BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

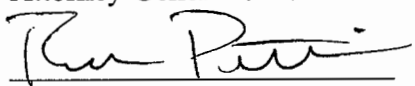
PRARIE RIVERS NETWORK, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL LAW & POLICY CENTER, FRIENDS OF CHICAGO RIVER, and GULF RESTORATION NETWORK,	)	
Petitioners,	)	
v.	)	PCB 14-106, 14-107, and 14-108 (Third Party NPDES Appeal-Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,	)	
Respondents.	)	

To: See attached service list.

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 22nd day of August, 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



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRARIE RIVERS NETWORK, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL LAW & POLICY CENTER, FRIENDS OF CHICAGO RIVER, and GULF RESTORATION NETWORK,	)	
Petitioners,	)	
v.	)	PCB No. 14-106, No. 14-107, No. 14-108 (consolidated)
	)	(Third Party NPDES Appeal-Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,	)	
Respondents.	)	

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 Petitioners, PRAIRIE RIVERS NETWORK, NATURAL RESOURCE DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL LAW & POLICY CENTER, FRIENDS OF CHICAGO RIVER, and GULF RESTORATION NETWORK ("Petitioners") in that there exist herein no genuine issues of material fact and that the Petitioners have failed to sustain their burden of proving that the NPDES permits before the Board in this matter, as

issued, would violate the Act or Board regulations. Therefore, Illinois EPA is entitled to judgment as a matter of law and the NPDES permit should be upheld. In support of this Cross-Motion for Summary Judgment and in response to the Petitioners' Motion for Summary Judgment, the Agency has filed a combined memorandum of law.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRARIE RIVERS NETWORK, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL LAW & POLICY CENTER, FRIENDS OF CHICAGO RIVER, and GULF RESTORATION NETWORK,	)	
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	)	(Third Party NPDES Appeal-Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,	)	
Respondents.	)	

AGENCY'S COMBINED MEMORANDUM IN RESPONSE TO PETITIONERS' 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 Petitioners, Prairie Rivers Network, Natural Resources Defense Council, Sierra Club, Environmental Law & Policy Center, Friends of Chicago River, and Gulf Restoration Network (collectively "Petitioners") in that there exist no genuine issues of material fact and that the Petitioners have failed to sustain their burden of proving that the National Pollutant Discharge

Elimination System ("NPDES") permits, as issued, would violate the Illinois Environmental Protection Act ("Act") or Board regulations. The Petitioners' 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 Petitioners' Motion for Summary Judgment, and in support of its Cross-Motion for Summary Judgment, the Agency states as follows:

I. INTRODUCTION

In this matter, Petitioners seek review of the decision by the Agency to renew three NPDES Permits held by the Metropolitan Water Reclamation District of Greater Chicago ("MWRD"). The NPDES Permits before the Board are: 1) Permit No. IL0028061 ("Calumet Permit"); 2) Permit No. IL0028053 ("Stickney Permit"); and 3) Permit No. IL0028088 ("O'Brien Permit"), (collectively the "Permits"). (Administrative Record ("R") at 2134-2162, 2620-2649, and 3308-3337).

Petitioners' Motion for Summary Judgment argues that, based on the facts and Administrative Record before the Board, the Permits should be remanded to the Agency for further review and analysis. Stated succinctly, Petitioners' arguments for remand are as follows: 1) that Illinois EPA failed to perform the necessary reasonable potential analysis for phosphorus or nitrogen before issuing the Permits; 2) that the Permits fail to prohibit sanitary sewer overflows; and 3) that Illinois EPA failed to respond to the Petitioners' comments during the public comment period for the Permits and failed to re-open the Permits for a second public comment period before issuing the Permits.

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, the Petitioners' arguments fail to meet the burden necessary for the Board to order a remand of

the Permits. Instead, the Administrative Record before the Board conclusively demonstrates that the Agency conducted the appropriate review and analysis required by the Act and Board regulations for issuance of the Permits, that the Permits do not violate the Act or Board regulations regarding sanitary sewer overflows, that the Agency did respond to all significant comments to the Permits; and that a re-opening of the public comment period was not required by law.

Accordingly, the Petitioners fail to demonstrate that the Permits violate the Act or Board regulations and, therefore, cannot meet their burden on summary judgment. The Agency respectfully requests that the Board enter an Order denying Petitioners' Motion for Summary Judgment, granting the Agency's Cross-Motion for Summary Judgment and dismissing the Petitioners' consolidated appeals.

