

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

To: see attached service list

PLEASE TAKE NOTICE that on October 10, 2014, the undersigned electronically filed a Reply in Opposition to the Petitioners' Motion for Summary Judgment and in Support of Metropolitan Water Reclamation District of Greater Chicago's Cross-Motion for Summary Judgment on behalf of the Metropolitan Water Reclamation District of Greater Chicago, a copy of which is hereby served upon you.

I HEREBY CERTIFY that I served this Notice and the above referenced Reply by placing a copy in an envelope, postage prepaid, and depositing it in the U.S. Mail, at 100 East Erie Street, at or before 5:00 p.m. on October 10, 2014.

Dated: October 10, 2014

Respectfully submitted,

METROPOLITAN WATER RECLAMATION
DISTRICT OF GREATER CHICAGO

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**REPLY IN OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT
AND IN SUPPORT OF METROPOLITAN WATER RECLAMATION DISTRICT OF
GREATER CHICAGO'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Respondent, Metropolitan Water Reclamation District of Greater Chicago ("District"), by its General Counsel, Ronald M. Hill, submits the following reply in support of its cross-motion for summary judgment and in opposition to the motion for summary judgment filed by the Prairie Rivers Network, Natural Resources Defense Council, Sierra Club, Environmental Law & Policy Center, Friends of the Chicago River, and Gulf Restoration Network (collectively, "Petitioners"):

I. Introduction

In this permit appeal, Petitioners face an insurmountable task: proving that the District's 1.0 mg/L phosphorus limit will somehow violate water quality standards despite the fact that: (1) this limit is identical to the one already approved by the Board for new and expanding wastewater treatment plants, and (2) no water quality standards exist for phosphorus.

Without a water quality standard to base their appeal on, Petitioners initially tried focusing their arguments on the water quality standards of other states and a phosphorus *threshold* that IEPA previously used for impairment listings. (*See* Pet. Memo in Supp. SJ, 7, 11-18). After the District demonstrated that IEPA stopped using the abovementioned threshold years ago, and that the out-of-state standards do not apply, Petitioners have seemingly abandoned these arguments in their response to the District's and IEPA's cross-motions for summary judgment ("Response"). (*See* Pet. Resp. to Cross-Mtn. for Sum. Judg.).

Instead, they have shifted their focus to several water quality standards that barely made a footnote in their initial filing. (*Id.* at 4). Specifically, the new emphasis of their appeal is that the issuance of the District's NPDES permits for its Calumet, Stickney, and Terrence J. O'Brien plants will result in the violation of: (1) the Board's numeric water quality standards for dissolved oxygen ("DO") (35 Ill. Adm. Code §§ 302.206, 302.405); and (2) the Board's narrative water quality standards related to unnatural plant and algal growth (35 Ill. Adm. Code §§ 302.203, 302.403). (*Id.*).

Yet, nothing in the record supports this theory. Despite the fact that it is their burden to do so, Petitioners have not identified any evidence from the record that establishes a connection between the District's nutrient discharges (i.e. phosphorus and nitrogen) and violations of the abovementioned water quality standards.

To the contrary, the record demonstrates that none of the stream segments downstream of the District's plants are impaired for unnatural plant or algal growth. (R. 1275). Moreover, the District's permits include a host of terms and conditions related to DO that the Petitioners neither appeal nor mention in any of their pleadings. These significant DO-related provisions, along with the nearly fifty percent reduction in phosphorus discharge that will result from imposing the

Board-approved effluent limit on the District (R. 1276), leave no doubt that the record supports the issuance of the District's permits. Indeed, these permits exceed what Illinois law requires with respect to nutrients.

Petitioners attempt to obscure the absence of evidence in support of their appeal by seeking to draw parallels between this case and *Des Plaines River Watershed Alliance v. IEPA* (“*New Lennox*”). (See Pet. Resp. to Cross-Mtn. for Sum. Judg., 8-10) (citing *Des Plaines River Watershed Alliance, et al. v. IEPA*, 2007 WL 1266926, *3-4, PCB 04-88 (Apr. 19, 2007)). Yet, neither the facts nor the controlling law of *New Lennox* apply to the matter at hand.

Without any precedent or evidence to support their claims, Petitioners simply cannot meet their burden of proving that IEPA's issuance of these permits violates the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* or the Board's regulations.

II. Argument

A. Nutrient limits in the District's permits do not violate water quality standards

1. *Numeric water quality standards for dissolved oxygen*

Petitioners spend much of their Response arguing that the District's permits violate the Board's numeric water quality standards for DO. Yet, they are not appealing any of the permits' terms or conditions related to DO. (See R. 2134-2162, 2620-2649¹, 3308-3337). Nor do they even acknowledge the existence of these provisions in their pleadings.

Remarkably, Petitioners emphatically contend that the permits will violate DO standards without even mentioning those permits' stringent limits on biochemical oxygen demand and suspended solids, which are the sole parameters that the Board has designated for regulating

¹ The “Administrative Record Index” states that Bates Nos. 2620-2649 consist of the following: “Letter dated December 23, 2013, from Al Keller to MWRDGC, with attached final NPDES Permit No. IL0028061, issued December 23, 2013 and effective January 1, 2014.” Yet, Bates Nos. 2624-2649 consist of the final Stickney permit (IL0028053), not the final Calumet permit (IL0028061). In fact, it appears that IEPA has inadvertently omitted the final Calumet permit from the record.

“deoxygenating wastes.” 35 Ill. Adm. Code 304.120. Petitioners further fail to acknowledge that the permits set minimum DO limits for the District’s effluent.

