BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on October 17, 2014 I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, **Petitioners' Response to Motions by IEPA and MWRD for Leave to File Reply Briefs in Support of their Motions for Summary Judgment** in PCB 2014-106, 107, 108 a copy of which is attached hereto and herewith served upon you.

Respectfully Submitted,

_____

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

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

PETITIONERS' RESPONSE TO MOTIONS BY IEPA AND MWRD FOR LEAVE TO FILE REPLY BRIEFS IN SUPPORT OF THEIR MOTIONS FOR SUMMARY JUDGMENT

Prairie Rivers Network, Natural Resources Defense Council, Sierra Club, Environmental Law & Policy Center, Friends of the Chicago River, and Gulf Restoration Network (collectively, Petitioners) hereby respond to the motions of the Illinois Environmental Protection Agency ("IEPA") and the Metropolitan Water Reclamation District ("MWRD") for leave to file "reply briefs" in support of their motions for summary judgment. Both motions apparently reflect a decision by IEPA and MWRD to unilaterally rearrange the briefing schedule to something more to their liking without consulting the Hearing Officer or Petitioners. In any event, Respondents have failed to demonstrate the material prejudice necessary to support their motion under the Board's

reply brief rule. There can be no prejudice in being required to comply with the agreed schedule ordered by the Hearing Officer. Respondents have also failed to identify any argument in Petitioners' reply brief that was not fully addressed in their initial brief, and their attempts to do so demonstrate that their arguments are wholly without merit.

Specifically, on May 8, 2014, the Hearing Officer in this matter ordered as follows:

> Dispositive motions must be filed on or before June 27, 2014. Response to the dispositive motions must be filed on or before August 8, 2014. *All parties* are given leave to reply and the replies must be filed on or before September 5, 2014.

(emphasis added.) Then, following an agreed motion to extend the schedule, the Hearing Officer on June 23, 2014, entered an order that stated:

> On June 19, 2014, the petitioner's informed the respondents that due to unforeseen circumstances, petitioners request that the dispositive motion briefing schedule be extended. Respondents notified the hearing officer that they had no objection. To that end, it was agreed that dispositive motions are now due to be filed on or before July 11, 2014. All responses are due to be filed on or before August 22, 2014. Replies are due to be filed on or before September 19, 2014.

Respondents' motion provides no basis at all to adjust that established schedule to allow a rehash of their meritless arguments.

I. ANY FAILURE OF IEPA OR MWRD TO BRIEF THE ISSUES WAS CAUSED BY THEIR OWN DECISIONS, PARTICULARLY THEIR DECISION NOT TO FILE A DISPOSITIVE MOTION AT THE TIME SET BY THE HEARING OFFICER.

In compliance with the Hearing Officer's June 23, 2014 order, Petitioners filed their Motion for Summary Judgment and Memorandum in Support of Petitioners' Motion for Summary Judgment ("Pet'rs' Mem.") on July 11, 2014, the deadline for dispositive motions established by the Hearing Officer. Neither the IEPA nor the MWRD filed a dispositive motion on July 11.

IEPA and MWRD instead filed their dispositive motions (as cross-motions for summary judgment) on August 22, 2014, the date set by the Hearing Officer's June 23, 2014 orders for filing of *responses* to dispositive motions. (Obviously, Petitioners could not file a response to those motions on that same day.) Then, on September 19, the date that had been set for "all parties" to file a reply by the Hearing Officer's June 23, 2014 order, Petitioners filed their reply, which included a response to the post-deadline IEPA and MWRD cross-motions for summary judgment. IEPA and MWRD did not file anything on September 19 – they had nothing to file, because they had made the choice earlier not to move for summary judgment by the dispositive motion deadline.

At the status conference held September 25, 2014, Respondents raised for the first time their intention to move for leave to file reply briefs, notwithstanding the existing schedule. IEPA filed its motion for leave to reply ("IEPA Motion") on October 3, 2014, with an attached proposed reply brief ("IEPA Reply"). On the same day, MWRD filed its Motion for Leave to Reply ("MWRD Motion") but did not file a brief with the motion. MWRD finally filed its proposed reply brief ("MWRD Reply") on October 10, 2014.