II. SUMMARY OF FACTS

The facts before the Board are not in dispute. In August 2006, MWRD applied to the Agency for reissuance of its existing NPDES permits for the three facilities specific to this appeal: the Stickney Water Reclamation Plant, located at 6001 West Pershing Road, Cicero, Illinois; the Terrence J. O'Brien Water Reclamation Plant located at 3500 West Howard Street, Skokie, Illinois; and the Calumet Water Reclamation Plant located at 400 East 130th Street, Chicago, Illinois (collectively the "Facilities") (R. at 1383-1843, 2680-2801 and 2182-2335). In November 2009, the Illinois EPA issued draft permits and fact sheets for the Facilities. (R. at 2015-2038, 2475-2496, and 3043-3063). On 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 comments were received, on the draft permits. (R. at 1327). On December 23, 2013, the

Agency responded to all significant public comments in its Responsiveness Summary. (R. at 1321-1365). The Permits were issued together on December 23, 2013, and became effective January 1, 2014. (R. at 2134-2162, 2620-2649, and 3308-3337). This appeal followed.

III. REGULATORY FRAMEWORK/BURDEN OF PROOF

Petitioners' permit appeal was brought pursuant to a statutory provision which authorizes interested third parties to appeal NPDES permits to the Board. See 415 ILCS 5/40(e) (2012).

Section 40(e) of the Act provides:

1. If the Agency grants or denies a permit under subsection (b) of Section 39 of this Act, a third party, other than the permit applicant or Agency, may petition the Board within 35 days from the date of issuance of the Agency's decision, for a hearing to contest the decision of the Agency.

2. A petitioner shall include the following within a petition submitted under subdivision (1) of this subsection:

   A. a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held; and

   B. a demonstration that the petitioner is so situated as to be affected by the permitted facility.

3. If the Board determines that the petition is not duplicitous or frivolous and contains a satisfactory demonstration under subdivision (2) of this subsection, the Board shall hear the petition (i) in accordance with the terms of subsection (a) of this Section and its procedural rules governing permit denial appeals and (ii) exclusively on the basis of the record before the Agency. The burden of proof shall be on the petitioner. The Agency and permit applicant shall be named co-respondents. 415 ILCS 5/40(e) (2012).

Section 40(e)(3) of the Act provides that the burden of proof shall be on the petitioner in third party NPDES permit appeals such as this. 415 ILCS 5/40(e)(3) (2012). The Board has consistently applied this same statutory burden in other permit appeals brought under Section 40

of the Act, 415 ILCS 5/40 (2012). See, *e.g., Panhandle Eastern Pipe Line Company v. IEPA* (January 21, 1999), PCB 98-102.

The Board has unfailingly held that Section 40(e)(3) of the Act unequivocally places the burden of proof on the petitioner, regardless of whether the petitioner is a permit applicant or a third-party. See 415 ILCS 5/40(e)(3) (2012). *See, e.g., Prairie Rivers Networks v. IEPA and Black Beauty Coal Company* (August 9, 2001), PCB 01-112. In the case of a permit issued with conditions, the Board must determine that, as a matter of law, the application submitted to the Agency demonstrates that no violations of the Act or Board rules will occur if the requested permit is issued. *Jersey Sanitation v. IEPA*, PCB 00-82 (June 21, 2002) *aff'd IEPA v. Jersey Sanitation and PCB*, 336 Ill. App. 3d 582 (4th Dist. 2003). In the context of a third party appeal, the Board is reviewing the issuance of a permit. Thus, this review is similar to a review of contested conditions. Therefore, the Board will look at the language of the permit and the entire record to determine if the permit, as issued, violates the Act or Board regulations. *See, Natural Resource Defense Council, et. al. v. Illinois Environmental Protection Agency,* PCB 13-17 (June 5, 2014). The Board will not limit the review of the Agency's decision to reasoning articulated in one document in the record. *Id.* To limit the Board's review in such a manner ignores the substantial case law, which establishes that the Board reviews the Agency's decision based on the entire record before the Agency. *See e.g., Jersey Sanitation* PCB 00-82; *Browning-Ferris Industries of Illinois, Inc. v. PCB*, 179 Ill. App. 3d 598 (2nd Dist. 1989); *John Sexton Contractors Company v. Illinois (Sexton)*, PCB 88-139 (Feb. 23, 1989). *Des Plaines River Watershed Alliance, et al. v. IEPA and the Village of New Lenox*, PCB 04-88, pg. 14-15, April 19, 2007.

