Assembly created the Act to prevent the spread of environmental damage and to reduce and eliminate pollution. *Id.* 415 ILCS 5/1 *et seq*.

In Section 2(b) of the Act, the General Assembly set forth the purposes of the Act, which are "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." 415 ILCS 5/2(b) (2012); *Town & Country Utilities, Inc. v. Illinois Pollution Control Bd.*, 225 Ill. 2d 103, 107 (2007).

In Section 11 of the Act, the General Assembly set forth its findings and purpose governing pollution of the State's waters, including that discharges to State waters are "subject to such conditions as are required to achieve and maintain compliance with State and federal law."

a) The General Assembly finds:

> (1) that pollution of the waters of this State constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish, and aquatic life, impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water, depresses property values, and offends the senses;
>
> (2) that the Federal Water Pollution Control Act, as now or hereafter amended, provides for a National Pollutant Discharge Elimination System (NPDES) to regulate the discharge of contaminants to the waters of the United States;
>
> * * *
>
> (4) that it would be inappropriate and misleading for the State of Illinois to issue permits to contaminant sources subject to such federal law, 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;
>
> * * *

b) It is the purpose of this Title *to restore, maintain and enhance the purity of the waters of this State in order to protect health, welfare, property, and the quality of life, and to assure that no contaminants are discharged into the waters of the State*, as defined herein, including, but not limited to, waters to any sewage works, or into any well, or from any source within the State of Illinois, *without being given the degree of treatment or control necessary to prevent pollution, or without being made subject to such conditions as are required to achieve and maintain compliance with State and federal law*; . . .

415 ILCS 5/11 (2012) (*Emphasis added*).

A court must not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent. *Alternate Fuels, Inc. v. Dir. of Ill. E.P.A.*, 215 Ill. 2d 219, 238 (2004). In addition, statutes should be read so as to yield logical and meaningful results and to avoid constructions that render specific language meaningless or superfluous. *Rochelle Disposal Serv., Inc. v. Ill. Pollution Control Bd.*, 266 Ill.

App. 3d 192, 198 (2nd Dist., 1994). Furthermore, words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute. *Alternate Fuels, Inc.*, at 238.

With these guiding principles in mind, the plain language of Section 11 of the Act makes it clear that the Illinois General Assembly intended the Act to be consistent with the Clean Water Act (33 U.S.C. 1251 *et. seq.* (1972)) and its prohibitions against water pollution. The prohibitions against water pollution in Illinois are found in Section 12 of the Act, entitled "Actions Prohibited." 415 ILCS 5/12 (2012). This includes the prohibition against a violation of the terms and conditions imposed by an NPDES permit issued pursuant to the Act. 415 ILCS 5/12(f) (2012). Nothing in the specified intent of the Act states, or intimates, in any way that the minimum requirements defined in the Board regulations are the only requirements necessary to achieve the purpose of the Act as outlined above.

Thus, with the purpose of the Act and Board regulations defined, we can address the Petitioner's challenge that the monitoring requirements for fecal coliform in the Permits and the continuous sampling requirement for dissolved oxygen in the O'Brien Permit, are not necessary to meet the purposes of the Act defined above.

B. <u>The Volume and Variance in Daily Flow Necessitates Daily Monitoring for Fecal Coliform.</u>

Petitioner argues that daily sampling for fecal coliform is not necessary to fulfill the purpose of the Act or Board regulations. (Pet. Memo. at 8). In support of this proposition, Petitioner asserts that its proposed five-day per week sampling would "more than comply" with the Board's applicable regulations, citing 35 Ill. Admin. Code 304.224 as the applicable regulation. *Id.* However, Section 304.224 does not establish a minimum or maximum sampling

frequency for fecal coliform. Instead, Section 304.224 states the minimum acceptable colony forming units for fecal coliform based on whether the number of samples taken in any 30-day period is less than 10 samples or greater than 10 samples. 35 Ill. Admin. Code 304.224. Section 304.224 also states ". . . nor shall more than 10% of the samples during any 30 day period exceed 400 CFU per 100 mL." Accordingly, there is no floor or ceiling for the sample frequency for fecal coliform in the Act or Board regulations, leaving it for the Agency to determine the appropriate sample frequency to effectuate the purpose of the Act and Board regulations based on the facts in the Administrative Record.

