

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

METROPOLITAN WATER RECLAMATION	)	
DISTRICT OF GREATER CHICAGO,	)	
	)	
Petitioner,	)	
	)	PCB No. 14-103
v.	)	(Calumet)
	)	PCB No. 14-104
ILLINOIS ENVIRONMENTAL PROTECTION	)	(O'Brien)
AGENCY	)	(Permit Appeals - Water)
	)	(Consolidated)
Respondent.	)	

**NOTICE OF ELECTRONIC FILING**

To: see attached service list

**PLEASE TAKE NOTICE** that on July 10, 2014, the undersigned electronically filed the Metropolitan Water Reclamation District of Greater Chicago's Motion for Summary Judgment, a copy of which is herby served upon you.

**I HEREBY CERTIFY** that I served this Notice and the above referenced Motion 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 July 10, 2014.

Dated: July 10, 2014

METROPOLITAN WATER RECLAMATION  
DISTRICT OF GREATER CHICAGO

/s/ Ronald M. Hill

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**METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO'S  
MOTION FOR SUMMARY JUDGMENT**

Petitioner, Metropolitan Water Reclamation District of Greater Chicago ("District"), by its General Counsel, Ronald M. Hill, moves the Illinois Pollution Control Board ("Board") to enter summary judgment in its favor pursuant to Title 35, Part 101.516 of the Illinois Administrative Code. In support thereof, the District states as follows:

**I. Introduction**

On March 3, 2014, the District filed two petitions asking the Board to review the December 23, 2013 National Pollutant Discharge Elimination System ("NPDES") permits issued by the Illinois Environmental Protection Agency ("IEPA") for the District's Calumet Water Reclamation Plant and its Terrence J. O'Brien Water Reclamation Plant. Specifically, the District is appealing (1) the condition requiring daily grab sampling for fecal coliform in its Calumet permit, and (2) the conditions requiring daily grab sampling for fecal coliform and

continuous sampling for dissolved oxygen (“DO”) in its O’Brien permit. The Board consolidated both of the District’s appeals by order dated April 3, 2014.

On March 26, 2013, the IEPA filed the administrative record in this case. Nothing in the record suggests that any of the abovementioned sampling conditions are necessary to accomplish the purposes of the Illinois Environmental Protection Act or the Board’s regulations. To the contrary, the purposes of both the Act and the Board’s regulations would be accomplished by grab samples taken five-days per week for fecal coliform, and by grab samples taken daily for DO.

Accordingly, the District moves the Board to enter summary judgment on its appeals, and to: (1) replace the daily sampling requirement in the Calumet and O’Brien permits with a five-day per week sampling requirement for fecal coliform; and (2) replace the continuous sampling requirement in the O’Brien permit with a daily grab-sampling requirement for effluent DO.

## **II. Statement of Facts**

### **A. Background**

The District is a publicly-owned treatment works (“POTW”) that is located in Cook County, Illinois. (R. 3381). It serves over five million people throughout an 883-square-mile service area that includes the city of Chicago and 128 suburban communities. (*Id.*). In its role as a POTW, the District treats approximately 1.4 billion gallons of wastewater per day at its seven water reclamation plants. (R. 3382). Those plants discharge treated effluent pursuant to NPDES permits issued by the IEPA.

In August of 2006, the District applied to the IEPA for reissuance of its existing NPDES permits for the two plants at issue in this appeal. Specifically, on August 23, 2006, the District applied for the reissuance of its permit to discharge effluent to the North Shore Channel from its

North Side Water Reclamation Plant (now known as the Terrence J. O'Brien Water Reclamation Plant), which is located at 3500 West Howard Street, Skokie, Illinois 60076 (the "O'Brien plant"). (R. 2680-2801). Two days later, the District applied to the IEPA for reissuance of its permit to discharge effluent to the Little Calumet River from its Calumet Water Reclamation Plant, which is located at 400 East 130<sup>th</sup> Street, Chicago, Illinois 60628, (the "Calumet plant"). (R. 2182-2335).

B. Daily Sampling Requirement for Fecal Coliform

In November of 2009, the IEPA issued draft permits and associated fact sheets for the Calumet and O'Brien plants. (R. 2475-2496, 3043-3063). Notably, like the then-existing permits for those plants, neither the draft permit for Calumet, nor the draft permit for O'Brien, imposed any effluent limitations on fecal coliform at the plants' main outfalls. (*Id.*). Thus, because those draft permits did not include the fecal coliform sampling requirements contested in this appeal, the District did not have any reason to comment on fecal coliform sampling at or before the March 9, 2010 public hearing on the permits. (3348-3502).