IV. 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 Petitioners' 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 renew the Permits.

V. ARGUMENT

A. Nutrient Limits do not Violate the Act or Board Regulations.

The Petitioners' first argument for remand is that the Agency failed to perform a proper analysis to determine if the discharges of phosphorous or nitrogen from the Facilities have a "reasonable potential" to cause or contribute to a violation of Illinois' water quality standards. (Pet. Mem. at 14-16). Petitioners argue in the alternative that, if a reasonable potential study is not required, MWRD should be required to perform data collection necessary to establish a water quality based effluent limit for phosphorus and nitrogen. (Pet. Mem. at 17). However, given that there is no numeric water quality standard for either phosphorus or nitrogen in the Act or Board regulations, and that any applicable narrative standard is addressed by the Permits, the Petitioners' arguments are without merit.[1] Accordingly, the issuance of the Permits does not violate the Act or Board regulations and, as discussed below, summary judgment in favor of the Agency's decision to issue the Permits is appropriate.

1. Reasonable Potential Analysis is not Necessary.

As stated above, the Petitioners bear the burden of proving that based on the Administrative Record in this permit proceeding, the Permits, as issued, would violate the Act or Board regulations. Petitioners argue that the Agency should have performed an analysis to determine if the discharges of phosphorous and nitrogen from the Facilities have a reasonable

[1] The Petitioners Motion at times reads like a request for rule making and the adoption of a water quality standard through permitting. To be clear, this is not permissible. Water quality standards are state-wide pollution control standards for Illinois waters, which are exclusively promulgated by the Board's Rulemaking procedures. See, *Granite City Division of Nat. Steel Co. v. IPCB, 155 Ill.2d 149 (1993).* The Agency is then tasked with enforcement of these standards. *Id.*

potential to cause or contribute to an exceedance of Illinois' water quality standards. (Pet. Memo, Pg. 14 and 15). As the Petitioners assert, it is the duty of the Agency to ensure that a permitted discharge, new or existing, does not contribute to a violation of water quality standards. Section 309.141(d)(1) of the Board Water Pollution Regulations states that "[i]n establishing the terms and conditions of each issued NPDES Permit, the Agency shall apply and ensure compliance with all of the following whenever applicable ... [a]ny more stringent limitation . . . necessary to meet water quality standards." 35 Ill. Adm. Code §309.141(d)(1). Similarly, 35 Ill. Adm. Code §304.105 provides that "no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard."

Clearly, any reasonable potential analysis of the above permitting regulations contemplates the existence of a water quality standard adopted by the Act, Board regulations, or federal regulations. For phosphorus and nitrogen there are no numeric water quality standards that are applicable to discharges from the Facilities, nor is there an established water quality based effluent limit for phosphorous or nitrogen in Illinois.[2] In the Permits, however, the Agency established a 1.0 mg/L effluent limit for phosphorus which represents a nearly 50% reduction in the current phosphorous discharge from the Facilities. (R. at 2157, 2644, and 3330). This limit on phosphorous is akin to the 1.0 mg/L monthly average effluent standard for phosphorous adopted by the Board and set forth in 35 Ill. Adm. Code 304.123(g) for discharges into General Use waters for new or expanded facilities with a design average flow ("DAF") of

[2] The Petitioners' Motion does not cite an Illinois or federal water quality standard for phosphorus or nitrogen. Instead, the Petitioners repeatedly reference the numeric water quality standard for phosphorus in Wisconsin and a recommendation for a numeric phosphorus water quality standard listed in a guidance document produced by U.S. Environmental Protection Agency in 1998. Neither the USEPA's guidance document nor the Wisconsin regulatory water quality standard for phosphorus, which, incidentally, exceeds the recommendation in USEPA's guidance document, are binding on NPDES permits issued in Illinois.

one-million gallons per day or a total effluent phosphorous load of 25 pounds per day. [3] Consequently, if the Facilities were entirely new or expanded facilities that met the DAF or total effluent load standard in 304.123(g), the Facilities would be obligated to meet the Board's adopted limit of 1.0 mg/L for phosphorous. While the Facilities are neither new nor expanded, the 1.0 mg/L phosphorus limit in the Permits represents a more stringent limitation on the discharge of phosphorus than any numeric standard currently applicable to the Facilities.