As stated above, one of the purposes of the Act is to restore, maintain and enhance the purity of the waters of this State in order to protect health, welfare, property, and the quality of life, and to assure that no contaminants are discharged into the waters of the State . . . without being given the degree of treatment or control necessary to prevent pollution. 415 ILCS 5/11(b) (2012) (emphasis added). Here, the Agency and the U.S. EPA determined that to achieve this purpose, daily monitoring of fecal coliform at the Facilities is necessary. This determination is supported by the facts in the Administrative Record and the requirement to meet water quality standards.

The Administrative Record reveals that there exists a substantial variance in the volume of daily flow at both Facilities. The substantial variance in the volume of daily flow from the annual average at the Facilities necessitates daily monitoring to ensure accuracy. Indeed, the application submitted by the Petitioner for the O'Brien Facility states that the average daily flow rate is 226.5 million gallons per day. (R. at 2688). The Administrative Record also demonstrates that the peak daily flow at the O'Brien Facility can reach as high as 466 million gallons in one

day. (R. at 2687). Thus, at any given time, on any given day, the variance in flow from the annual average can be as much as 240 million gallons. If not monitored daily, this substantial variance would not be taken into account when averaging the fecal coliform colonies in the effluent for the O'Brien Facility.

Likewise, the application for the Calumet Facility states that the average annual daily flow rate through the facility is 224 million gallons per day. (R. at 2188-2193). The maximum daily flow at the Calumet Facility was 467 million gallons in one day. (R. at 2188-2193). Like the O'Brien Facility, the substantial variance from any given day to the next from the annual average daily flow to the maximum recorded daily flow is more than double the average daily flow.[2] Therefore, to ensure an accurate averaging with such a high variability in daily flow, daily sampling is necessary.

Further, in a 28 day, four week, period a five-day per week sampling model will take samples on only 20 days, leaving eight (8) days unaccounted. When considering the sheer volume of water that may go unaccounted as part of the 30 day average, and given the variability in daily flow rates, it is inarguable that the requirement for daily monitoring of fecal coliform, at facilities servicing over 2.3 million people combined (R. at 2687 and 2188), does not meet the purpose of assuring that no contaminants are discharged into the waters of the State with out the necessary treatment and control. Given that the variation between the annual average flow rate and the daily maximum flow rate is more than double the annual daily average for the Facilities, daily monitoring for the Facilities was deemed necessary by the Agency and U.S. EPA to ensure

[2] Additional information on the volume of waste water addressed by the Facilities can be found in *United States v. Metro. Water Reclamation Dist. of Greater Chicago*, 2014 WL 64655 (N.D. Ill. Jan. 6, 2014)

accuracy and compliance with water quality standards and, importantly, that the purpose of the Act, as stated in the Constitution of 1970 and section 11(b) of the Act, is met. (R. at 2620 and 3308)

As stated in Petitioner's Motion, the record must contain evidence to support the conditions attached to an NPDES permit. (Pet. Mot. p 11; citing *Des Plaines River Watershed Alliance, et. al. v.* IEPA, PCB 04-88 (April 19, 2007)). Here, the permit condition requiring daily monitoring for fecal coliform is supported by facts contained in the Administrative Record discussed above. Because the decision to include the daily monitoring for fecal coliform is supported by the Administrative Record, and is necessary to effectuate the purposes of the Act and Board regulations, the Petitioner fails to meet its burden for summary judgment, and the Petitioner's Motion for Summary Judgment must be denied, and the Agency's Cross-Motion for Summary Judgment must be granted as a matter of law.

C. Continuous Monitoring of Dissolved Oxygen is Appropriate to Achieve the Purposes of the Act and Board Regulations, and Petitioner was Afforded a full Opportunity to Comment on this Condition.

The Petitioner asserts that nothing in the Administrative Record supports the requirement for continuous monitoring of dissolved oxygen in the O'Brien Permit. Further, Petitioner asserts that the Agency did not provide Petitioner with an opportunity to comment on the continuous monitoring requirement for dissolved oxygen. However, Petitioner fails to establish that the continuous monitoring of dissolved oxygen is not necessary to ensure compliance with the minimum acceptable dissolved oxygen concentrations outlined in the O'Brien Permit. Also, contrary to the Petitioner's assertions, the Administrative Record clearly demonstrates that

Petitioner was afforded the opportunity to comment on the requirement for continuous monitoring of dissolved oxygen at the O'Brien Facility.

1. Petitioner Fails to Establish a *Prima Facie* case that Continuous Monitoring of Dissolved Oxygen at the O'Brien Facility is not Necessary to fulfill the Purpose of the Act.

The Petitioner fails to establish a *prima facie* case with regard to the dissolved oxygen monitoring requirements in the O'Brien Permit. To establish a *prima facie* case, and meet its burden of proof on summary judgment, Petitioner must demonstrate that the continuous monitoring requirement for dissolved oxygen in the O'Brien Permit is unnecessary to accomplish the purpose of the Act or Board regulations, which for this requirement is compliance with an NPDES permit.[3]

Importantly, the Petitioner does not challenge the dissolved oxygen minimum concentration requirements outlined in the O'Brien Permit. Instead, Petitioner challenges the sampling type and sampling frequency necessary to monitor the minimum dissolved oxygen concentration limits set forth in the O'Brien Permit. (Pet. Mot. p. 2). Therefore, to meet its burden, Petitioner must demonstrate that continuous monitoring is not necessary to ensure compliance with the minimum concentration parameters required by the O'Brien Permit.

The Petitioner's lone assertion that continuous monitoring of dissolved oxygen is not necessary to meet the specific concentration limits of the O'Brien Permit is that the Board regulations allow proof of a violation of numeric standards contained in Part 304 of the Board regulations based on the averaging rules found in 35 Ill. Admin. Code 304.104(a). (Pet. Mot. 10). While it may be true that a grab sample is appropriate to establish a violation of a numeric

[3] See, Section 12(f) of the Act stating that: "No person shall: . . .(f) Cause, threaten or allow the discharge of any contaminant into the waters of the State . . .without an NPDES permit . . . in violation of any term or condition imposed by such permit . . ." 415 ILCS 5/12(f).

standard found in Part 304, the dissolved oxygen minimum concentration limits at issue are specific to the O'Brien Permit, and are not based on numeric standards found in Part 304. [4]

T he O'Brien Permit requires that dissolved oxygen levels in the effluent "[s]hall not be less than 5 mg/l during 16 hours of any 24 hour period, nor less than 4 mg./l at any time." (R. at 3313)(emphasis added). Clearly, Petitioner's argument that averaging daily grab samples is appropriate to show a violation of Part 304 is not the same as establishing that continuous monitoring is not necessary to ensure compliance with the minimum dissolved oxygen limits stated in the O'Brien Permit. In fact, the Petitioner's Motion is silent on how a daily grab sample would demonstrate compliance with the 16 hour rule stated in the O'Brien Permit. The Petitioner's Motion is equally silent as to how a grab sample will demonstrate compliance with the requirement that dissolved oxygen not be less than 4 mg/l "at any time." (R. at 3313). Indeed, Petitioner's Motion offers no evidence from the Administrative Record that would indicate that continuous monitoring is not necessary to achieve compliance with the dissolved oxygen requirements in the O'Brien Permit.

Additionally, the fact sheet for the final O'Brien Permit states that: "[r]eporting of continuous dissolved oxygen monitoring is necessary to ensure compliance with the minimum acceptable dissolved oxygen concentration." (R. at 3308). In short, the Agency determined that continuous monitoring is necessary to ensure that the minimum dissolved oxygen concentration is not less than 5.0 mg/l during 16 hours of any 24 period, nor less than 4.0 mg/l at any time. If there is not continuous monitoring then Petitioner would be unable to demonstrate that dissolved oxygen concentrations are no less than 5.0 mg/l during 16 hours of any 24 hour period, nor less

[4] It is noteworthy that 35 Ill. Admin. Code 304 does not contain an effluent limitation for dissolved oxygen. Instead, the applicable water quality standard for dissolved oxygen is found at 35 Ill. Admin. Code 302.401, which is adopted as part of the O'Brien Permit and not challenged in this matter.

than 4.0 mg/l at any time. The data must be collected continuously in order to make the calculation in the first instance and to demonstrate compliance in the second. Nothing in the Petitioner's Motion adequately refutes this necessity or demonstrates that a daily grab sample can ensure compliance with these minimum concentrations "at any time."

Finally, this matter is distinguishable from both cases cited by the Petitioner to support its proposition that the continuous monitoring requirement should be modified. (Pet. Mot. p. 11). In *Sauget v. IEPA*, the Board did find that "the continuous TOC monitoring requirement is not necessary to ensure compliance with the Act and Board regulations." (Pet. Mot. p 11, citing *Sauget v. IEPA,* 1988 WL 160940 at 9, PCB 86-57 (Dec. 15, 1988)). However, the Board made this finding based on the fact that in that case there was no load or concentration limit for total organic carbon ("TOC") specified in the permit at issue. Here, the O'Brien Permit clearly specifies a minimum concentration limit for dissolved oxygen that, by its very parameters, necessitates continuous monitoring, rendering the finding in *Sauget* inapplicable to the facts of this case. (R. at 3313).

Likewise, in *Marathon Petroleum Co. v. IEPA*, the Board found that where there was no evidence in the record to support a quarterly monitoring requirement imposed by the Agency, the regulatory minimum monitoring requirements are acceptable. *Marathon Petroleum Co. v. IEPA* 1989 WL 95840 at 10-12, PCB 88-179 (Jul. 27, 1989). In *Marathon*, the petitioner demonstrated that semi-annual monitoring and reporting met regulatory minimums and that site-specific conditions did not require more frequent monitoring and reporting. *Id.* The Agency did not offer any evidence to refute this showing by the petitioner, leading to the Board's finding. *Id.* Here, the facts are quite different, as there is clear evidence that continuous monitoring is necessary to

ensure compliance with the site-specific dissolved oxygen requirements in the O'Brien Permit. Because the Administrative Record and the O'Brien Permit itself demonstrate that continuous monitoring of dissolved oxygen is necessary to ensure compliance with the minimum concentration limits in the O'Brien Permit, *Marathon* and *Sauget* are inapposite to this matter, and the O'Brien Permit must be upheld.

Accordingly, because the Petitioner's Motion does not address the requirements actually in the O'Brien Permit, and because the O'Brien Permit and the Administrative Record demonstrate that continuous monitoring of dissolved oxygen is necessary to ensure compliance with the minimum concentration limits "at any time," Petitioner cannot establish a *prima facie* case that the condition requiring continuous monitoring of dissolved oxygen is not necessary to achieve the purposes of the Act and Board Regulations. Therefore, Petitioner cannot meet its burden and Petitioner's Motion for Summary Judgment must be denied, and the Agency's Cross-Motion for Summary Judgment must be granted as a matter of law.

2. Petitioner was Afforded Opportunity To Comment on the Continuous Monitoring Requirement for Dissolved Oxygen Requirements in the O'Brien Permit.

Petitioner was afforded an opportunity to comment on the continuous monitoring condition in the O'Brien Permit prior to issuance of the final permit. While the November, 2009, draft permit for the O'Brien Facility identified the sample type and frequency as grab for dissolved oxygen, Petitioner was made aware of the revision to continuous monitoring before the issuance of the final permit.

In March, 2013, the Petitioner received a revised draft permit for the O'Brien Facility. (R. at 3288). The revised permit stated that the sampling frequency for dissolved oxygen would be "continuous," but also stated the sample type to be "grab." (R. at 3289). In a letter to the

Agency on April 1, 2013, the Petitioner commented on the sampling frequency to the Agency, and requested a clarification between the sample type and sample frequency. (R. at 3289).

Shortly thereafter, the Petitioner's comment was considered by the Agency and U.S. EPA. (R. at 1303-1310). The Agency and U.S. EPA determined that the sample type should be consistent with the sample frequency, stating that:

> [S]ampling frequency is continuous, MWRD is requesting that the sample type match/be made consistent with other parameters. The sample type should be edited to 'Continuous' from the existing 'Grab.' (R. at 1309).

Thereafter, on December 23, 2013, the final permit issued for the O'Brien Facility. As part of the final permit a fact sheet was provided. (R. at 3308). This fact sheet states, in response to Petitioner's April 1, 2013, comments, that "[r]eporting of continuous dissolved oxygen monitoring is necessary to ensure compliance with the minimum acceptable dissolved oxygen concentration." (R. at 3308).

Clearly, Petitioner had the opportunity to address the issues of continuous monitoring for dissolved oxygen when it received and reviewed the revised permit in March, 2013. In fact, the Petitioner did comment, requesting that the sample frequency and type be consistent with the other parameters in the permit. (R. at 3289). At that time, Petitioner failed to offer any additional support for the request that the continuous monitoring requirement be changed from continuous to grab.

Accordingly, because Petitioner had an opportunity to offer comments in support of its April 1, 2013 letter, Petitioner cannot meet its burden of establishing that the Agency failed to afford Petitioner an opportunity to comment on the revised draft of the O'Brien Permit. Therefore, Petitioner's Motion for Summary Judgment must be denied and, because Petitioner

cannot as a matter of law meet its burden, the Agency's Cross-Motion for Summary Judgment must be granted as a matter of law.

D. Agency's Decision to Adopt U.S. EPA Requirements for the Permits was Appropriate Pursuant to the NPDES Permit Program and Supported by the Administrative Record.

Finally, for both the fecal coliform monitoring and the dissolved oxygen monitoring requirements challenged in this appeal, the Petitioner takes issue with the fact that the Agency adopted permit conditions required by U.S. EPA that were contrary to the Petitioner's own comments. This position fails to account for the fact that when issuing an NPDES permit the Agency is subject to oversight by the U.S. EPA's Regional Administrator for Region 5.

Under Section 402(b) of the Clean Water Act (33 U.S.C. § 1342(b)), U.S. EPA delegated authority to Illinois to implement the NPDES program in this State. Responsibilities that, under federally-administered NPDES programs rest solely with U.S. EPA, are divided in Illinois between the Agency and the Board. However, even after this delegation occurs, the U.S. EPA Regional Administrator, under federal regulations, has the right to receive, review, and object to a "proposed permit" and to issue the permit if the State does not resubmit a permit revised to account for the Regional Administrator's objections. 40 C.F.R. §§ 123.43, 123.44. Under the Clean Water Act, a "proposed permit" is "a State NPDES 'permit' prepared after the close of the public comment period which is sent to U.S. EPA for review before final issuance by the State." 40 C.F.R. § 122.2. Accordingly, before the Agency may issue a final NPDES permit it must be reviewed by the U.S. EPA, and the final permit must account for any objections or revisions required by the Regional Administrator.

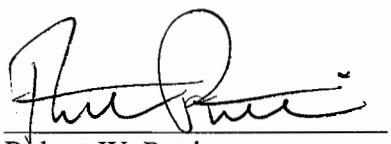
Here, the "proposed permits" were submitted to U.S. EPA for review following receipt of the Petitioner's April 1, 2013, comments to the revised draft permits. (R. at 1303-1310). In May, 2013, the Agency received the U.S. EPA's comments and objections to the "proposed permits," which also included responses to the Petitioner's comments. (R. at 1303-10). The final Permits were issued December 23, 2013, and included revisions made to account for the comments and objections of the Regional Administrator. (R. at 2620 and 3308). Contemporaneous with the issuance of the Permits, the Agency published the Responsiveness Summary and fact sheets with the final Permits, which provided responses to comments made by the Petitioner. (R. at 1321-1364, 2620, and 3308). Therefore, there is no basis for Petitioner's challenge to the Permits' conditions that came from comments or requirements of the U.S. EPA, especially considering the comments and requirements at issue in this appeal are all supported by the Administrative Record, as discussed in detail above.

VI. CONCLUSION

For all the reasons stated above, there is no genuine issue of material fact, and the Petitioner cannot sustain its burden of proving that the daily sampling frequency for fecal coliform in the Permits and the continuous monitoring requirement for dissolved oxygen in the O'Brien permit were not necessary to fulfill the requirements of the Act and Board regulations. Accordingly, the Agency requests that the Board enter an order: 1) denying Petitioner's Motion for Summary Judgment; 2) finding that the Agency is entitled to summary judgment as a matter of law; 3) granting the Agency's Cross-Motion for Summary Judgment; and 4) upholding the Permits.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By LISA MADIGAN
Attorney General of the, State of Illinois



Robert W. Petti
Thomas H. Sheperd
Assistant Attorney General
Environmental Bureau
69 W. Washington Street, Suite 1800
Chicago Illinois, 60602
312-814-2069
312-814-5361
rpetti@atg.state.il.us
tsheperd@atg.state.il.us