Three years after that public hearing, IEPA sent the District revised draft permits for the Calumet and O'Brien plants. (R. 2596, 3288). This time, both of the revised drafts included new conditions imposing effluent limitations on fecal coliform. (R. 2597, 3289). Moreover, the draft permits required daily sampling for this substance at the plants' main outfalls. (*Id.*).

On April 1, 2013, the District submitted comments to the IEPA on the revised draft permits. (R. 2596-2603, 3288-3294). Specifically, in response to the new sampling requirements for fecal coliform in both of the drafts, the District stated as follows:

The sample frequency for fecal coliform is daily. Currently, all fecal coliform testing at the District is performed at the Stickney [plant]. Daily sampling (especially on weekends) will place an additional burden on District staff with respect to transportation and analysis as there is typically a six-hour holding time

limitation to begin fecal coliform testing. It is requested that a 5-day per week sampling frequency be allowed in order to reduce the additional burden. A 5-day per week sampling frequency would also be consistent with the other three District [plants] that currently disinfect the effluent.

(R. 2597, 3289).

In its May 15, 2013 memorandum to IEPA, the United States Environmental Protection Agency (“USEPA”) suggested that IEPA maintain the daily sampling requirement notwithstanding the District’s abovementioned comment. (R. 1296-1301). However, the USEPA did not provide any legal or technical basis for imposing this requirement on the District. (*Id.*). Rather, it merely mentioned that “[i]n order to reduce monitoring frequency, the permit would have to be re-public noticed per 40 CFR 122.63.” (R. 1297).

Additionally, the USEPA noted that a few wastewater treatment plants outside the State of Illinois “sample daily for bacteria.” (*Id.*). Importantly though, the USEPA did not identify any Illinois wastewater treatment plants that are required to sample daily for fecal coliform. (*Id.*). Indeed, as the District pointed out in its comment above, none of the fecal coliform conditions in the permits for the other District plants require daily sampling. (R. 2597, 3289). Nevertheless, in its May 29, 2013 memorandum responding to the USEPA, the IEPA simply stated that “IEPA agrees with [US]EPA, daily requirement to monitor and report on bacteria shall remain in both permits.” (R. 1303-1310).

Despite this correspondence between USEPA and IEPA, it was not until about seven months later—in a cover letter transmitting the final Calumet and O’Brien permits—that IEPA formally responded to the District’s objections to the new sampling requirement for fecal coliform. (R. 2620-2623<sup>1</sup>, 3308-3337). Remarkably, IEPA provided no legal or technical

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<sup>1</sup> 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

justification for this novel sampling requirement. (R. 2621, 3309). Rather, it merely stated that “Fecal coliform sampling of Outfall 001 on a daily basis is required by USEPA,” and that, “therefore, the Final Permit has not been revised.” (*Id.*). Moreover, the IEPA similarly provided no explanation for the fecal coliform sampling requirement in its mandatory Responsiveness Summary. (R. 1321-1365).

C. Continuous Sampling Requirement for DO at the O’Brien Plant

On November 12, 2009, IEPA issued the draft permit for the O’Brien plant. (R. 3043-3063). One significant difference between that draft and the then-existing permit for O’Brien was that the draft, for the first time, imposed an effluent limitation on DO at the plant’s main outfall. (*Id.*). However, the draft required daily grab samples for DO, not continuous sampling. Therefore, the District did not comment regarding continuous sampling at or before the March 9, 2010 public hearing on the permit. (R. 3348-3502).

Three years after that public hearing, IEPA sent the District a revised draft permit for the O’Brien plant. (R. 3288). Although IEPA preserved the “grab” sample requirement for DO in the new draft, IEPA perplexingly changed the sample frequency from “daily” to “continuous.” (R. 3289). Because the abovementioned sample type and frequency are mutually exclusive, the District submitted a comment to the IEPA seeking clarification. (R. 3288-3294). Specifically, the District stated as follows:

The District requests clarification regarding Dissolved Oxygen (DO) reporting. The permit states that the reporting frequency should be continuous, yet the sample type is grab. This appears to be incompatible and the District requests that the sample frequency and type be consistent with other parameters.