Further, although the Petitioners argue that the phosphorous and nitrogen discharges from the Facilities will contribute to impairments to the waters, they fail to offer any supporting evidence, beyond the fact that there is phosphorous and nitrogen in the effluent discharge. (Pet. Memo. p. 14-16). Petitioners fail to cite any specific water quality standard that the Permits will violate, but nevertheless, in effect, ask the Board to merely ignore the fact that the Permits each specifically preclude the violation of any water quality standards. (Pet. Memo. at 15, footnote 9). Indeed, Special Condition 5 of the Permits states: "[t]he effluent, alone or in combination with other sources, shall not cause a violation of any applicable water quality standard outlined in 35 Ill. Adm. Code 302." (R. at 2143, 2630, and 3316). Accordingly, the Permits clearly obligate the Facilities to prevent the discharge of any constituent that alone, or in combination with other sources, will cause a violation of any applicable water quality standards, and the Permits, as issued, do not violate the Act or Board regulations.

Finally, regarding the period of time for the Facilities to come into compliance with the 1.0 mg/L phosphorous limit in the Permits, during the permit drafting period, the Agency agreed with MWRD that the aggressive phosphorus limit of 1.0 mg/l will require the Facilities to

[3] The 1.0 mg/L limit on phosphorous for new or expanded facilities with a DAF of more than one-million gallons per day or total effluent phosphorous load of 25 pounds per day or more, was adopted through Rulemaking before the Board in R04-26 (January 19, 2006).

modify existing infrastructure, make significant operational changes, and install new control devices to reduce phosphorus discharges. (R. at 1273-1276). Importantly, these activities are being undertaken by MWRD to achieve an effluent standard above and beyond any that currently exist in the Act or Board regulations for these Facilities, and will result in a nearly 50% reduction from current phosphorous loads from the Facilities. (R. at 1276). In light of the fact that the 1.0 mg/L parameter is not required by the Board for the Facilities, it is reasonable to include a compliance schedule for the Facilities to meet the Permits' parameters for phosphorus.

For these reasons the Petitioners' first argument for remand must fail. The Administrative Record supports the Agency's decision, and Petitioners fail to meet their burden of showing that granting of the Permits would result in a violation of the Act or the Board regulations. As such, the Agency's grant of the Permits should be upheld and the Petitioners' request for summary judgment must be denied.

2. Study to Establish Water Quality Based Effluent Limit is not Required by Law.

Petitioners next argue, in the alternative, that if no reasonable potential analysis is required for issuance of the Permits, then the Permits should require MWRD to perform data collection for phosphorus and nitrogen discharges at the Facilities. The Petitioners attempt to liken this matter to *Prairie Rivers Network, et. al. v. Illinois Environmental Protection Agency and Dynegy Midwest Generation*, PCB 13 – 17. (Pet. Memo. at 17-18). In *Dynegy*, the permit holder was required to perform monitoring and studies to collect information on the discharge of mercury so that a water quality based effluent standard could be, potentially, established during the next NPDES permit renewal. There are two major distinctions between *Dynegy* and the instant matter.

First, with regard to any numeric standard for phosphorus and nitrogen this argument is inapposite, given that there are presently no water quality standards for these nutrients applicable to the Facilities. In *Dynegy*, the parameter at issue, mercury, has a numeric water quality standard and effluent limit established pursuant to the Board regulations.

In *Dynegy*, the Agency took the position that no reasonable potential analysis was performed for mercury because there was no information regarding the quantity of mercury present in the effluent at issue. *Dynegy,* PCB 13 – 17, at. 40-45. The Board agreed that because there was no information available to perform the reasonable potential analysis a study could not be performed at that time, and that monitoring required by the NPDES permit at issue to collect data on mercury discharges for a possible reasonable potential analysis in the future was appropriate. *Id.* In this matter, the argument is different.

Here, the argument is not that the information is unavailable, but that there is presently no numeric water quality standard for phosphorus or nitrogen, and that the Permits already preclude violation of narrative standards involving phosphorus or nitrogen, obviating the need for a reasonable potential study. For this reason, there is simply no legal basis to require the collection of data for a reasonable potential analysis that may, speculatively, be required in the future.

Based on the above, the Petitioners cannot support the argument that the Permits must require the collection of data regarding phosphorus and nitrogen in the effluent. The Administrative Record supports the Agency's decision and Petitioners have failed to demonstrate that granting the Permits would result in a violation of the Act or the Board's regulations.