Respondents' motions do not come close to meeting the standard set by the Board's rule governing leave to file a reply brief, as neither motion demonstrates any material prejudice. The rule provides as follows:

> The moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. A motion for leave to file a reply must be filed with the Board within 14 days after service of the response.

35 Ill. Admin. Code § 101.500(e).

The IEPA in its motion offers no explanation as to why it should be allowed to file a late reply after having failed to file a dispositive motion on the deadline established

in the Hearing Officer Orders. Respondents cannot claim to be prejudiced when their predicament, if it can even be called that, is squarely of their own making. The Hearing Officer's orders provided that "*[a]ll parties* are given leave to reply" by the September 19 deadline, and Respondents present no good reason why "all parties" should not include them.

II. MWRD'S ASSERTIONS THAT PETITIONERS' HAVE "SHIFTED" THEIR ARGUMENTS ON REPLY ARE FALSE

MWRD asserts, in an evident attempt to demonstrate prejudice justifying a reply brief, that Petitioners' September 19 reply "shifted the focus of this appeal by arguing that the Permits as issued will lead to violations of the Illinois Administrative Code's dissolved oxygen and/or narrative offensive conditions water quality standards." (MWRD Motion 2.) This assertion is patently false. In the comments filed April 8, 2010, (R. 5365), and the Petition filed January 27, 2014, Petitioners made clear that the permits must be remanded *because they did not prevent violations of narrative and dissolved oxygen standards*. Indeed, the Petitioners could hardly have been clearer on this point, stating as a basis for the appeal as follows:

> The Permit and the Responsiveness Summary show that there was no effort made to determine whether the discharges of nitrogen and phosphorus allowed by the Permit could cause or contribute to violations of the dissolved oxygen (35 Ill.Admin. Code 302.206 and 302.405), Unnatural Sludge (35 Ill. Admin. Code 302.403) or Offensive Conditions (35 Ill. Admin. Code 302.203) water quality standards.

(Pet'rs' Pet. ¶27.) Further, in the Memorandum in support of their summary judgment motion filed July 11, 2014, Petitioners stated:

> [T]he Administrative Record neither reflects nor supports any finding that the 1.0 mg/L phosphorus limit is adequate to reduce the phosphorus concentration in the receiving water to levels where it will not cause excessive plant and algal growth, violations of the dissolved oxygen

> standards, and impairments of aquatic life uses. The failure to ensure that the permitted phosphorus discharges will not cause or contribute to violations of Illinois water quality standards violates 35 Ill. Admin. Code. 304.105, 309.141, 309.143 and 309.146.

(Pet'rs' Mem. 2.)

Petitioners further pointed out in that memorandum that IEPA and U.S. EPA have identified numerous waters affected by MWRD pollution that "fail to meet water quality standards for dissolved oxygen, 'unnatural sludge' and/or 'offensive conditions' standards" and cited the relevant portions of the Illinois standards. (Pet'rs' Mem. 11.) Still further, Petitioners stated in their July memorandum—to which MWRD already responded on August 22—that:

> IEPA did not even attempt to correlate the 1.0 mg/L limit with the identified impairment, or to assert, much less demonstrate through reasonable potential analysis, that this limit would prevent the MWRD effluent from causing or contributing to the impairment or to the excursion of the dissolved oxygen, offensive conditions, or unnatural sludge water quality standards.

(Pet'r Mem. 15.)

Thus, neither IEPA nor MWRD offer any valid explanation as to why they did not fully respond to these arguments in their opposition brief, and now should be allowed to get the last word despite the agreed schedule laid out in the Hearing Officer's order.

III. THE IEPA MOTION AND THE REPLY BRIEFS DISTORT THE LAW AND MISREPRESENT THE RECORD.

Respondents' motion and proposed reply briefs additionally fail to demonstrate prejudice since they are grounded in claims that are demonstrably untrue. Reply briefs grounded in distortion of the record and the law are not only unnecessary to a reasoned resolution of this matter by the Board, but a distraction from it. Specifically, IEPA claims without basis that Petitioners are attempting to shift the burden of proof,

misapplying precedent to this case, and attempting to ascribe a violation of the Illinois Environmental Protection Act or Board regulations where none exists. (IEPA Motion ¶3.) MWRD claims, also without basis, that the discharges meet all applicable water quality standards, and that the holdings of the Board and the Illinois Appellate Court in the *New Lenox* case are not applicable here. There is no truth in any of these assertions.

