

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
v.)	(O'Brien)
)	PCB 14-107
ILLINOIS ENVIRONMENTAL)	(Calumet)
PROTECTION AGENCY and)	PCB 14-108
METROPOLITAN WATER)	(Stickney)
RECLAMATION DISTRICT OF)	(Third-Party NPDES Permit Appeals -
GREATER CHICAGO)	Water)
)	(Consolidated)
Respondents.)	

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on July 11, 2014 I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, **Petitioners' Motion for Summary Judgment** and **Petitioners' Memorandum of Law in Support of Their Motion for Summary Judgment** in PCB 2014-106, 107, 108 a copy of which is attached hereto and herewith served upon you.

Respectfully Submitted,



Jessica Dexter (Region No. 6298340)
Staff Attorney
Environmental Law & Policy Center
35 E. Wacker Drive, Suite 1600
Chicago, IL 60601
312-795-3747
jdexter@elpc.org

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’ MOTION 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) move for summary judgment pursuant to 35 Ill. Adm. Code 101.516 (b) on all counts of their Petition for Administrative Review, which was accepted by the Board on February 6, 2014. Petitioners are entitled to summary judgment because undisputed facts show that the Illinois Environmental Protection Agency (“IEPA”) violated the Illinois Environmental Protection Act and regulations in the issuance of NPDES permits to the Metropolitan Water Reclamation District of

Greater Chicago (MWRD) for discharges from the Stickney, Calumet and O'Brien water reclamation plants (the "Plants"). The attached Memorandum establishes that there are no genuine issues of material fact and that Petitioners are entitled to judgment as a matter of law.

The record shows that IEPA failed to ensure that MWRD discharges would not cause or contribute to violations of water quality standards through discharges of phosphorus and nitrogen, failed to include numeric permit limits necessary to achieve water quality standards, and failed even to require studies that would determine the proper numeric limits for phosphorus or nitrogen. As to the phosphorus limit that it did establish, IEPA granted compliance schedules for phosphorus permit limits that are not justified in the record. IEPA also failed to prohibit sanitary sewer overflows in the NPDES permits for the Plants. Finally, IEPA violated its own rules (which were enacted as a requirement under federal law for IEPA to administer the NPDES program in Illinois) by, among other things, failing to respond to comments made by the public on the draft permits. In support of their motion, Petitioners state:

1. In November 2009, IEPA gave public notice of draft NPDES permits for the Plants. (AR 3356).¹

2. Each of the Petitioners submitted pre-hearing comments on the draft permits (R. 2051-62, 2520-26, 3073-80) at the public hearing that was held on March 10, 2010 (R. 3348, 3398-3425) and/or in Post-Hearing Comments. (R. 5365-77).

3. Petitioners commented, *inter alia*, that the draft permits were inadequate and did not comply with 35 Ill. Adm. Code 304.105, 309.141, 309.143 because they did not

¹ Citations to the administrative record are cited here and in the Memorandum in Support of Petitioners' Motion for Summary Judgment as "(R. __)."

contain water quality-based effluent limits for phosphorus and nitrogen, despite knowledge that such pollutants are a major problem in Midwestern waters, that waters receiving the effluent from the three Plants are being harmed by phosphorus and nitrogen pollution, and that the Plants discharge large amounts of phosphorus and nitrogen. (R. 5370-73). Petitioners also cited the fact that numerous waters receiving phosphorus effluent from the Plants were listed as impaired by phosphorus in by IEPA in 2010, along with other data showing that those waters are impaired by phosphorus. Petitioners commented that the Plants caused and contributed to phosphorus levels in the receiving waters well in excess of the applicable U.S. Environmental Protection Agency ("U.S. EPA") recommended ecoregional criteria for phosphorus (MWRD discharges of phosphorus in concentrations over 1.0 mg/L are much greater than U.S. EPA criteria of 0.077 mg/L), and far in excess of the phosphorus standards that have been adopted by Wisconsin based on scientific analysis of the level necessary to prevent excess algal growth (0.1 mg/L). (R 2054-56, 2522-3, 3074-5 3398-3409, 5371-2. *See also*, R. 1251-7 and 1092-96 on proper standards and R. 1044-65 showing concentrations of phosphorus and nitrogen discharges).

4. Petitioners further commented that IEPA should require MWRD to perform studies regarding the effects of its discharge of nitrogen and phosphorus from the Plants and ways to end impairments of water quality caused by such discharges. (R. 5372-73).

5. On December 23, 2013, IEPA issued final permits, which differed in significant ways from the draft permits. Among other things, unlike the draft permits, the final permits contain a concentration limit of 1.0 mg/L for total phosphorus (well over ten times the applicable U.S. EPA criterion), and schedules of compliance of up to 10 years.

In addition, also unlike the draft permits, the final permits contain a special condition requiring that MWRD “work towards the goals of achieving no discharges from sanitary sewer overflows.” The final permits also contain no water quality-based effluent limit on phosphorus or total nitrogen.

6. IEPA did not allow any opportunity for public comment on the significant changes to the final permits, including the new 1.0 mg/L phosphorus limit, or whether that limit would be adequate to address identified impairments as required under 35 Ill. Adm. Code 309.141(d)(1); 304.105; 309.143.

Phosphorus and Nitrogen Pollution

7. The Responsiveness Summary that was filed at the time of the issuance of the final permits acknowledges that the Chicago Sanitary and Ship Canal (“CSSC”) and the Calumet Sag Channel (“Cal Sag”), which receive phosphorus from the Plants, are listed by IEPA as impaired for aquatic life by phosphorus. (R. 1333). The Responsiveness Summary states that the segments of the North Shore Channel (HCCA-04) and the Little Calumet (HA-04) that are among the “receiving waters” of respectively the O’Brien and Calumet plants are not listed as impaired. (R. 1333).

8. However, documents and testimony available to IEPA prove that, in addition to the CSSC and the Cal Sag, IEPA has listed segments of at least the North Shore Channel (HCCA-02 – the segment immediately north of the discharge point of the O’Brien Plant), the Little Calumet River (HA-05 – the segment immediately east of the discharge point of the Calumet Plant), Chicago River (HCB-01), Lake Depue and Lake Senachwine as impaired by phosphorus, and that those segments receive effluent from the Plants. (Pre-filed Testimony of Dr. Charles Melching, IPCB R2008-09 (Document 62134) p.4;

R2008-09 Tr. 11/17/08 at 69-71 (Document 63376); R. 1131-36, 2576, 463-4, 1177, 1258; IEPA 2012 303(d) List pp. 28, 30 <http://www.epa.state.il.us/water/tmdl/303-appendix/2012/appendix-a2.pdf>). Those impaired segments are not mentioned in the Responsiveness Summary,

9. The Responsiveness Summary indicates that the reason that the 1.0 mg/L limit was chosen was that it was the limit to which MWRD “agreed.” (R. 1333). The record contains no document with information that indicates that the 1.0 mg/L limit is likely to prevent (or is capable of preventing) violations of the water quality standards in the CSSC and the Cal Sag; and no document with analysis of the maximum level of phosphorus that is consistent with the CSSC or Cal Sag meeting water quality standards.

10. Unlike other NPDES permits that require studies to assist IEPA in determining appropriate limits in future permit renewals,² the final 2013 Permits for the Plants do not require MWRD to conduct studies of the effect of MWRD phosphorus or nitrogen discharges on receiving or downstream waters, even though such studies were requested by U.S. EPA and initially agreed to by IEPA. (R. 1112-57, 1259-60, 1277).

Compliance Schedule

11. The record contains proposals by MWRD regarding its desired schedule for reducing discharges of phosphorus to 1.0 mg/L. (R. 1169-74). However, the record does not contain or support a justification by IEPA showing that the 4 year, 6.5 year and 10 year schedules for meeting the limit (at the Stickney, Calumet and O’Brien plants, respectively) require meeting the 1.0 mg/L limit at the Plants “at the earliest reasonable date.” 415 ILCS 5/39(b). (*See also* R. 1159 on need for justification).

² See e.g., permit conditions requiring studies in the 2002 Stickney Permit and 2013 O’Brien permit. (R. 131-34, 1366).

Sanitary Sewer Overflows

12. Petitioners objected in their December 11, 2009 comment letters that the draft Permits' controls on sanitary sewer overflows were inadequate. (R. 2053, 2521).

13. The final Permits contain the following language that did not appear in the draft Permits (and, thus, could not be the subject of comment by the public):

The Permittee shall work towards the goals of achieving no discharges from sanitary sewer overflows or basement backups and ensuring that overflows or backups, when they do occur do not cause or contribute to violations of applicable standards or cause impairment in any adjacent receiving water.

14. The language in the Special Condition that MWRD shall "work toward the goal of achieving no discharges from sanitary sewer overflow" is illegal on its face. 35 Ill. Adm. Code 306.304 requires more than working toward a goal, stating clearly that "overflows from sanitary overflows are expressly prohibited."

15. The Responsiveness Summary states, "Sanitary Sewer Overflows are prohibited by the permits and state law." However, no prohibition on sanitary sewer overflows appears in the permits except in the Standard Conditions; and the permits state that Special Conditions control in the case of a conflict with Standard Conditions. (Standard Condition #26 at R. 3337). The "work towards" provision appears to illegally license sanitary sewer overflows as long as MWRD is taking the steps prescribed in the Special Condition.

Failure to Respond to Comments

16. IEPA made no response to comments that the permits should contain limits on nitrogen and require studies of the effects of Plants' discharge of nitrogen and phosphorus, in clear violation of 35 Ill. Adm. Code 166.192(a)(5). *See also*, 40 CFR

124.17(a)(2). Illinois NPDES permits must be subject to judicial review under 40 CFR 123.30.

Conclusion

17. Petitioners have filed this appeal pursuant to 415 ILCS 5/40(e) as persons who raised issues before the agency regarding lack of adequate controls on phosphorus, nitrogen and SSO pollution and who have members that are affected by the permitted facilities.

18. Because the permits were issued in violation of law, the Board should vacate the permits and require the agency to do the following: (1) conduct analyses of the phosphorus and nitrogen discharges from the Plants to quantify the extent that those discharges cause or contribute to an exceedance of water quality standards; (2) set water quality based effluent limits where reasonable potential is found; require compliance with permit effluent limits “as soon as possible”;(3) unambiguously prohibit sanitary sewer overflows; and (4) comply with all regulations governing permit issuance procedure that have been established under the Illinois Environmental Protection Act, including the requirement to respond to comments, and the requirement to re-notice a draft permit for public comment when the agency significantly modifies the draft permit. In the alternative to items (1) and (2), the agency should be required to include in the Permits a condition requiring MWRD to perform the data collection and analysis necessary to establish a water quality-based effluent limit for phosphorus and nitrogen in the future.

Respectfully Submitted,



Albert Ettinger
Counsel for Sierra Club & Gulf
Restoration Network
53 W. Jackson, Suite 1664
Chicago, Illinois 60604
773 818 4825
Ettinger.Albert@gmail.com



Jessica Dexter (Reg. No. 6298340)
Environmental Law & Policy Center
35 E. Wacker Dr. Suite 1600
Chicago, Illinois 60601
312-795-3747
jdexter@elpc.org



Kim Knowles (Reg. No.6303731)
Prairie Rivers Network
1902 Fox Drive, Suite G
Champaign, IL 61820
217-344-2371
kknowles@prairierivers.org



Ann Alexander
Natural Resources Defense Council
2 Riverside Plaza, Suite 2250
Chicago, IL 60606
312-651-7905
aalexander@nrdc.org

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' MEMORANDUM OF LAW IN
SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

Petitioners Prairie Rivers Network, Environmental Law & Policy Center, Sierra Club, Friends of the Chicago River, Natural Resources Defense Council and Gulf Restoration Network (collectively "Petitioners") submit this memorandum in support of their Motion for Summary Judgment and ask that the Board remand the subject National Pollution Discharge Elimination System ("NPDES") permits to respondent Illinois Environmental Protection Agency ("IEPA" or "the Agency"). There is no genuine issue of material fact, and Petitioners are entitled to judgment as a matter of law as to all four counts of the petition.

Summary of Argument

The Administrative Record clearly establishes that phosphorus from the Calumet, O'Brien, and Stickney wastewater treatment plants (the "Plants") operated by respondent Metropolitan Water Reclamation District of Greater Chicago ("MWRD") is potentially causing or contributing to violations of water quality standards in at least the Calumet Sag Channel ("Cal Sag"), Chicago Sanitary and Ship Canal ("CSSC"), the Chicago River, the Little Calumet River and the North Shore Channel. There is no doubt that the Plants are discharging large amounts of phosphorus in concentrations far higher than the applicable U.S. Environmental Protection Agency ("U.S. EPA") criterion, and there is no shortage of data indicating that there are Illinois water quality standards violations that can be attributed to that phosphorus.

IEPA, however, made no attempt to determine what phosphorus permit limits are necessary to prevent these ongoing violations. The Administrative Record reflects that the 1.0 mg/L total phosphorus concentration limits in the Permits issued to MWRD ("Permits") were chosen simply because those were the limits that MWRD "agreed" to accept. (R. 1333¹). As explained below, the 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 waters to levels where it will not cause excessive plant and algal growth, violations of the dissolved oxygen standards, and impairment 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. Adm. Code 304.105, 309.141, 309.143 and 309.146.

The record establishes that IEPA should have done the necessary analysis to determine the proper limit, which would almost certainly have been far more restrictive than 1.0 mg/L, probably an order of magnitude lower. The Responsiveness Summary offers no hint of a

¹ References to pages in the Administrative Record will be cited as "R __."

rationale for IEPA's failure to do a "reasonable potential" analysis designed to determine proper water quality based effluent limits ("WQBELs") necessary to prevent water quality standards violations.

To the extent IEPA may have believed it lacked the information necessary to establish WQBELs (although the record reflects no such lack), it should certainly at a minimum have made sure that the information would be collected and studied as need be – as it has done in other cases where the permittee was ordered to collect data and perform studies necessary for setting protective limits in the future. Indeed, the record shows that both IEPA (and U.S. EPA) thought such studies would be helpful in setting WQBELs, but these studies were never performed, for reasons that IEPA never explained or justified. The law is clear that IEPA cannot issue a permit without at least making sure that the permittee collects information that would enable IEPA to set proper water quality based effluent limits in the future. 35 Ill. Adm. Code 304.105, 309.141(d)(1), 146(d); 40 CFR 122.48. *See also Natural Resources Defense Council, Prairie Rivers Network and Sierra Club v. Illinois Environmental Protection Agency and Dynegy Midwest Generation, Inc. ("Dynegy")*, No. 13-17, 2014 WL 2591592, at *42 (Ill. Pollution Control Bd. June 5, 2014) (finding increased monitoring requirement imperative for evaluation of need for a WQBEL and remanding to IEPA for permit revisions to assure needed information was collected). Accordingly, Petitioners argue in the alternative that if the Board does not require IEPA to determine protective WQBELs immediately, that it remand the Permits with instructions for IEPA to determine what information is necessary for setting proper WQBELs and assure that MWRD produce that information.

Additionally, IEPA failed to reopen the public comment period after significant modifications were made to the draft Permits that resulted in final Permits that are not logical

outgrowths of the drafts. The phosphorus limits of 1.0 mg/L were developed after the public comment period had closed. The drafts contained no phosphorus limits at all, and commenters had no opportunity to evaluate and comment upon the specific limit that was eventually proposed, or on the Agency's basis for that limit (which, as discussed *infra*, were clearly deficient and problematic). Failing to reopen the comment period thus left the public with no opportunity to present further evidence responding to the proposed limit. *See* 35 Ill. Adm. Code 309.120.

The Permits, and the procedure by which they were issued, suffered from the following additional serious flaws:

- *Failure to prohibit SSOs.* The Permits are ambiguous as to what restrictions are applicable to sanitary sewer overflows (“SSO”). The law is clear: SSOs must be prohibited in permits. IEPA cannot include language in the permits that implies that MWRD may simply “work towards[sic]” the goal of achieving no discharges from sanitary sewer overflows.
- *Failure to respond to comments.* In the Responsiveness Summary, IEPA should have addressed Petitioners’ comments regarding nitrogen pollution, and regarding the need for studies of the effects of nitrogen and phosphorus discharges by the Plants.

Statement of Facts

1. Procedural History

a. The Draft Permits

At Petitioners’ request, and having determined there was significant public interest in the Permits, IEPA held public hearings on March 9, 2010. Petitioners submitted pre- and post-hearing comments on the Permits and testified at the public hearing. (R. 2051-2062, 2520-2526,

3073-3080 (initial comments); R. 3399-3425; 3477-3494 (hearing testimony); R. 5365-5377 (post-hearing comments) (collectively, “Comments”).

In their Comments, Petitioners raised numerous objections to the draft Permits. In particular, they objected to the lack of phosphorus and nitrogen limits, and presented evidence of the effects of phosphorus and nitrogen pollution. (R. 3398-25, 5365-77). Petitioners summarized some of the extensive findings by IEPA regarding dissolved oxygen and phosphorus impairments in the receiving waters. (R. 5370 and *infra* this section). Additionally, Petitioners objected, *inter alia*, to the inadequacy of controls on SSOs.² (R. 2053, 2521).

b. IEPA Development of the Final Permits

By letter dated June 30, 2010, after the close of the public comment period and reviewing data supplied by MWRD, U.S. EPA informed IEPA that it should do a “reasonable potential” analysis of the effects of MWRD phosphorus discharges on water quality in light of the numerous waters that had been listed as potentially impaired by phosphorus. (R. 463-4, 482-3, 488-9). IEPA and USEPA then made a joint plan for an extensive study of the effects of MWRD phosphorus discharges that was detailed in a group of documents in early October 2011. (R. 1112-57).

Through a letter dated October 26, 2011, MWRD told IEPA that it would be willing to treat its discharges of phosphorus from the Stickney and Calumet plants to a 1.0 mg/L concentration level.³ (R. 1160-66). In that letter, MWRD also proposed schedules for

² As discussed *infra*, the Special Condition to which Petitioners have objected in this Permit appeal was not included in the draft permits.

³ This letter was sent after Petitioners NRDC, Prairie Rivers Network and Sierra Club sent MWRD a Notice of Intent to Sue MWRD in U.S. District Court regarding its phosphorus discharges on March 1, 2011. (R 1092-96) The suit was brought in June 2011 and proceeds in the United States District Court for the Northern District of Illinois.

complying with the 1.0 mg/L limits at the Stickney, and Calumet Plants in 4 and 6.5 years, respectively.

Following MWRD's proposal for the 1.0 mg/L standard – which neither MWRD nor IEPA characterized as a WQBEL – plans to develop a WQBEL that would actually establish proper phosphorus limits continued for over a year. The Administrative Record indicates that MWRD told IEPA that its monitoring and research department was working on a proposal for such a study as late as December 6, 2012. (R. 1259-60). Later in December 2012, however, MWRD decided that it did not want a phosphorus impact study because it did not “believe that the District performing such a study [would] be productive.” (R. 1273). MWRD also asserted, in a memo sent to IEPA on December 21, 2012, that the Agency's phosphorus impairment listings in waters receiving phosphorus pollution from the Plants were not scientifically justified, and that the algae-related impairments in segments of the Little Calumet (HA-05) and the North Shore Channel (HCCA-02) were “upstream” of its Plants. (R. 1274-76).

IEPA ceased pursuing its request for the phosphorus impact study in 2013 for reasons not explained in the Administrative Record. However, U.S. EPA and IEPA expressly rejected MWRD's position that its phosphorus discharges were not a potential cause of aquatic life impairments and violations of water quality standards. In particular, IEPA agreed that the Cal Sag and the CSSC were potentially impaired by phosphorus, stating that the “Permit fact sheet reflects current listed impairments and causative pollutants that IEPA verified and listed for each 303(d) cycle. There is no reason to alter permit fact sheets in response to MWRD's comments.” (R. 1303).

A draft Permit for O'Brien dated August 20, 2012 was sent to U.S. EPA (but not to the public for comment, as required under 35 Ill. Admin. Code § 309.119) that included a

phosphorus limit of 1.0 mg/L and a 10-year compliance schedule for meeting that limit. U.S. EPA commented on September 11, 2012 that “IEPA needs to explain in the fact sheet why a ten year compliance schedule is justified.” (R. 3168, 3241). Nonetheless, the Administrative Record contains no analysis by IEPA of the appropriateness of the 4 and 6.5-year schedules proposed by MWRD for compliance with the 1.0 mg/L schedule for Stickney and Calumet or any discussion of how the 10-year schedule was determined for O’Brien.

c. The Final Permits

On December 23, 2013, IEPA issued the final Permits. Notwithstanding the changes described below from the draft Permits, IEPA did not seek additional public comment prior to issuing the final Permits.

With respect to phosphorus, the Permits contain 1.0 mg/L phosphorus limits and the compliance schedules proposed by MWRD. (R. 2134 (Stickney Permit); R. 2620 (Calumet Permit); and R. 3308 (O’Brien Permit)). In response to Petitioners’ Comments regarding the impact of phosphorus on water quality and the need for water quality-based effluent limits, the Responsiveness Summary states:

The District’s permits require implementation of enhanced biological phosphorus removal at all three plants in order to achieve a monthly average Total Phosphorus limit of 1.0 mg/L. The permits include compliance schedules to provide the District necessary time to comply with the phosphorus limit. Semi-annual progress reports must be submitted to the Agency until the phosphorus limit has been achieved. Please note that, at present, there has not been a Total Maximum Daily Load (TMDL) completed for the Gulf hypoxic zone or the Mississippi River Basin for nutrients. (R. 1332).

Concerning the Comments identifying phosphorus-related impairments in waters that receive phosphorus from the three Plants, the Responsiveness Summary states:

For the benefit of the hearing record, the 2012 draft Illinois Integrated Water Quality Report and Section 303(d) List status of the receiving waters for the three MWRDGC plants is as follows:

Terrence J. O'Brien – North Shore Channel (Stream Code HCCA-04) - fully supporting Indigenous Aquatic Life Uses

Calumet – Little Calumet River (Stream Code HA-04) – fully supporting Indigenous Aquatic Life Uses

Stickney – Chicago Sanitary and Ship Canal (Stream Code GI-03) – Indigenous Aquatic Life Uses impaired with potential causes given as total phosphorus, dissolved oxygen (non-pollutant) and ammonia.

Given that the North Shore Channel and Little Calumet River are fully supporting Indigenous Aquatic Life Uses, phosphorus is not a cause of impairment because no impairment exists in the stream segments directly receiving the discharges. The North Shore Channel is upstream of the Chicago Sanitary and Ship Canal, which has the aforementioned total phosphorus potential cause of impairment. Further downstream from the Little Calumet River, the Calumet Sag Channel is listed as impaired for Indigenous Aquatic Life Use with a potential cause given as total phosphorus. Therefore, it is true that at least one CAWS segment downstream of all three plants has a potential cause of impairment due to total phosphorus. The District has agreed to implement enhanced biological phosphorus removal at all three plants in order to achieve a monthly average Total Phosphorus limit of 1.0 mg/L. (R. 1333).

The Responsiveness Summary offers no explanation of how the 1.0 mg/L limits were chosen except that that was the figure to which MWRD “agreed.” While the Responsiveness Summary identifies Petitioners’ comment that IEPA should limit nitrogen, (R. 1332), it contains no response to this comment.

With respect to SSOs, the final Permits contain the following Special Condition language that did not appear in the draft Permits (and thus, could not have been the subject of public comment):

The Permittee shall work towards the goals of achieving no discharges from sanitary sewer overflows or basement backups and ensuring that overflows or backups, when they do occur do not cause or contribute to violations of applicable standards or cause impairment in any adjacent receiving water. (R. 2644 (Calumet Permit Special Condition 18), R. 2157 (Stickney Permit Special Condition 17), and R. 3329 (O'Brien Permit Special Condition 18)).⁴

⁴ The Permits also contain language in standard conditions indicating that the regulatory prohibitions against, *inter alia*, SSOs are applicable. (See Standard Condition 27; R. 3337). However, the standard conditions also contain a

On the subject of SSOs, the Responsiveness Summary states:

Special Conditions in the permits require reductions in I/I that cause or contribute to basement back-ups or sanitary sewer overflows. CMOM conditions were added to the permits to address capacity and notification issues. In addition, sanitary sewer overflows are prohibited by the permits and state law. (R. 1333).

The Responsiveness Summary does not, however, attempt to reconcile the new “working towards” language with the prohibition.

A timely Petition for review of the permits was filed by Petitioners on January 17, 2014. (Document-83172).

2. *Additional Relevant Facts in the Administrative Record*

The Administrative Record contains, *inter alia*, the key facts set forth below relevant to the Petition and this motion.

a. The Plants’ Phosphorus and Nitrogen Discharges

The Plants, which are the largest in Illinois,⁵ discharge very large volumes of phosphorus and nitrogen. (R. 1044-65) (MWRD Northside 2008 effluent data); (R. 1092-96 (NRDC Notice of Intent to Sue MWRD for Violations of Clean Water Act); R. 2963, 2968-71 (U.S. EPA Region V comments on Northside draft permit January 29, 2008)). On average each day between 2005 and 2009, Stickney discharged 5900 pounds of phosphorus and 61,600 pounds of nitrogen; O’Brien discharged 2500 pounds of phosphorus and 20,000 pounds of nitrogen; and Calumet discharged 5700 pounds of phosphorus and 21,500 pounds of nitrogen each day. (R. 1126. (Quality Assurance Project Plan for a Nutrient Reasonable Potential Analysis Upper Illinois River System and Chicago Area Waterways, EPA Region 5)).

clause stating that in case of conflict between standard conditions and other conditions, “the other conditions shall govern.” (Standard Condition R. 3337). It is at least arguable, then, that the special condition that states that MWRD need only “work towards” eliminating SSOs trumps the standard condition prohibiting SSOs.

⁵ The Plants have a combined average design flow of 1,887 million gallons per day. (R. 1126).

b. Effects of Phosphorus And Nitrogen Pollution

Excess phosphorus and nitrogen in rivers and streams can result in the overgrowth of algae and an overabundance of phytoplankton and macrophytes. High algal and macrophyte biomass can cause depressed dissolved oxygen levels, and diel fluctuations in dissolved oxygen and pH. These conditions can significantly harm aquatic life directly, and also by causing increased availability of toxic substances like ammonia and hydrogen sulfide, reducing available aquatic habitat, and decreasing the overall health of the stream. (R. 3942 (Petition to US EPA for Rulemaking Secondary Treatment Standards); R. 4347-48 (USGS Harmful Algal Blooms)). Excess phosphorus and nitrogen can harm both the receiving and downstream waters; and phosphorus and nitrogen flowing downstream from the Plants' receiving waters have been linked to eutrophication of downstream lakes and impoundments in Illinois, as well as to hypoxia in the Gulf of Mexico. (R. 1135-36 (Quality Assurance Project Plan for Nutrients Reasonable Potential Analysis Upper Illinois and CAWS); R. 2522-23 (Petitioners' comment letter on Calumet draft Permit, 12/9/09); R. 2963-71 (Region 5 U.S. EPA letter)).

Nitrogen and phosphorus pollution can also affect human health. High levels of algae in drinking water supplies necessitate additional treatment, which in turn can produce carcinogens known as trihalomethanes as a byproduct. (R. 4086 (US EPA Nutrient Criteria Technical Guidance Manual Rivers and Streams July 2000)). Phosphorus and nitrogen also stimulate growth of toxic cyanobacteria, which can harm humans, pets and livestock. (R. 4086-87 (US EPA Nutrient Criteria Technical Guidance Manual Rivers and Streams July 2000); R. 4349-80 (WHO Guidelines for Safe Recreational Water Environments)).

c. Impairments of Water Quality in Receiving and Downstream Waters

Phosphorus concentrations in the Lower Des Plaines and Upper Illinois rivers downstream of the Plants have been reported at more than 10 times the water quality criteria recommended by U.S. EPA to protect against excessive algal growth (0.077 mg/L), and nitrogen levels are found at 2 to 3 times as high as the recommended nitrogen criteria. (R. 507 (US EPA email to IEPA re: ecoregional criteria for nutrients, September 7, 2010); R. 1753 (MWRD 2004 Annual Report of Water Quality); R. 4385-8 (MWRD memo Impacts of Chicago Metropolitan Area Point Sources on Water Quality in Upper Illinois Waterway); R. 507-08 (Email from US EPA to IEPA re: US EPA recommended ecoregional nutrient criteria)).

IEPA and U.S. EPA have identified numerous waters affected by pollution from the Plants that are impaired for causes that can be attributed to phosphorus pollution. The impaired waters on the 303(d) list fail to meet water quality standards for dissolved oxygen, “unnatural sludge” and/or “offensive conditions” standards.⁶ These waters include, as mentioned by IEPA in the Responsiveness Summary, the Cal Sag, which receives phosphorus from the Calumet plant and the CSSC which receives phosphorus from all three Plants. (R. 1333. *See also* <http://www.epa.state.il.us/water/tmdl/303-appendix/2012/appendix-a2.pdf>.) Additionally, IEPA overlooked Chicago River downtown in the Responsiveness Summary (segment HCB-01), Lake Depue and Lake Senachwinewhich was also listed in 2012 for phosphorus. (*See* <http://www.epa.state.il.us/water/tmdl/303-appendix/2012/appendix-a2.pdf> at p. 9). MWRD officials have also acknowledged that phosphorus levels are elevated by MWRD discharges well

⁶ The offensive conditions standard applies to general use waters, requiring them to be free from plant or algal growth of other than natural origin. 35 Ill. Adm. Code 302.203. The unnatural sludge standard applies to secondary contact and indigenous aquatic life waters, which must be free from unnatural plant or algal growth. 35 Ill. Adm. Code 302.403. Illinois’ general use water quality standard for dissolved oxygen requires maintenance of sufficient oxygen concentrations to prevent offensive conditions. 35 Ill. Adm. Code 302.206. Illinois’ dissolved oxygen standards for secondary contact and indigenous aquatic life waters set minimum thresholds for dissolved oxygen. 35 Ill. Adm. Code 302.405.

down into the Illinois River. (R. 4385. (Former MWRD General Superintendent Richard Lanyon states that Illinois River locations were found to be over 7 times the criteria for chlorophyll *a*, a parameter regarded by U.S. EPA, and reflected in MWRD studies, as an indicator of eutrophication, a state of algae overgrowth and depleted dissolved oxygen)).

The Responsiveness Summary also fails to identify all relevant facts regarding impairments. The Summary identifies impaired “downstream” segments, but there are impaired segments “upstream” of the Calumet and O’Brien plants that are also affected by phosphorus discharges from those Plants. The segment “upstream” of the Little Calumet found to be impaired by algal growth, HA-05, receives effluent from the Calumet plant. (R. 2576. (Email US EPA to IEPA September 21, 2012 regarding location of outfall from Calumet plant)).

Additionally, the record in this Board’s R2008-9 water quality standards rulemaking proceeding, which IEPA used in making its decisions on the Permits, (R. 1318), likewise clarifies that both the Little Calumet River segment HA-05 to the east of the discharge point and North Shore Channel segment HCCA-02 to the north of the O’Brien discharge point are affected by the discharges from the Plants. Indeed, the Board accepted MWRD’s position on this issue and stated in its decision in R2008-9(C) of November 21, 2013 that portions of the Chicago Area Waterway system were subject to flow reversals. Specifically, the Board had heard testimony of Dr. Charles Melching, who testified as an expert on behalf of the MWRD that effluent from the Calumet and O’Brien plants flows in both directions. (*See* PCB R2008-9, Subdocket C, Proposed Rule, Second Notice, November 21, 2013, pp. 27, 32, 50; Prefiled Testimony of Adrienne D. Nemura and Charles Melching, August 8, 2008, PCB R2008-9, pdf p. 98). Dr. Melching further testified that the very “concept” of “upstream and downstream” made no sense

as to the North Shore Channel because “more often than not, the north side plant is backing up into the North Shore Channel.” (R2008-9 Document # 63376, Tr. 70-1).

STANDARD OF REVIEW

Although a third-party permit appellant bears the burden of proof that the Permit as issued will violate the Environmental Protection Act (“Illinois Act”) or Board regulations, IEPA's decision to issue the Permit is not awarded any special deference by the Board. 415 ILCS 5/40(a)(1). *See Des Plaines River Watershed Alliance v. IEPA* (“New Lenox”), PCB 04-88 at 11 (April 19, 2007), *aff'd sub nom. IEPA v. IPCB*, 896 N.E.2d 479 (Ill. App. Ct. 3d. 2007), (*citing IEPA v. PCB*, 115 Ill. 2d 65, 70; 503 N.E.2d 343, 345 (1986) (“The Board reviews the entirety of the record to determine (1) if the record supports the IEPA's decision, and (2) that the procedures used by the IEPA are consistent with the Act and Board regulations. The Board does not affirm the IEPA's decision on the permit unless the record supports the decision.”)).

Summary judgment is appropriate, in a permit appeal or other matter, when there is no genuine issue of material fact and the record before the Board, including the pleadings, exhibits, discovery documents, and affidavits, demonstrates a clear right to judgment as a matter of law. 35 Ill. Adm. Code 101.516(b); *Clayton Chemical Acquisition L.L.C. v. IEPA*, PCB 98-113 at 2 (March 1, 2001) (*citing Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 180 14 Ill. Dec. 691, 607 N.E.2d 1204 (1992)). The Board has observed that the language of 35 Ill. Adm. Code 101.516(b) makes summary judgment mandatory where there are no genuine issues of material fact. *City of Quincy v. IEPA*, PCB 08-86 at 26 (June 17, 2010).

ARGUMENT

I. IEPA FAILED TO ASSURE THAT PHOSPHORUS DISCHARGES FROM THE PLANTS DO NOT CAUSE OR CONTRIBUTE TO VIOLATIONS OF WATER QUALITY STANDARDS

A. IEPA Failed to Perform the Necessary “Reasonable Potential” Analysis to Determine the Need for Phosphorus WQBELs

There is no real debate here about whether the Plants are discharging levels of phosphorus that can cause impairments of water quality. The Plants make up much and sometimes all of the flow in the Chicago Area Waterway System (“CAWS”). Even after the limits are met that are set by the Permits (in 10 years), the Plants will discharge more than 10 times the instream phosphorus criterion of .077 mg/L proposed by U.S. EPA. Further, as discussed above, IEPA has found that numerous water body segments are not meeting water quality standards for reasons that can be attributed to phosphorus, as evidenced by IEPA’s Section 303(d) listings. *See Alabama Dep’t of Env’tl. Mgmt. v. Alabama Rivers Alliance, Inc.* (Alabama Rivers), 14 So. 3d 853, 864 (Ala. Civ. App.2007) (“The inclusion of the [subject waterbody] on the 303(d) list is prima facie evidence of [its] impairment.”). The Responsiveness Summary concedes that many water segments receiving effluent from the Plants are potentially impaired by phosphorus.

The law prohibits IEPA from granting a permit without limits against discharges that cause or contribute to violations of water quality standards. “In establishing the terms and conditions of each issued NPDES Permit, the Agency shall apply and ensure compliance with . . . [a]ny more stringent limitation . . . necessary to meet water quality standards.” 35 Ill. Adm. Code 309.141(d)(1). Further, the Board’s effluent limitations also require that “no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard,” and that the “Agency shall take appropriate action under Section 31 and Section 39 of

the Act to require the discharge to meet *whatever effluents limits are necessary to ensure compliance with the water quality standards.*” 35 Ill. Adm. Code 304.105 (emphasis added).

NPDES permits must include effluent limitations that control all pollutants that IEPA determines are or may be discharged at a level that will cause or contribute to an excursion above any state water quality standard. 35 Ill. Adm. Code 309.143. To assess whether such limits are necessary, IEPA must perform an analysis to determine whether a discharge has “reasonable potential” to cause or contribute to a violation of water quality standards, and to establish limits to prevent such violation. 35 Ill. Adm. Code 309.143.⁷

The Administrative Record reflects no analysis whatsoever of the obvious “reasonable potential” for MWRD’s massive phosphorus discharges to contribute to the impairments in the waters affected by those discharges. 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 excursions of the dissolved oxygen, offensive conditions, or unnatural sludge water quality standards.⁸ IEPA simply recited the impairments, recited the 1.0 mg/L limit, and noted that MWRD had “agreed” to that limit; but included no WQBELs in the Permits for phosphorus, nor engaged in any of the analysis necessary to establish that WQBEL.⁹ It

⁷ As under Illinois law, the federal Clean Water Act and its regulations require that effluent limitations control all pollutants the permitting agency determines may be discharged at a level that will cause or contribute to an excursion above any state water quality standard, including narrative standards as well as numeric. 33 U.S.C. §§ 1311 (b)(1)(C) and 1312; 40 C.F.R. § 122.44(b) and (d); *American Paper Institute v. U.S. Environmental Protection Agency*, 996 F.2d. 346, 350 (D.C. Cir. 1993).

⁸ *See* (R. 1882-1884, 2338, 2838) (IEPA memos referencing WQBELs for the plants contain no reasonable potential analysis); (R 3399-3401) (IEPA response in public hearing transcript showing failure to perform reasonable potential analyses on nitrogen and phosphorus discharges).

⁹ The Permits do include a narrative Special Condition 5 that the 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, but IEPA has generally not made any effort to enforce this narrative provision and MWRD does not attempt to comply with it.

likewise made no effort to analyze either the impact of MWRD's nitrogen discharges or the need for a limit on them.

The only real difference between this case and *New Lenox* is that in *New Lenox* the discharger did not volunteer to accept a 1.0 mg/L phosphorus limit, but that difference has no import here. In neither case did IEPA consider what limits on P and N were necessary to prevent violations of water quality standards.¹⁰ Moreover, here, unlike in the *Dynegy* case recently considered by the Board, there is no question or doubt that MWRD is discharging phosphorus at very high concentrations, and that it will continue to do so even after the Plants bring down the concentration of phosphorus 10 years from now to 1.0 mg/L.

With or without "reasonable potential" analysis, we do know that a 1.0 mg/L concentration of phosphorus in the water is very unlikely to ensure compliance with water quality standards because when calculations have been done elsewhere to identify a phosphorus limit necessary to protect water quality from eutrophication, they come out at least an order of magnitude less than 1.0 mg/L. The numeric water quality criteria for rivers in Wisconsin is 0.1 mg/L (= 100 µg/L). NR 102.06(3). The U.S. EPA criteria for phosphorus for flowing waters in the ecoregion where the Plants are located is 0.077 mg/L total phosphorus. U.S. EPA Region 1, in developing numeric limits for dischargers of phosphorus into effluent dominated waters, has imposed effluent limits of 0.1 mg/L on those dischargers. *Upper Blackstone Water Pollution Abatement District v. U.S. EPA*, 690 F.3d 9 (1st Cir.), cert. denied, 133 S. Ct. 2382 (2013).

There is no evidence in the Administrative Record that suggests that a proper water quality-based effluent limit for these Plants would be significantly different than what has been found

¹⁰ Nutrient management plans to achieve nutrient concentrations at levels that are in excess of that likely to limit plant and algal growth are unlikely to have much of a beneficial effect on the receiving waters. See, Dodds, W.K. 2007, Trophic State, eutrophication and nutrient criteria in streams. Trends Ecol. Evol. 22:669-76 p.673, available at www.jlakes.org_web_trophicstate-streams-TIEE2007.pdf.

elsewhere in effluent dominated waters. And there is certainly no evidence in the record that indicates that a 1.0 mg/L limit ensures compliance with Illinois water quality standards.

IEPA's utter failure to comply with legal requirements to conduct reasonable potential analyses and include WQBEL limits to assure that water quality standards are not exceeded requires that the Board remand the Permits to IEPA with instructions to fulfill those duties. *New Lenox*, PCB 04-88 at 11.

B. In the Alternative, IEPA Should Have Required, at Minimum, that MWRD Perform the Data Collection and Analysis Necessary to Establish a WQBEL

In stark contrast to the recent *Dynegy* permit appeal implicating similar issues regarding the need for WQBELs, IEPA here did not even require MWRD to obtain the information necessary to establish WQBELs at the next permit renewal. *See Dynegy* at *42 (finding it reasonable for IEPA to include a monitoring requirement in the permit, and enhancing that requirement, in order to establish the magnitude of the discharge and as appropriate, facilitate analysis of the need for a WQBEL).

With no explanation in the Responsiveness Summary, IEPA simply declined to require performance of the studies requested by both Petitioners, (R. 5372), and U.S. EPA, (R. 2072), of the impacts of phosphorus and nitrogen on receiving waters, in furtherance of developing a WQBEL. The Administrative Record reflects that phosphorus studies were actually designed, but that MWRD dissuaded IEPA from requiring them for the reason (not further explained or justified) that the studies would not be "productive." (R. 1273). Thus, when the Permits are renewed in five years, IEPA will not have an additional analysis supporting establishment of a WQBEL, and hence may *still* take the position that it does not have the necessary information concerning the effect of MWRD phosphorus and nitrogen discharges that could have been required in these Permits. 35 Ill. Adm. Code 309.146.

As explained in Subsection A, IEPA has the information it needs – including, *inter alia*, monitoring data, 303(d) impairment analyses, U.S. EPA criteria, and analyses done in comparable waterbodies – to set a phosphorus limit, which should be similar to the limits set in other cases where the flow from a wastewater treatment plant dominates receiving waters (which are far lower than 1.0 mg/L). 40 CFR 122.47(a)(1). However, in the alternative, to the extent IEPA is deemed to lack sufficient information to do so, the Board should remand the Permits with an order that IEPA require MWRD to develop information and studies that will enable the Agency to set a proper WQBEL upon renewal of the Permits.

II. THE PERMITS' COMPLIANCE SCHEDULES DO NOT REQUIRE COMPLIANCE AT THE EARLIEST REASONABLE DATE

IEPA may only grant a compliance schedule allowing delayed compliance with a NPDES permit where it makes a specific finding that the schedule is appropriate, and that compliance with the final limit is required as early as reasonably possible. Specifically, the Illinois Environmental Protection Act provides that IEPA may include “schedules for achieving compliance therewith at the earliest reasonable date.” 415 ILCS 5/39(b) (2014). When such compliance schedules are included in permits, Board regulations demand that “the permittee shall be required to take specific steps to achieve compliance . . . in the shortest reasonable period of time consistent with the guidelines and requirements of [Clean Water Act] and the [Illinois Environmental Protection] Act.” 35 Ill. Adm. Code 309.148(a). Federal Clean Water Act regulations similarly require the permitting authority to show that the schedule is appropriate and requires compliance with permit requirements “as soon as possible.” 40 C.F.R. 122.47(a)(1).

The extended compliance schedules for MWRD compliance with the 1.0 mg/L phosphorus limit added to the final Permits should be remanded, because the Administrative

Record does not show these schedules require compliance at the earliest reasonable date. To the contrary, when IEPA initially internally discussed the schedules, it was suggested that the period of 6.5 for Calumet years “seemed a little long.” (R.1159).

The record does not include any explanation of how the schedules – including the decade long schedule for the O’Brien Plant – were justified, or any justification for allowing MWRD up to a decade to comply with its anything-but-stringent phosphorus limit.¹¹ Accordingly, there is no genuine issue of material fact that IEPA did not justify the long compliance schedules for the three Plants. Absent that justification, IEPA’s permit condition was arbitrary and capricious, and did not comply with the legal requirement that permit conditions require compliance “at the earliest reasonable date.” Petitioners are therefore entitled to judgment as a matter of law on this count, and reconsideration by IEPA as to what compliance schedules are justified.

III. THE PERMITS FAIL TO PROHIBIT SSOs

Illinois law expressly prohibits SSOs, 35 Ill. Adm. Code 309.148(a) (“Overflows from sanitary sewers are expressly prohibited.”), but the Permits do not. Notwithstanding the clear regulatory prohibition against SSOs, the permits could be construed as *allowing* SSOs, even though they are clearly illegal. In all three final Permits, IEPA added Special Conditions requiring MWRD merely to “work towards” eliminating SSOs, rather than plainly specifying, consistent with applicable law, that they must be eliminated.¹²

Specifically, the Special Conditions state as follows:

¹¹ Under the Great Lakes Water Quality Agreement of 1978, Great Lakes dischargers have been required to meet this concentration limit for over two decades. *See* [epa.gov/greatlake/glwqa/1978/annex.html#PHOSPHORUS LOAD REDUCTION](http://epa.gov/greatlake/glwqa/1978/annex.html#PHOSPHORUS_LOAD_REDUCTION).

¹² Since this language was not contained in the draft Permits, Petitioners could not have commented on it; although the Comments did include other concerns with the insufficiency of provisions addressing SSOs which preserve Petitioners’ ability to challenge these permit conditions. (R. 2053, 2521).

The Permittee shall work towards the goals of achieving no discharges from sanitary sewer overflows or basement backups and ensuring that overflows or backups, when they do occur do not cause or contribute to violations of applicable standards or cause impairment in any adjacent receiving water.

The Permits do contain a Standard Condition that in principle incorporates the regulatory prohibition on SSOs.¹³ (For example, see Standard Condition 27, R. 2162). However, Standard Condition 26 states that in case of a conflict between the Standard Conditions and Special Conditions, the Special Conditions control. Standard Condition 26, (R. 2162). If IEPA does not intend to imply that SSOs are permissible so long as MWRD is “working towards” control, the language of the Permits fails to convey its true intent.

IEPA provided no justification for any exemption from 35 Ill. Adm. Code 309.148(a) that may be implied by the the “working towards” language in the Special Conditions. Illinois courts have supported the Board’s refusal to grant permit applicants site-specific relief from 309.148(a). *Mendota v. Pollution Control Bd.*, 192 Ill. App. 3d 704, 710 (1990). IEPA has not even purported to make a showing that the high bar for such exemptions has been met.

There is no genuine issue of material fact regarding what the Special Conditions in the Permits say. The Permits must be consistent with the law that expressly prohibits SSOs, and they are not. Accordingly, Petitioners are entitled to judgment as a matter of law and the Board should remand the Permits with instructions that the Agency revise the Permit conditions to clearly prohibit SSOs.

IV. IEPA FAILED TO RE-OPEN THE COMMENT PERIOD AFTER MAKING SIGNIFICANT CHANGES TO THE FINAL PERMITS

In order to prevent the Agency from misleading citizens with inaccurate or incomplete information in the public notice process, IEPA regulations require that a draft NPDES permit be

¹³ Standard Condition 27 requires permittees to comply with all applicable provisions of 35 Ill. Adm. Code Subtitles C, D and E. 35 Ill. Adm. