ILLINOIS POLLUTION CONTROL BOARD
March 5, 2015

PRAIRIE RIVERS NETWORK, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL LAW & POLICY CENTER, FRIENDS OF THE CHICAGO RIVER, and GULF RESTORATION NETWORK,	)	PCB 14-106 (O'Brien)
Petitioners,	)	PCB 14-107 (Calumet)
v.	)	PCB 14-108 (Stickney)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,	)	(Third-Party NPDES Permit Appeals – Water) (Consolidated)
Respondents.	)	

ORDER OF THE BOARD (by J.A. Burke):

The Illinois Environmental Protection Agency (Agency or IEPA) issued to the Metropolitan Water Reclamation District of Greater Chicago (District) three National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA). The Agency issued the permits for three separate District facilities in Cook County. Pursuant to Section 40(e)(1) of the Illinois Environmental Protection Act (Act) and Section 105.204(b) of the Board's regulations, Prairie Rivers Network, Natural Resources Defense Council, Sierra Club, Environmental Law & Policy Center, Friends of the Chicago River, and Gulf Restoration Network (collectively, Environmental Groups) asked the Board to review the three permits. *See* 415 ILCS 5/40(e)(1) (2012); 35 Ill. Adm. Code 105.204(b).

The parties filed cross-motions for summary judgment on the three petitions. On December 18, 2014, the Board granted summary judgment in favor of the Agency and the District, and dismissed these consolidated permit appeals.

On January 20, 2015, the Environmental Groups filed a motion for reconsideration of the Board's December 18, 2014 opinion and order (Mot.), accompanied by a memorandum in support of the motion (Memo.). The Agency (Agency Resp.) and the District (District Resp.) filed separate responses to the motion on February 18, 2015. For the reasons below, the Board denies the Environmental Groups' motion to reconsider the Board's December 18, 2014 opinion and order (Opinion).

SUMMARY OF THE BOARD'S DECEMBER 18, 2014 OPINION AND ORDER

The Environmental Groups asked the Board to review three permits issued by the Agency to the District for three separate facilities in Cook County: the Terrance J. O'Brien Water Reclamation Plant (O'Brien Plant); the Calumet Water Reclamation Plant (Calumet Plant); and the Stickney Water Reclamation Plant (Stickney Plant). The Groups' challenge related to phosphorous and nitrogen discharges, overflow from sanitary sewers, and the Agency's response to public comments. The parties filed cross-motions for summary judgment, and the Board granted summary judgment in favor of the Agency and the District.

The Board found that the Environmental Groups did not meet their burden of proof of establishing that the challenged conditions in the permits issued by the Agency violated the Act or Board regulations. Opinion at 27. The Board concluded

> [t]he Agency's condition to limit phosphorus discharges to 1.0 [milligram per liter (mg/L)] is consistent with the Board's interim effluent standard and acceptable to prevent a violation of dissolved oxygen standards as well as to prevent offensive or unnatural plant or algal growth in the receiving waters of the three District plants. The Board further finds that the Agency's imposition of compliance schedules to meet the phosphorus effluent limit is authorized by the Act and that the permits appropriately prohibit overflows from sanitary sewers. The Board also declines to review whether the Agency's responsiveness summary complies with 35 Ill. Adm. Code 166.192. Opinion at 27.

The Board noted that nothing in the Opinion precluded enforcement against the District for violating any applicable water quality standard. *Id.*

ENVIRONMENTAL GROUPS' MOTION TO RECONSIDER

Alternative Requested Relief

The Environmental Groups argue that the Board overlooked portions of the record establishing "that phosphorous pollution from the three plants has caused violations of water quality standards in water segments that receive phosphorous directly from the plants and in segments into which that water flows." Memo. at 3. The Groups contend that, "at a minimum, IEPA biologists' persistent and repeated decisions that phosphorous is impairing numerous waters that receive phosphorous from the plants means there is a reasonable potential of water quality standard violations now and in the future." *Id.* at 3-4.

The Environmental Groups contend that the Agency and the United States Environmental Protection Agency (U.S. EPA) "are united that the [water bodies receiving phosphorous from the plants] are impaired by phosphorous" and contend that "[t]he permits should set forth a plan to determine the full impacts of the phosphorous discharges on water quality by the time the permits are renewed." Memo. at 4. The Groups believe that "such studies are clearly needed to monitor compliance with Special condition 5 of the permits that prohibits discharges that cause violations of water quality standards." *Id.* The Groups state that, without these studies, the

Agency "will not have the facts that are critical to setting proper water quality-based phosphorous limits even in the next round of permits." *Id.* at 4-5. The Environmental Groups therefore "ask that the permits be remanded to consider what studies can be done by MWRD to ensure that proper water quality-based effluent limits can be developed when the permits are renewed." *Id.* at 5.

Agency Regulatory Requirements

The Environmental Groups argue that "[t]he Opinion does not discuss the implications of 35 Ill. Adm. Code 304.105 or 35 Ill. Adm. Code 309.141(a) that require that IEPA 'ensure' that limits are placed in the permits that prevent violations of water quality standards." Memo. at 6. The Groups further argue that the Opinion does not "discuss the language of 35 Ill. Adm. Code 309.143(a) requiring limits on pollutants that have the 'reasonable potential' to cause violations of water quality standards." *Id.* The Groups contend that the Agency cannot ensure that allowed pollutants will not violate water quality standards "without 1) first studying the potential impacts of the pollution on the receiving streams, 2) determining what is necessary to prevent impacts that violate water quality standards, and 3) including limits in the permit to prevent such violations." *Id.* The Groups also contend that 35 Ill. Adm. Code 309.143(a) "establishes that violations need not be proven before a pollutant limit is required." *Id.*

The Environmental Groups state that phosphorous levels allowed by the permits are "over ten times higher than the criteria recommended by U.S. EPA, . . . and 5 to 10 times greater than the Minnesota and Wisconsin standards." Memo. at 7. The Groups contend that "if there is uncertainty whether there will be violations of water quality standards, that is the 'potential' for a violation, at a minimum data should be collected that will resolve the uncertainty." *Id.*, citing Des Plaines River Watershed Alliance v. IEPA, PCB 04-88 (April 19, 2007).

Unnatural Plant or Algal Growth in Receiving Stream Segments

The Environmental Groups state "the record is uncontradicted that unnatural plant and algal growth has been observed in the receiving stream segments." Memo. at 8. The Groups state that, in 2012, the Agency "specifically listed segment HA-05 on the Little Calumet River as impaired by low dissolved oxygen (code #322) phosphorous (code #462) and 'aquatic algae' (code #479)." Memo. at 8. The Agency "also found that segment HCCA-02 of the North Shore Channel was impaired by low dissolved oxygen, phosphorous, and aquatic algae." *Id.* The Groups state that these water segments "directly receive pollution from (respectively) the Calumet and the O'Brien plants, as the plants discharge at the demarcation of two segments of the Little Calumet (HA-04 and HA-05) and the North Shore Channel (HCCA-02 and HCCA-04)." *Id.* The Groups state that the Board's R 08-9 proceeding "likewise clarifies that both Little Calumet River segment HA-05 (to the east of the discharge point for the Calumet plant) and North Shore Channel segment HCCA-02 (to the north of the O'Brien discharge point) directly receive effluent from the Calumet and O'Brien Plants, respectively." *Id.* at 8-9; *see* Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System (CAWS) and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304, R 08-9.

Phosphorous Discharges and Dissolved Oxygen

The Environmental Groups argue the Opinion does not consider whether phosphorous causes or contributes to violations of dissolved oxygen standards in the waters that are listed as impaired by low dissolved oxygen and receive discharge from the plants. Memo. at 10. The Groups state that the Agency has listed phosphorous as a cause of impairment in a number of waters that receive discharges from the plants, including: segments in the Calumet Sag Channel H-01, the Chicago Sanitary and Ship Canal, segments GI-02, GI-03, GI-06, the North Shore Channel HCCA-02, the Chicago River HCB-01, and the Little Calumet River HA-05. *Id.* The Groups state that "[e]ach of these waters is listed as impaired by low dissolved oxygen and phosphorous" and that "[a] 303(d) listing of a water body as impaired by the state is at least a prima facie showing that it is in fact impaired." *Id.*, citing Alabama Dept. of Environmental Management v. Alabama Rivers Alliance, Inc., 14 So.3d 853, 864. The Groups further state that the Agency made these impairment findings after rejecting MWRD's denial that phosphorous was causing impairments. Memo. at 11, citing Agency Record (R.) (March 26, 2014) at 1303.