A. Petitioners have properly met their burden to prove that IEPA did not do what was necessary to issue a valid permit.

As they very clearly explained in their opening memorandum, and contrary to IEPA's assertions otherwise, Petitioners *accept the burden* of showing that IEPA has violated Board rules in issuing the permits. (Pet'r Mem. 13.) Petitioners then show that they have fully met this burden by demonstrating that IEPA issued permits without establishing in the record that the limits set for phosphorus were adequate to prevent phosphorus from causing violations of the standards regarding dissolved oxygen levels and the narrative standards regarding plant and algal growth. Petitioners made this showing by citing much scientific evidence in the record showing that levels of phosphorus caused by discharges as high as those in the Permits are known to cause such violations. (Pet'rs' Mem. 9-10, 16-18.) Petitioners also cited evidence that numerous waters that receive phosphorus from the MWRD discharges at issue are listed by IEPA as impaired by phosphorus. (Pet'rs' Mem. 11-13.) This includes both waters that IEPA stated in its Responsiveness Summary to be impaired waters "downstream" of the MWRD discharges and those impaired waters that IEPA failed to recognize in the Responsiveness Summary but that are impaired and that do receive effluent from the discharges at issue. (Pet'rs' Mem. 11-12.)

IEPA and MWRD, in arguing their need for the last word, distort the burden that Petitioners must meet in a manner contrary to the Board rules and other applicable law. They claim it is Petitioners' duty to show that the MWRD discharges being allowed will *necessarily* cause violations of water quality standards, but that is not the law.

First, IEPA and MWRD are conflating "Board rules" and "water quality standards." Although there are currently water quality standards that are being violated by the MWRD discharges, Petitioners claims include more specifically that IEPA neglected to follow the Board rules that must be followed when establishing permit effluent limits. Petitioners need not prove that violations of water quality standards will occur with certainty as a result of the permitted discharge but only that IEPA violated rules designed to protect against such violations. *Ill. EPA v. Ill. Pollution Control Bd.*, 386 Ill. App. 3d 375, 383 (3d Dist. 2008).

Second, under the Board rules, IEPA must determine whether there is a "reasonable potential" that the discharges will cause such a violation. 35 Ill. Admin. Code 309.143; *see also* 40 CFR 122.44(d). Here, the record makes clear that, even when limiting consideration to those waters that everyone agrees are "downstream" from the plants, there is much more than a "reasonable potential" of violating water quality standards as to numerous water bodies, in that numerous water bodies are actually impaired by phosphorus. Given this reasonable potential, IEPA was obligated by the Board rules to set permit limits that would be sufficiently "stringent" to prevent violations of water quality standards, 35 Ill. Admin. Code 309.141(d), using the methods set forth in 40 CFR 122.44(d) (1)(vi), and not just accept the permit limits that the permit applicant suggested.

B. Petitioners' properly applied the Board's *New Lenox* decision and the Board rules regarding the 1.0 mg/L phosphorus effluent limit established by the Board.

Both IEPA and MWRD are at pains to distinguish the decisions of the Board and the Appellate Court in the *New Lenox* cases: *Illinois EPA v. Ill. Pollution Control Board*, 386 Ill. App. 3d 375, 383 (3d. Dist. 2008), and *Des Plaines Watershed Alliance v. Illinois EPA*, IPCB 2004-88 (April 19, 2007). They stress that *New Lenox* was decided under the antidegradation regulations of 35 Ill. Admin. Code 132.105 that apply to new or increased loading while this case involves a decreased loading.

Once again, however, Respondents' desire to have the last word over applicability of these cases does not amount to a showing of material prejudice. Petitioners have never claimed that this case involves the antidegradation rules or that *New Lenox's* holdings regarding the meaning of the antidegradation rules are specifically applicable here. *New Lenox*, however, is clear regarding the following larger principles of law that are plainly applicable and relevant here:

1. Third parties can establish that NPDES permits were issued in violation of Board rules by showing that the record does not support the IEPA's permit decisions 386 Ill. App. 3d 375 at 384; IPCB 04-88 at 35, 38, 46, 50.

2. Violations of the dissolved oxygen standards and the narrative standards regarding plant and algal growth can be caused by phosphorus discharges 386 Ill. App. 3d 375 at 385; IPCB 04-88 at 35, 43-44, 46.

3. To avoid a remand, the administrative record must show that IEPA complied with applicable Board rules requiring protection of water quality standards, including setting protective limits on pollutants for which there is not

currently a numeric water quality standard, such as phosphorus or nitrogen. 386 Ill. App. 3d 375 at 383. IPCB 04-88 at 43-44, 46.

It does not matter that in this case, it is not the antidegradation rules which IEPA must follow, but rather other permitting rules, in considering phosphorus discharges and their potential impact on dissolved oxygen standards and narrative plant and algal growth standards.[1] The applicable Board rules provide that IEPA must "ensure" that "any more stringent limitation" necessary to meet water quality standards is included, 35 Ill. Admin. Code 309.141(d)(1), and that effluent limits "must control" all pollutants that "may be" discharged at a level that has a " reasonable potential" to cause or contribute to a violation of the water quality standards "including State narrative criteria for water quality." 35 Ill. Admin. Code 309.143(a). *See also,* 35 Ill. Admin. 309.141(d)(2), incorporating by reference 40 CFR 122.44(d).

Thus, both the Board rules and *New Lenox* flatly prohibit IEPA from allowing discharges at levels that IEPA cannot ensure will protect Illinois water quality standards, including narrative standards. Petitioners presented evidence that there are already impairments that are exacerbated by the MWRD discharges at issue in this case. Simultaneously, there is no scientific basis in the record whatsoever supporting 1.0 mg/L phosphorus as sufficiently stringent to protect water quality standards. IEPA did not follow the Board's rules regarding setting water quality-based effluent limits, so the Permits must be remanded.

[1] The antidegradation standard requires IEPA to "assure" that increased discharges do not cause a violation of water quality standards 35 Ill. Admin. Code 302.105(c)(2)(B), while the general rule requires IEPA to "ensure" that discharges not cause or contribute to a violation. 35 Ill. Admin. Code 309.141(d)(1). There is certainly no reason to believe that "ensure" means something substantially different than "assure" in this context.

Both IEPA and MWRD cite the 1.0 mg/L effluent standard of 35 Ill. Admin. Code 304.123(g) that applies to certain new discharges, but do not even pretend that that rule applies here. Further, contrary to the suggestions of IEPA and MWRD, there is not a hint in that rule that the 1.0 mg/L phosphorus limit was chosen because it would protect against violations of the dissolved oxygen standards or the narrative standards against unnatural plant and algal growth. Indeed, the rule is clearly a technology-based rule that is part of effluent standards and even states on its face that it is only operative until the Board adopts a numeric standard for phosphorus. 35 Ill. Admin. Code 304.123(j).

C. The record clearly shows that the permits were issued in violation of numerous Board regulations.

Because IEPA failed to do a reasonable potential analysis and ensure that MWRD discharges of phosphorus and nitrogen would not cause or contribute to violations of the dissolved oxygen or narrative standards, the permits were issued in violation of law. As has been explained, at least 35 Ill. Admin. Code 309.141 (d)(1), 309.141(d)(2), and 309. 143(a) were violated by this failure. Further, by not even requiring studies necessary to ensure that it would be able to write proper numeric limits in the future, IEPA violated 35 Ill. Admin. Code 309.143.

The Petitioners' do not "conjecture" (IEPA Reply Mem. 6) that phosphorus from the plants may be causing violations of water quality standards for DO and algal growth. Rather, they offered factual evidence from the record clearly showing, based on scientific investigation and analysis, both that phosphorus discharges can have this effect and that MWRD's discharges *are* having this effect. (Pet'rs' Mem. 9-13, 16-18.) It is IEPA that is conjecturing – without offering anything from the record – that its inordinately high 1.0 mg/L total phosphorus limit will even make a dent in the problem. The Board rules do

not allow IEPA to issue permits without "ensuring" that they will not allow pollution that causes or contributes to violations of water quality standards and the law is clear that IEPA may not throw up its hands and claim that it does not know what to do in the face of uncertainty or the lack of a numeric standard for phosphorus. (Pet'r Reply Mem. 5-8.)

Losing sight of the Administrative Record, geography, established science, and what MWRD has told the Board, IEPA and MWRD also present a fog of facts and falsities suggesting, vaguely, that there is no evidence of impairments in waters that receive effluents from MWRD's discharges at issue. However, IEPA and MWRD ignore, first, the salient fact that IEPA has unambiguously found such impairments. IEPA stated clearly in the Responsiveness Summary that "it is true that at least one CAWS segment downstream of all three plants has a potential cause of impairment due to total phosphorus." (R. 1333.)

Thus, as already explained in Petitioners' Memorandum, MWRD's protests that there are no impairments "downstream" of the discharges are simply false. Everyone agrees the Calumet Sag Canal and the Sanitary and Ship Canal are "downstream" of MWRD's discharges, as stated by the Responsiveness Summary. Additionally, numerous other waters have been listed as impaired by IEPA that the record shows (and that MWRD has testified to the Board) actually receive discharges from the MWRD's sewage treatment plants, notwithstanding MWRD's broad reference to these waters being "upstream" of the plants. (Pet'rs' Mem. 11-12.) The record evidence makes clear that there *is* no real "upstream" as to the Upper North Shore Channel and the Little Calumet River east of the plant discharge because effluent from the O'Brien and Calumet plants

flows both ways. (Pet'rs' Mem. 12.) Notably, MWRD has not attempted to refute this fact.

MWRD additionally protests that Illinois River side channel waters identified as impaired by IEPA, Lake Depue and Lake Senachwine, may be affected by local sources of pollution and both IEPA and MWRD stress that those lakes are over 100 miles from the discharges. On this point, IEPA and MWRD actually state some facts accurately, but then ignore the portions of the record showing that upstream phosphorus *does*, in fact, enter side channel lakes, (R.1131, 1136, 4719), and that there is considerable evidence in the record that pollution from the MWRD plants reaches even the Gulf of Mexico. (R. 2963, 4007, 4781, 4789, 5372.) Indeed, MWRD's former General Superintendent, Richard Lanyon, stated that MWRD discharges are a substantial portion of the phosphorus reaching down the Illinois River all the way down to the Mississippi, well below Lake Depue and Lake Senachwine, (R. 4388-9.)

In any event, the law requires that IEPA-issued permits must not allow discharges that "cause *or contribute*" to violations, 35 Ill. Admin. Code 309.143, 40 CFR 122.44(d), not just discharges that are the *entire* cause. Thus, the fact that MWRD may not be the whole problem in these Illinois River side channels does not help the Respondents. On remand, the problems facing these Illinois River side channels can be considered more carefully.

Finally, MWRD cites the fact that there are limitations in the permits on biological oxygen demand ("BOD") and that there are minimum dissolved oxygen effluent limits and suggests that IEPA has therefore done enough to protect DO levels. (MWRD Reply 2, 3-4.) These assertions are irrelevant to the question raised in

Petitioners' appeal, which is not whether the permits contain some measures, somewhere, addressing DO, but whether the permitted discharges on the whole cause or contribute to a DO violation. MWRD simply ignores the huge amount of science in the record clearly showing that phosphorus discharges, in addition to BOD, can and do cause or contribute to violations of DO standards, via algal photosynthetic activity that drives down DO levels at night. (Pet'rs' Mem. 10, R. 282, 308, 2522, 4019-21, 4323-4, 4328, 4347, 4565.) Certainly, neither IEPA nor MWRD point to anything in the record showing that the BOD and minimum DO effluent limits in the permits are adequate to protect in-stream DO standards by themselves.

CONCLUSION

The Motions of IEPA and MWRD for Leave to file reply briefs should be denied. Alternatively, the reply briefs should be accepted for filing and given as much credence as they deserve, which is none.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jessica Dexter, hereby certify that I have served the attached **Petitioners' Response to Motions by IEPA and MWRD for Leave to File Reply Briefs in Support of their Motions for Summary Judgment** in PCB 2014-106, 107, 108 upon:

Mr. John T. Therriault
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via electronic filing on October 17, 2014; and upon the attached service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on October 17, 2014.

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