3. The Permits allow for Modification.

As a final point on the issue of effluent limits for phosphorus and nitrogen, it is significant that the Permits each allow for modification in the event there is a change in the law. (R. at 2141, 2628, and 3316). Special Condition 1 in each of the Permits states: "[t]his Permit may be modified to include different final effluent limitations or requirements, which are consistent with applicable laws, regulations, or judicial orders." (R. at 2141, 2628, and 3316). Further, Standard Condition 19 in each of the Permits states: "[i]f an applicable standard or limitation is promulgated under Section 301(b)(2)(C) and (D), 304(b)(2), or 307(a)(2) and that effluent standard or limitation is more stringent than any effluent limitation in the permit, or controls a pollutant not limited in the permit, the permit shall be promptly modified or revoked, and reissued to conform to that effluent standard or limitation." (R. at 2162, 2649, and 3337). Because the Permits expressly allow for modification, in the event that the law changes and a numeric water quality standard and/or effluent limitation for either phosphorus or nitrogen is established in the future, the Permits have a built in mechanism for modification to comply with any future requirements.

B. The Permits Do Not Allow Sanitary Sewer Overflows.

Next, the Petitioners argue that the Permits "could be construed as allowing SSOs [sanitary sewer overflows], even though they are clearly illegal." (Pet. Mem. at p. 19). Such an interpretation of the Permits is entirely inconsistent with Board regulations and case law regarding interpretation of NPDES permits, and is not a reasonable interpretation of the Permits.

Clearly, SSOs are prohibited by the Board regulations pursuant to 35 Ill. Adm. Code 309.148(a). The law interpreting whether NPDES permit language or the Board regulations is

controlling is clear that "the grant of a permit does not insulate violators of the Act or give them license to pollute." *Landfill, Inc. v. PCB,* 74 Ill.2d 541, 559 (1978); see also *Mahomet Valley Water Authority, et. al. v. Clinton Landfill, Inc.,* PCB 13-22, slip op. at 27 (September 2013)(even with a NPDES permit, where there is a violation of the Act or regulations, enforcement actions are available). Given the prohibition against SSOs in the Board regulations, and the fact that case law dictates the regulations are controlling, the Petitioners' argument that the Permits "could" be construed as allowing SSOs is without merit, because such an interpretation is clearly contrary to controlling law.

Nonetheless, the Permits are not ambiguous as to what restrictions are applicable to sanitary sewer overflows as Petitioners claim. The Standard Conditions in the Permits prohibit sanitary sewer overflows. (R. at 2159-62, 2646-49, and 3334-37). A Special Condition in each of the Permits requires the development and implementation of a Capacity, Management, Operations, and Maintenance ("CMOM") plan to accomplish the goal of no sanitary sewer overflows and to ensure that if any such overflows occur, that they do not cause or contribute to violations of the applicable standards or cause impairment in any adjacent receiving water. (R. at 2157, 2644, and 3329-30). The Special Condition language further supplements the Permits' prohibition of sanitary sewer overflows by allowing MWRD to be required to construct additional sewage transport and/or treatment facilities in future permits or other enforceable documents should the implemented CMOM plan indicate that MWRD's facilities are not capable of conveying and treating the flow for which they were designed. *Id.* In short, the Petitioners' interpretation of the Permits creates ambiguity where none exists. The Standard Conditions of the Permit, as required by law, prohibit sanitary sewer overflows, and Special Conditions detail

the development and implementation of a plan to achieve that goal and ensure that the environmental impact of any such overflows that may occur is minimized. In light of the applicable law prohibiting sanitary sewer overflows and the language of the permit conditions, Petitioner's interpretation of the Permits is not reasonable.

Accordingly, Petitioners have failed to meet their burden of demonstrating that granting the Permits would result in a violation of the Act or the Board's regulations with regard to SSOs. As such, denial of the Petitioners' Motion for Summary Judgment and the granting of the Agency's Cross-Motion for Summary Judgment is appropriate, and the Agency's grant of the Permits should be upheld.

C. The Agency Addressed All Significant Comments in the Responsiveness Summary.

Finally, Petitioners argue that the Agency's Responsiveness Summary failed to adequately respond to their comments regarding the nutrient limits in the Permits, and that the Agency should have re-opened the Permits for additional public comment following the inclusion of the 1.0 mg/L parameter for phosphorus. (Pet. Memo, at p. 20 and 22). With regard to the Agency's Responsiveness Summary, the Board Regulations provide for the contents as follows:

Section 166.192 Contents of Responsiveness Summary

a) Responsiveness summary shall be prepared by the Agency. The responsiveness summary shall include:

1) An identification of the public participation activity conducted;
2) Description of the matter on which the public was consulted;
3) An estimate of the number of persons present at the hearing;
4) A summary of all the views, significant comments, criticisms, and suggestions, whether written or oral, submitted at the hearing or during the time the hearing record was open;

5) The Agency's specific response to all significant comments, criticisms, and suggestions; and
6) A statement of Agency action, including when applicable the issuance or denial of the permit or closure plan.