(R. 3289). In its memorandum dated May 15, 2013, the USEPA suggested to IEPA that “[t]he sample type should be edited to ‘Continuous’ from the existing ‘grab.’” (R. 1296-1301).

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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.

However, the USEPA failed to state any basis for imposing this continuous sampling requirement on the District. (*Id.*).

In a May 29, 2013 memorandum responding to the USEPA's abovementioned comments, the IEPA simply stated that "IEPA agrees with EPA, DO sampling shall be done on a continuous basis." (R. 1303-1310). Yet, it was not until about seven months later—in a cover letter transmitting the final permit for O'Brien—that the District discovered that IEPA would require it to sample continuously for DO. (R. 3308-3337). The District, therefore, did not have an opportunity to comment on this condition prior to the issuance of the final permit.

Remarkably, IEPA offered no legal or technical justification for this novel sampling condition. (R. 3309). Rather, it merely stated that "[t]he dissolved oxygen sample for Outfall 001 has been revised to 'continuous' to be consistent with the sample frequency and as required by USEPA." (*Id.*). Moreover, the IEPA similarly provided no explanation for this sampling requirement in its mandatory Responsiveness Summary. (R. 1321-1365).

### **III. Standard of Review**

The Illinois Environmental Protection Act ("Act") and the Board's regulations require that the Board's review of permit appeals be limited to the administrative record. 415 ILCS 5/40(e); 35 Ill. Adm. Code § 105.214(a). Accordingly, when the administrative record in a permit appeal demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *City of Quincy v. IEPA*, 2010 WL 2547531, \*26, PCB 08-86 (Jun. 17, 2010).

Furthermore, a party opposing a motion for summary judgment may not merely rest on its pleadings but must, instead, "present a factual basis which would arguably entitle [it] to a judgment." *Des Plaines River Watershed Alliance, et al. v. IEPA*, 2007 WL 1266926, \*16, PCB



04-88 (Apr. 19, 2007) (quoting *Gauthier v. Westfall*, 639 N.E.2d 994, 999 (2d Dist. 1994)). Ultimately, if “the movant’s right to relief is clear and free from doubt,” then the Board should grant summary judgment. *Id.*

#### **IV. Burden of Proof**

When granting permits under the Act, the IEPA may “impose such...conditions as may be necessary to accomplish the purposes of this Act, and are not inconsistent with the regulations promulgated by the Board hereunder.” 414 ILCS 5/39(a)(2004). Accordingly, “when appealing conditions imposed in a permit, it is the petitioner’s burden to prove that the conditions in the Agency-issued permit are not necessary to accomplish the purposes of the Act and Board regulations, and therefore, must be deleted from the permit.” *Board of Trustees of SIU v. IEPA*, 2005 WL 2040591, \*5, PCB 02-105 (Aug. 4, 2005).

Once a permittee establishes a *prima facie* case that a permit condition is unnecessary, it is incumbent upon the IEPA to refute the *prima facie* case. *John Sexton Contractors Co. v. PCB*, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

#### **V. Argument**

The District is appealing (1) the conditions requiring daily grab sampling for fecal coliform in both the Calumet and O’Brien permits, and (2) the condition requiring continuous sampling of DO in the O’Brien permit. Nothing in the record suggests that these conditions are necessary to accomplish the purposes of the Act, 415 ILCS 5/1 *et. seq.*, or the Board’s regulations, 35 Ill. Admin. Code §101.100 *et seq.* To the contrary, the Act and the Board’s regulations would be accomplished by grab samples taken five-days per week for fecal coliform, and by grab samples taken daily for DO.

##### **A. Daily Sampling for Fecal Coliform is not Necessary to Accomplish the Purposes of the Act or the Board’s Regulations**

Neither the Act nor the Board's regulations require daily sampling for fecal coliform. In fact, the Board regulation applicable to the discharge at issue in this appeal does not even set a minimum sampling frequency. Rather, Section 304.224 of the Illinois Administrative Code merely provides that:

From March 1 through November 30, effluents discharged to [the Little Calumet River] must not exceed 400 fecal coliform colony forming units (CFU) per 100mL if less than 10 samples are taken in a month. If 10 or more samples are taken in a month, fecal coliform shall not exceed a 30-day geometric mean of 200 CFU per 100 mL, nor shall more than 10% of the samples during any 30 day period exceed 400 CFU per 100 mL.

35 Ill. Admin. Code § 304.224 (2014) *cf.* 35 Ill. Admin. Code § 203.209 (2010) (discussing “a minimum of five samples taken over not more than a 30 day period...”).

Accordingly, adopting the District's proposed five-day per week sampling would more than comply with the Board's applicable regulations. In fact, this is the very same sampling frequency that IEPA utilizes in the existing permits for the District's other plants. (R. 2597, 3289). Nothing in the record supports imposing a different and more onerous sampling condition for the District's Calumet and O'Brien plants.

The Board has previously held that “[t]he record must contain evidence to support the...conditions attached to [an NPDES] permit.” *Des Plaines*, 2007 WL 1266926 at \*11. Indeed, “[t]he Board does not affirm the IEPA's decision on the permit unless the record supports the decision.” *Id.* Accordingly, without any support in the record for its new and unprecedented daily sampling requirement, the IEPA cannot overcome the District's motion for summary judgment. *Id.*; *see also Marathon Petroleum Co. v. IEPA*, 1989 WL 95840, \*\*10-12, PCB 88-179 (Jul. 27, 1989) (Board held that record did not support quarterly monitoring imposed by IEPA in permit; semi-annual monitoring sought by permittee complied with regulatory

minimums and there was no evidence in the record that anything more was necessary); *Village of Sauget v. IEPA*, 1988 WL 160840, \*9, PCB 86-57 (Dec. 15, 1988) (nothing in the record supported continuous monitoring of total organic carbon, and the Board found that “the continuous TOC monitoring requirement is not necessary to ensure compliance with the Act and Board regulations”).

While there is no evidence in the record of any technical or legal rationale for requiring daily sampling, there is evidence of the burden that such unnecessary sampling would impose on the District. In its April 1, 2013 comments, the District explained that all fecal coliform testing at the District is performed at the District’s Stickney water reclamation plant, and that daily sampling (especially on weekends) would burden the District to employ staff to transport and analyze samples for fecal coliform in light of the short six-hour holding time limitation from collection to analysis. (R. 2597, 3289). The record provides no justification for this added expense to the taxpayer.

Without addressing the District’s abovementioned April 1, 2013 comments on the sampling frequency for fecal coliform in its Responsiveness Summary, the IEPA issued the final Permits requiring the District to collect (transport, analyze, and record) daily samples for fecal coliform at the Calumet and O’Brien plants. (R. 1321-1365). In the cover letters enclosing the permits, the IEPA simply stated, “Fecal coliform sampling of Outfall 001 on a daily basis is required by USEPA,” and that, “[t]herefore, the Final Permit has not been revised.” (R. 2620-2623; 3308-3337).

Under the applicable federal and state regulations, the IEPA was required to address the District’s comments regarding the sampling frequency for fecal coliform. *See* Ill. Admin. Code tit. 35 §166.192 (2014) (requiring the IEPA to prepare a responsiveness summary including the

“Agency’s specific response to all significant comments, criticisms, and suggestions”); *see also* 40 C.F.R. §124.17 (requiring States to respond to comments when a final permit is issued and to “[s]pecify which provision, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change”). The IEPA’s statement that the sampling “is required by USEPA,” without more, does not meet the IEPA’s obligations under these regulations.

As stated above, neither the Act nor the Board’s regulations require daily sampling for fecal coliform; the additional two-days per week of sampling simply is not necessary to accomplish the purposes of the Act or the Board’s regulations. A five-day per week sampling frequency would not only accomplish these purposes, but would also place significantly less burden on the District. The current condition unnecessarily requires the District to employ personnel on the weekends to sample, transport, analyze and record fecal coliform levels.

Nothing in the record justifies this additional burden (and the resulting expense to the taxpayer), and nothing suggests that daily sampling is necessary to accomplish the purposes of the Act or the Board’s regulations. To the contrary, the fact that IEPA does not require daily sampling from any of the other District plants that disinfect effluent supports the opposite conclusion. So does IEPA’s failure to address the District’s comment on this condition despite its statutory obligation to do so. Accordingly, the fecal coliform sampling conditions in the Calumet and O’Brien permits should be stricken and replaced with a five-day per week sampling requirement.

**B. Continuous Sampling for Dissolved Oxygen is not Necessary to Accomplish the Purposes of the Act or the Board’s Regulations**

Neither the Act nor the Board’s regulations require continuous sampling for DO. In fact, the Board’s regulations state that proof of violation of numerical standards “shall be on the basis of one or more of the following averaging rules: (1) No monthly average shall exceed the

prescribed numerical standard; (2) No daily composite shall exceed two times the prescribed numerical standard; and (3) No grab sample shall exceed five times the prescribed numerical standard.” 35 Ill. Adm. Code § 304.104(a)(1)-(3) (emphasis added). The regulations further explain that “[a] monthly average must be based on at least three daily composites,” and “[a] daily composite must be based on at least three grab samples or three aliquots taken at different times.” *Id.* at § 304.104(b)(1)-(2). Additionally, “[a] grab sample is a sample taken at a single time,” not continuously. *Id.* at § 304.104(b)(3).

Accordingly, utilizing the daily grab-sampling prescribed in IEPA’s original draft permit would more than comply with the Board’s regulations. (R. 3043-3063). Nothing in the record supports imposing a different and more onerous sampling condition on the District.

The Board has previously held that “[t]he record must contain evidence to support the...conditions attached to [an NPDES] permit.” *Des Plaines*, 2007 WL 1266926 at \*11. Indeed, “[t]he Board does not affirm the IEPA's decision on the permit unless the record supports the decision.” *Id.* Accordingly, without any support in the record for its new and unprecedented continuous sampling requirement, the IEPA cannot overcome the District’s motion for summary judgment. *Id.*; see also *Marathon Petroleum Co. v. IEPA*, 1989 WL 95840, \*\*10-12, PCB 88-179 (Jul. 27, 1989) (Board held that record did not support quarterly monitoring imposed by IEPA in permit; semi-annual monitoring sought by permittee complied with regulatory minimums and there was no evidence in the record that anything more was necessary); *Village of Sauget v. IEPA*, 1988 WL 160840, \*9, PCB 86-57 (Dec. 15, 1988) (nothing in the record supported continuous monitoring of total organic carbon, and the Board found that “the continuous TOC monitoring requirement is not necessary to ensure compliance with the Act and Board regulations”).

Not only did IEPA fail to offer any technical or legal rationale in the record for requiring continuous sampling, but it also failed to provide the District with an opportunity to comment on the new condition. Had the IEPA provided the District with due process and the opportunity to comment on this onerous new requirement, the District would have emphasized that continuous sampling would require automated in-line DO probes, which are prone to malfunction. Furthermore, if required to sample continuously, each malfunction would subject the District to liability for permit violations. Indeed, this imperfect technology would make it virtually impossible for the District to maintain one hundred percent compliance with the permit's sampling requirement. While automated in-line probes might suffice for certain types of general monitoring, the record provides no support for the viability of this technology as a mandatory means of sampling for compliance with DO effluent limits.

Without any discussion of this novel requirement or the associated technology in its Responsiveness Summary, the IEPA issued the final Permit for O'Brien which, for the first time, compels the District to continuously monitor for DO at the plant's main outfall. (R. 1321-1365; 3308-3337). In the cover letter enclosing the Permit, the IEPA simply stated, "[t]he dissolved oxygen sample type for Outfall 001 has been revised to 'continuous' to be consistent with the sample frequency and as required by the USEPA." (R. 3309). IEPA has provided no technical or legal explanation for why it changed the daily grab-sampling requirement in its original draft to the significantly more stringent continuous-sampling requirement in the final permit. Nothing in the record suggests that this drastic revision was necessary.

In fact, and as mentioned above, neither the Act nor the Board's regulations require continuous sampling for DO; nonstop sampling is simply not necessary to accomplish the purposes of the Act or the Board's regulations. A daily grab-sampling requirement would

accomplish these purposes in a technically feasible way that complies with all applicable rules and regulations.

The current condition subjects the District (and its taxpayers) to potentially costly violations resulting from failures of the imperfect technology associated with this onerous new sampling requirement. Nothing in the record justifies this additional burden and, more importantly, nothing suggests that continuous sampling is necessary to accomplish the purposes of the Act or the Board's regulations. Accordingly, the DO sampling condition in the O'Brien permit should be stricken and replaced with a daily grab-sampling requirement.

#### **VI. Conclusion**

For all the reasons stated above, the District requests that the Board enter summary judgment in its favor.

Dated: July 10, 2014

Respectfully submitted,

METROPOLITAN WATER RECLAMATION  
DISTRICT OF GREATER CHICAGO

/s/ Ronald M. Hill

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