Additionally, the Petitioners’ Response completely disregards 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 DO. Nor do the Petitioners acknowledge the extraordinary requirements in the permits with regard to the operation of in-stream aeration facilities, which pump DO directly into the plants’ receiving waters.

IEPA wrote the abovementioned provisions into the District’s permits to prevent violations of the Board’s water quality standards for DO. Without addressing these provisions in their pleadings, the Petitioners cannot meet their burden of proving that the permits will violate DO standards. Nevertheless, Petitioners ignore the permits’ DO-related provisions and, instead, exclusively focus on nutrient limits. In doing so, Petitioners seemingly imply that nutrients are the only concern relative to the DO standards.

Yet, Petitioners cannot cite any evidence in the record establishing a connection between the District’s nutrient discharges and the DO levels in the waterway. Indeed, 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 DO. Additionally, “numerous studies conducted in Illinois for the purpose of determining defensible nutrient standards have failed to show any correlation between [total phosphorus] and...*dissolved oxygen*.” (R. 1212; *see also* R. 304) (emphasis added).

Absent a direct correlation between the plants’ nutrient discharges and DO in the waterway, the Petitioners cannot establish that IEPA acted unreasonably in issuing the District’s

permits. Moreover, by imposing a 1.0 mg/L phosphorus limit on the District, IEPA will reduce phosphorus discharges from the District's plants by nearly fifty percent. (R. 1276). Petitioners have not met their burden of proving that this significant reduction in phosphorus output and the multitude of DO-related restrictions in the District's permits will somehow result in violations of the Board's water quality standards for DO.

2. Narrative standards for unnatural plant or algal growth

In their Response, Petitioners argue that the phosphorus effluent limit (and lack of a nitrogen effluent limit) in the District's permits will somehow result in a violation of the State's narrative water quality standards relative to unnatural plant or algal growth. Yet, the State has not listed unnatural plant or algal growth as a cause of impairment for any of the stream segments downstream of the plants at issue in this appeal.

The Petitioners do not refute this in their Response. Rather, they perplexingly list examples of impaired waters that are not stream segments downstream of the District's plants. (Pet. Resp. to Cross-Mtn. for Sum. Judg., 5). For instance, the only two stream segments that they cite for impairments of the narrative standards—the North Shore Channel (HCCA-02) and the Little Calumet River (HA-05)—are *upstream* of the District's plants. The other impaired waters that they list are not stream segments at all; they are two lakes that do not receive direct flow from the receiving waters of the plants. Specifically, they reference Lake Senachwine and Lake Depue, which are backwater lakes adjacent to the Illinois River that are located 117 and 105 miles downstream of the District's Stickney plant, respectively.

Nothing in the record establishes that any significant amount of nutrients from the District's plants ever reaches these distant lakes. To the contrary, a number of other point and non-point sources of nutrients directly drain into Lakes Senachwine and Depue and appear to be

the cause of any impairments. Indeed, according to IEPA's website, "[1]and use is predominantly agricultural" in the watershed surrounding those lakes (<http://www.epa.state.il.us/water/water-quality/report-1996/fact-sheets/fact-sheet-11.html>). Additionally, a local sewage treatment plant unrelated to the District *directly* discharges into Lake Depue (NPDES public notice/fact sheet for Village of Depue Sewage Treatment Plant, <http://www.epa.state.il.us/public-notices/2010/depue-stp/index.pdf>).

Moreover, "numerous studies conducted in Illinois for the purpose of determining defensible nutrient standards have failed to show any correlation between [total phosphorus] and algae..." (R. 1212; *see also* R. 304). In light of the above, Petitioners cannot satisfy their burden of proving that the IEPA was unreasonable in imposing the Board's interim effluent limit on phosphorus; nor can they prove that this effluent limit violates any of the Board's narrative water quality standards.

B. The case law cited by Petitioners is inapposite

Petitioners attempt, in vain, to support their Response by citing to the Board's opinion in *New Lennox*. (*See* Pet. Resp. to Cross-Mtn. for Sum. Judg., 8-10). Yet, neither the facts nor the controlling law in that case apply to the matter at hand.

Notably, the *New Lennox* case involved a wastewater treatment plant that sought a permit for a major facility expansion, which would result in an increased discharge of pollutants. *Des Plaines River Watershed Alliance, et al. v. IEPA*, 2007 WL 1266926, *3-4, PCB 04-88 (Apr. 19, 2007). As a result of this increase in pollutant loading, the facility's permit was subject to the Board's antidegradation regulations. *Id.* at *1 (citing 35 Ill. Adm. Code 302.105(c)).

Because the Board found that IEPA "failed to properly review the increased discharge pursuant to [the antidegradation regulations]," the Board remanded the permit for further

consideration. *Id.* One of the Board's primary concerns was that the permit for the expansion failed to include any limit on the plant's discharges of nutrients despite evidence in the record that the expansion would significantly increase that discharge in violation of the antidegradation regulations. *Id.*

Those regulations do not apply in this case because the District's plants are not increasing their discharges of nutrients. *See* 35 Ill. Adm. Code 302.105(c). To the contrary, the IEPA has imposed effluent limits that will reduce the plants' phosphorus discharge by nearly fifty percent. Accordingly, *New Lennox* is inapposite.

VI. Conclusion

For all the reasons stated above, the District requests that the Board: (1) deny Petitioners motion for summary judgment, and (2) enter summary judgment in the District's favor.

Dated: October 10, 2014

Respectfully submitted,

METROPOLITAN WATER RECLAMATION
DISTRICT OF GREATER CHICAGO

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