35 Ill. Adm. Code 166.192(a).

It is important to note that this regulation was promulgated by the Agency pursuant to the implementing and authorizing provisions of Section 4 of the Act, 415 ILCS 5/4 (2012). Additionally, the Responsiveness Summary is part of the Informational Hearing process, a hearing that by definition is not required by law. 35 Ill. Adm. Code §166.120(b).

Even with that framework, the Agency acknowledges the obligation to respond to significant comments. It is clear from the Administrative Record that the Petitioners' comments regarding both phosphorus and nitrogen were addressed in the Responsiveness Summary. (See Responsiveness Summary responses Nos. 4 and 5; R. at 1332 and 1333). In the Responsiveness Summary, the Agency specifically addresses both phosphorus and nitrogen as "nutrients," and refers directly to phosphorus when discussing the phosphorus reduction parameters included in the Permits. *Id.* Further, the Responsiveness Summary specifically explains that the Act and Board Regulations do not contain numeric water quality standards for "nutrients," and therefore, not all nutrients are addressed in the permits even though the Permits each contain a 1.0 mg/L limit on phosphorus. (R. at 1332-1333). Additionally, the Responsiveness Summary fully addresses concerns that the Facilities may discharge into receiving waters listed in 35 Ill. Adm. Code 303(d) as impaired for phosphorous. *Id.* Therefore, upon review of the Responsiveness Summary, it is clear that the Agency addressed the significant comments presented in a sufficient manner. See, 35 Ill. Adm. Code §166.192(a); see also 40 C.F.R. 124.17(a)(2) (requiring the States to "*[b]riefly* describe and respond to all significant comments" on a draft

permit)(emphasis added). Thus, the Agency did provide specific and appropriate responses to the Petitioners' comments.

Much like the arguments presented in *Dynegy*, PCB 13 – 17, the Petitioners here do not cite to any authority that allows the Board to review the Agency's implementation of its own rule. In *Dynegy,* the Board declined to review the completeness of the Agency's Responsiveness Summary, finding that how the Agency implements its own rules is within the Agency's discretion. *Dynegy*, at p. 44. In this matter, the Petitioners are asking for the same type of oversight of the Agency's Responsiveness Summary and the Board should, again, decline this review.

Finally, the Agency was not required by law to re-open the Permits for additional public comments following the inclusion of the 1.0 mg/L phosphorus limit in the final versions. The Agency followed the requirements of 35 Ill. Adm. Code 309.120. After receiving public comments to the draft permits, and recognizing the concerns related to nutrient discharge, and specifically phosphorous discharges at the Facilities, the Agency modified the draft permits to include the 1.0 mg/L limitation on phosphorous. (R. at 1273-1276; and 1321-1365). This modification of the Permits represented a logical outgrowth of the comments received, resulting in a more stringent effluent limitation for nutrients, specifically for phosphorous, than currently required by the Act or the Board regulations.

For these reasons the Petitioners' arguments for remand must fail. The Administrative Record supports the Agency's decision. Petitioners have failed to meet their burden of proving that granting of the Permits would result in a violation of the Act or the Board's regulations. As such, denial of the Petitioners' Motion for Summary Judgment and the granting of the Agency's

Cross-Motion for Summary Judgment is appropriate. The Agency's grant of the Permits must be upheld.

VI. CONCLUSION

For all the reasons stated above, the Illinois EPA requests that, because there is no genuine issue of material fact and because the Petitioners cannot sustain their burden of proving that the NPDES permits, as issued, would violate the Act or Board regulations, the Board enter an order: 1) denying Petitioners' Motion for Summary Judgment; 2) finding that Illinois EPA is entitled to summary judgment as a matter of law; 3) granting Illinois EPA's Cross-Motion for Summary Judgment; and 4) finding that the NPDES permits must be upheld.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By LISA MADIGAN
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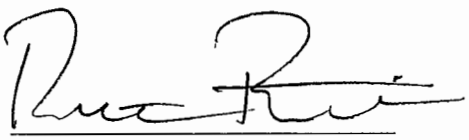

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