The Environmental Groups state that the Opinion is unclear on how the Board views the role of dissolved oxygen limits in the permit. Memo. at 12. The Groups state "[t]he record is clear that diel swings in dissolved oxygen levels can be caused by plant or algal growth that is stimulated by phosphorous pollution." *Id.* The Groups continue that "[p]hosphorous discharged with the effluent will not immediately have any effect on dissolved oxygen in the effluent and will not even have an effect in the receiving water bodies until there has been time for plants or algae in the receiving waters to use that phosphorous." *Id.*

Downstream Waters

The Environmental Groups state that the Agency "has repeatedly found [evidence of low dissolved oxygen or unnatural or algal growth] in segments (HCCA-02 and HA-05) that are known to receive pollutants directly from the plants." Memo. at 13. The Groups contend "the law is clear that IEPA may not permit discharges that may cause or contribute to a violation of water quality standards in any water segment, even segments that are well downstream of the discharge point." *Id.*, citing Arkansas v. Oklahoma, 503 U.S. 91, 105-07 (1992); Proposed Determination of No Significant Ecological Damage for the Joliet Generating Station, PCB 87-93 (Nov. 15, 1989).

The Environmental Groups argue "it is well-established that phosphorous pollution can travel great distances and often causes adverse effects well downstream from the discharge point at locations where the other necessary requirements for plant or algal growth (e.g. light, proper flow conditions) give the algae an opportunity to grow." Memo. at 13-14. The Groups further state that "the Board in its regulations has specifically recognized that phosphorous discharges can cause or contribute to impairments of water quality standards miles below the discharge point and presumes such adverse effects will occur to lakes as far as 25 miles downstream of the discharge." *Id.* at 14.

1.0 mg/L Phosphorous Discharge Limit

The Environmental Groups argue that, while the District reducing its discharge level to 1.0 mg/L may be helpful toward needed reductions, "there is no evidence in the record that the 1.0 mg/L will do anything to address whatever problems there are in the waters that receive pollution from the plants." Memo. at 14. Instead, "there is . . . abundant evidence in the record that 1.0 mg/L is far too lax to ensure that phosphorous discharges will not cause violations of the dissolved oxygen, unnatural sludge and offensive conditions standards." *Id.* at 15. The Groups contend that 1.0 mg/L "is at least 5 to 10 times too high" and that "U.S. EPA, other states and scientists who have studied to what levels the concentrations of phosphorous must be limited to control plant and algal growth and protect dissolved oxygen standards agree that levels must be less than 0.2 mg/L or lower." *Id.* at 15. The Groups also note that the District already reduced its phosphorous discharge at its Egan plant to 1.0 mg/L and concluded that it could not see any improvement in water quality. *Id.*, citing R. at 304. The Environmental Groups also argue that the record does not support the 1.0 mg/L limit and that this limit "was picked because that is what [the District] agreed to." Memo. at 15-16.

Reopening the Agency Record

The Groups cite 35 Ill. Adm. Code 309.102, which requires the Agency to reopen the public comment period when it significantly modifies a draft permit and the final permit is not a logical outgrowth of the proposed permit. Memo. at 16. The Groups state that the draft permit "contained no phosphorous permit limit at all, and members of the public could hardly be expected to comment on the impropriety of a limit that IEPA had not proposed." *Id.*

Summary Judgment Standard

The Environmental Groups state in their motion that the Opinion "identifies several factual matters as being in 'dispute,' . . . and then resolved the dispute in some fashion." Mot. at 6, citing Opinion at 17. The Groups state that such action "is inappropriate in the context of a summary judgment motion." Mot. at 6.

RESPONSES TO MOTION

Agency Response

The Agency states that the Environmental Groups do not set forth new facts, a change in the law, or an error in the Board's application of existing law. Agency Resp. at 3. The Agency also contends that each of the Environmental Groups' arguments allegedly overlooked by the Board "is either mentioned or discussed in the [Opinion] or is part of the Administrative Record." *Id.* The Agency states as an example that the Environmental Groups

> contend the Board overlooked evidence that a 1.0 mg/L effluent limit for phosphorous is not adequate to prevent violations of water quality standards. [Mot. at 5.] [The Groups] argue the Board failed to consider criteria proposed by U.S. EPA and criteria adopted by other jurisdictions in the Midwest that have

> established more stringent effluent standards for phosphorous. [*Id.*] In the [Opinion], however, the Board specifically acknowledges the criteria [the Groups] allege the Board overlooked, and directly references the more stringent numeric effluent limits on phosphorous from other jurisdictions, noting as well that these criteria from other jurisdictions were raised for consideration in the [Groups'] Summary Judgment briefs. [Opinion at 15.] Agency Resp. at 4.

The Agency states that the record from the Board's R 08-9 proceeding is raised for the first time in the Environmental Groups' motion for reconsideration. Agency Resp. at 5. The Agency contends that the information from that rulemaking, regarding specific waters that receive effluent discharge from the plants at issue in this matter, "was considered by the Board in the [Opinion]." Agency Resp. at 5, citing Opinion at 17. The Agency quotes the Board as stating "[t]he O'Brien Plant discharges to the North Shore Channel and the Calumet Plant to the Little Calumet River." *Id.* The Agency argues that the R 08-9 rulemaking "is not new law and does not represent a change in the law subsequent to December 18, 2014." Agency Resp. at 5. The Agency further argues that "the rest of the statutory law, regulations, and case law" presented in the Motion was available to the Environmental Groups prior to the Board's Opinion, "and does not represent new law, or new facts, for the purpose of" the Motion. *Id.*

The Agency contends that "each of [the] allegedly overlooked arguments [in the Motion] is considered in the Board's review and decision." Agency Resp. at 6, citing Opinion at 10-11. The Agency argues, for example, that the Environmental Groups "entirely misstate" the Opinion in their claim that the Board overlooked regulations requiring the Agency to ensure permitted discharges will not cause violations of water quality standards. *Id.* The Agency notes that the Board opens its "Board Analysis and Finding" section by discussing 35 Ill. Adm. Code 309.141(d) and 35 Ill. Adm. Code 309.143(a). *Id.* The Agency continues that the Board discussed "these regulations, among others, over numerous pages before ultimately concluding 'the record supports the Agency's decision that the 1.0 mg/L limit on phosphorous is sufficient to prevent a violation of the cited water quality standards.'" Agency Resp. at 6, citing Opinion at 18.

District Response

The District contends that the Environmental Groups' appeal must fail because they cannot meet their burden of proving that the challenged permits violate the Act or Board regulations. District Resp. at 4. The District further contends that the Groups do not identify any new or existing evidence or law to satisfy this burden of proof, and that the Groups "simply reiterate the same old arguments that the Board rejected in ruling on the parties' cross-motions for summary judgment." *Id.*

Alternative Requested Relief

The District states that the Board was not required to discuss every argument put forth by the Environmental Groups. District Resp. at 5, citing Rita v. U.S., 551 U.S. 338, 356 (2007). The District also argues that "the only purpose of a motion for reconsideration is to bring to the court's attention: (1) newly discovered evidence which was not available at the time of hearing,

(2) evidence that was overlooked, (3) change in the law, or (4) errors in the court's previous application of the existing law." District Resp. at 5, citing People v. Packaging Personified, Inc., PCB 04-16, slip op. at 4 (June 7, 2012). The District continues, "'[o]verlooked' arguments are no basis for a motion for reconsideration." District Resp. at 5.

The District contends that the Environmental Groups do not "identify any new or existing laws that would require a publicly-owned treatment works to perform [studies regarding the impacts of phosphorous] for purposes of developing water quality-based effluent limits." District Resp. at 5-6. The District states that the Board determines and promulgates statewide water quality standards, and the Agency develops and imposes water quality-based effluent limits. *Id.* at 6, citing 415 ILCS 5/5, 5/13 (2012). The District argues that the Board considered this in stating that it had not yet "promulgated numeric water quality standards for phosphorous or nitrogen in streams," and that "[a]ccordingly, the Agency is not required to establish effluent limits to ensure that the District plants meet a nonexistent numeric water quality standard." District Resp. at 6, citing Opinion at 13. The District further notes that the State is currently working on developing such standards and effluent limits. District Resp. at 6.

Agency Regulatory Requirements

The District states that the Board discusses 35 Ill. Adm. Code 304.105, 309.141(a) and 309.143(a) throughout its opinion. District Resp. at 7, citing Opinion at 8, 9, 13, 16. The District continues that the Board, in applying these sections, "unequivocally held that phosphorous limits in the District's permits are sufficient to ensure that water quality standards are not violated." District Resp. at 7, citing Opinion at 17, 27.

The District also emphasizes that, contrary to the Environmental Groups' arguments, the Agency has placed numeric effluent limits on the District's phosphorous discharges. District Resp. at 7-8. The District states that the permit limits imposed on the District "will result in a nearly fifty percent reduction in phosphorous discharges." *Id.* at 8.

Unnatural Plant or Algal Growth in Receiving Stream Segments

The District argues that the Environmental Groups "point to nothing in the record that quantifies the amount of flow or contribution of phosphorous that can be attributed to" the District's alleged effluent flows upstream. District Resp. at 8. The District further argues that the Groups' argument does not "acknowledge that there are many factors that can cause or contribute to algal growth, and nothing in the record suggests a correlation between the District's effluent and upstream algae." *Id.*, citing R. at 304. The District contends that, even with such evidence in the record, the Environmental Groups "still could not meet their burden of proving that a nearly fifty percent reduction in the District's phosphorous discharge would somehow violate the narrative standard for unnatural plant or algal growth." District Resp. at 9. The District also contends that the Agency "is not prohibited from permitting the District's discharge into impaired waters." *Id.*, citing NRDC, *et al.* v. IEPA and Dynegy Midwest Gen., Inc., 2014 WL 2591592, **35-38, PCB 13-17 (June 5, 2014). The District further notes that the U.S. Supreme Court has held that the Clean Water Act does not mandate a ban on discharges into a

waterway that is in violation of water quality standards. District Resp. at 9, citing Arkansas v. Oklahoma, 503 U.S. 91, 108 (1992).

Phosphorous Discharges and Dissolved Oxygen

The District contends that the record contains no evidence demonstrating a correlation between phosphorous discharges from the plants and dissolved oxygen concentrations in the receiving waters. District Resp. at 9-10. The District states that the Environmental Groups do not mention the permits' "stringent limits on biochemical oxygen demand and suspended solids, which are the sole parameters that the Board has designated for regulating 'deoxygenated wastes.'" *Id.* at 10, citing 35 Ill. Adm. Code 304.120. The District continues that the Groups "completely disregard[] the permits' provisions regarding combined sewer overflows and the District's corresponding Long Term Control Plan, despite the fact that these measures provide another layer of protection with respect to [dissolved oxygen]." District Resp. at 10. The District also notes "the extraordinary requirements in the permits with regard to the operation of in-stream aeration facilities, which pump [dissolved oxygen] directly into the plants' receiving waters." *Id.* The District contends that the Agency wrote these provisions into the permits "to prevent violations of the Board's water quality standards for [dissolved oxygen]." *Id.*

The District argues that "the fact that none of the stream segments downstream of the District's plants are impaired for unnatural plant or algal growth suggests that factors other than nutrients are to blame for any issues related to [dissolved oxygen]." District Resp. at 10. The District further states "numerous studies conducted in Illinois for the purpose of determining defensible nutrient standards have failed to show any correlation between [total phosphorous] and . . . dissolved oxygen." *Id.* at 10-11, citing R. at 1212, 304. The District concludes that the Environmental Groups "have not met their burden of proving that [a nearly fifty percent] reduction in phosphorous output and the multitude of [dissolved oxygen]-related restrictions in the District's permits will somehow result in violations of the Board's water quality standards for [dissolved oxygen]." *Id.* at 11.

Downstream Waters

The District argues that "nothing in the [Environmental Groups'] motion or the record establishes that any significant amount of nutrients from the District's plants ever reaches" lakes that the Groups claim are impaired by the District's discharges. District Resp. at 11. The District further argues that "a number of other point and non-point sources of nutrients directly drain into" these lakes "and appear to be the cause of any impairments." *Id.* The District concludes that the case law precedent cited by the Environmental Groups "is immaterial to the Board's holding in this case." *Id.* at 12.

1.0 mg/L Phosphorous Discharge Limit

The District contends that the evidence relied on by the Environmental Groups, *i.e.*, out-of-state standards and U.S. EPA's "Nutrient Criteria Guidance Manual," do not apply to the specific waterway in question. District Resp. at 12. The District also argues that the Environmental Groups misinterpret the conclusion of a District study relating to the effluent of a

plant that is not at issue in these appeals. *Id.* at 12-13. The District states that, in its study, "significant decreases in receiving-stream phosphorous levels were observed." *Id.* at 13, citing R. at 283. The District also reported that "no effect was observed on [dissolved oxygen] levels, algae, or biota." *Id.* The District states this conclusion is unsurprising given that "numerous studies conducted in Illinois have failed to show any correlation between [total phosphorous] and algae, dissolved oxygen, or biota in Illinois streams." District Resp. at 13, citing R. at 1212. The District also notes that the 1.0 mg/L phosphorous discharge limit "was the level selected by the Board as its interim phosphorous limit for new and expanding wastewater treatment plants." District Resp. at 13.

Reopening the Agency Record

> The District quotes the criteria of 35 Ill. Adm. Code 309.120, which states
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> > [i]n determining if the final permit is a logical outgrowth of the draft permit, the Agency shall consider the following: (1) Whether the interested parties could not have reasonably anticipated the final permit from the draft permit; (2) Whether a new round of notice and comment would provide interested parties the first opportunity to offer comments on the issue; or (3) Whether the provisions in the final permit deviate sharply from the concepts included in the draft permit or suggested by the commenters." District Resp. at 14, citing 35 Ill. Adm. Code 309.120.

The District contends that the Environmental Groups could reasonably anticipate the final permit because the Groups, during the comment period, demanded that the permits "should include limits on phosphorous . . . that require the removal of these pollutants and/or require systemic measures to reduce the plant's phosphorous discharges." District Resp. at 14, citing R. at 2053. The District also argues that the Environmental Groups cannot argue that a new round of notice and comment would provide the Groups' first opportunity to offer comments on the issue of nutrient limits or that the final permits deviate sharply from the concepts suggested by the Groups. District Resp. at 14. The District states this is because the Groups' "principal contention was that the permits lacked effluent limits for nutrients" and that the Groups "inundated the record with nutrient-related literature in an attempt to support their position." *Id.*, citing R. at 3398-3325, 5365-5377, 3503-5544.

Summary Judgment Standard

The District notes that, while the Environmental Groups contend in their motion that the Board did not apply the proper standard for summary judgment, the Groups "do not elaborate on this point in their motion and seem to abandon it altogether in their memorandum in support." District Resp. at 15. The District contends that "a dispute over an immaterial fact does not preclude granting an otherwise properly supported motion for summary judgment." *Id.*, citing City of Quincy v. IEPA, 2010 WL 2547531 at *29, PCB 08-86 (June 17, 2010). The District argues that "[n]othing in [the Groups'] motion contradicts the Board's finding that '[h]ere, none of the parties have raised any contested issue of material fact . . . ." District Resp. at 15, citing Opinion at 10.

BOARD DISCUSSION

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to determine whether the Board's decision was in error. 35 Ill. Adm. Code 101.902. A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence that was not available at the time of hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627 (1st Dist. 1992). A motion to reconsider may specify evidence in the record that was overlooked. *See* People v. Packaging Personified, Inc., PCB 04-16, slip op. at 16 (March 1, 2012). The Environmental Groups contend that the Board misapplied the standard for summary judgment, and that the Board overlooked evidence in the record in making its determination.

The Environmental Groups contend that the Board overlooked their argument that studies be required as a condition of the permits. Mot. at 1, Memo. at 3. In a third-party appeal of a NPDES permit, the third party has the burden of proof on appeal that the permit as issued violated the Act or the Board's regulations. Opinion at 10, citing 415 ILCS 5/40(e)(3)(ii) (2012); IEPA v. PCB, 386 Ill. App. 3d 375, 382 (3rd Dist. 2008); Prairie Rivers Network v. PCB, 335 Ill. App. 3d 391, 401 (4th Dist. 2002). The Board considered each of the Groups' arguments with this standard in mind. The Board specifically noted the Groups' request for additional studies. Opinion at 23. Further, the Board concluded that the Environmental Groups did not prove that the permit as issued violated the Act or Board regulations. Accordingly, there is no basis for the Board to require such studies as a permit condition.

The Environmental Groups next argue that the Board overlooked regulations requiring the Agency to "ensure" permitted discharges will not cause violations of water quality standards. Mot. at 3, Memo. at 5. The Groups also contend that the Agency is required to control pollutants where there is a "reasonable potential" discharged pollutants will cause or contribute to a violation of water quality standards. *Id.* The Board noted the "ensure" argument on page 10 of the Opinion and specifically discussed this regulatory requirement in its analysis. Opinion at 13. The Board thus did not overlook these regulations. Similarly, the Board extensively discussed the "reasonable potential" requirement throughout the Opinion. *See*, *e.g.*, Opinion at 9-10, 17-18. The Environmental Groups' arguments are repetitive of the prior arguments which were duly considered and rejected by the Board.

The Environmental Groups contend that the Board overlooked portions of the record contradicting the claim that unnatural algal growth has not been found in receiving stream segments. Mot. at 4, Memo. at 8. As noted by the Groups, the Board specifically addressed this issue in the Opinion and found that "the record does not contradict[] that unnatural plant or algal growth has not been observed in the receiving stream segments." Opinion at 17. The Board also observed that the O'Brien Plant discharges to the North Shore Channel and the Calumet Plant discharges to the Little Calumet River. *Id.* Further, the Board found that the 1.0 mg/L effluent limit on phosphorous imposed by the Agency in the permits "is consistent with the Act and Board regulations." *Id.* The Board continued, "there is no information in the record to conclude

that the 1.0 mg/L effluent limit on phosphorus or omission of a nitrogen limit would violate the standards for dissolved oxygen at 35 Ill. Adm. Code 302.206 and 302.405; unnatural sludge at 35 Ill. Adm. Code 302.403; or offensive conditions at 35 Ill. Adm. Code 302.203 in the receiving waters for the plants." *Id.* The portions of the record on existing water conditions cited by the Environmental Groups were reviewed by the Board in making its original assessment and do not persuade the Board that its previous decision was incorrect, or that the stated permit condition is in violation of the Act or Board regulations.

The Environmental Groups next contend that the Board overlooked evidence that phosphorous discharges are causing dissolved oxygen violations. Mot. at 4, Memo. at 10. The Board noted in the Opinion that the dissolved oxygen standards in the permits are consistent with the Act and Board regulations, and that neither the Environmental Groups nor the District contested the numeric dissolved oxygen minimum concentration requirements in the permits. Opinion at 15. The Board also specifically addressed the Groups' argument regarding the impact of phosphorous on dissolved oxygen standards in the receiving segments. *Id.* at 13, 15-18.

The Environmental Groups argue that the Board overlooks laws that prevent permits from allowing discharges that cause or contribute to violations of water quality standards even in waters that are not the direct receiving waters of the discharge. Mot. at 4, Memo. at 13. The Groups raised downstream impairment in their motions for summary judgment, and the Board addressed the issue in the Opinion. Opinion at 17. The Board found that the 1.0 mg/L limit on phosphorous represented a reduction in phosphorous discharge (nearly fifty percent based on information from the District) and that the permit conditions were consistent with the Act and Board regulations. *Id.* at 17, 18.

The Environmental Groups state that the Board did not consider whether the Agency should have reopened the record. The Board specifically addressed this question in the Opinion, including addressing 35 Ill. Adm. Code 309.120, the section the Groups cite in their motion. Opinion at 23-27. The Board therefore declines to readdress this issue beyond the substantive discussion already set forth in the Opinion.

The Environmental Groups argue that the Board did not apply the correct standard for summary judgment. Summary judgment is appropriate when the record, including pleadings, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Opinion at 10, citing 35 Ill. Adm. Code 101.516(b). The Board found that "none of the parties have raised any contested issue of material fact presented in any of the three petitions." Opinion at 10. The Environmental Groups cite to page 17 of the Opinion but do not specify any statement that there is a factual dispute. Rather, the "dispute" referenced by the Board referred to the parties' legal arguments. Summary judgment was therefore appropriate.

In general, the Environmental Groups contend that the Board overlooked evidence in the record. As set forth above, the evidence cited by the Environmental Groups was carefully considered by the Board in making its December 18, 2014 decision. Further, the arguments presented by the Groups in their motion "are repetitive of the prior arguments which have been duly considered and rejected by this Board." City of Geneva v. Kane County, *et al.*, PCB 94-58, slip op. at 2 (Oct. 6, 1994). The Groups present no new evidence, change in the law, or error in

the Board's previous application of existing law for the Board to reconsider its December 18, 2014 opinion and order. The Board therefore denies the Environmental Groups' motion for reconsideration.

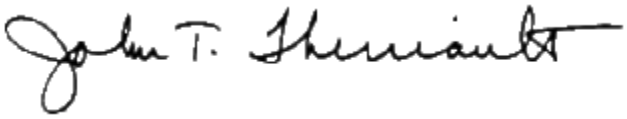
CONCLUSION

The Board denies the Environmental Groups' motion to reconsider its December 18, 2014 opinion and order.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2012); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 5, 2015, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board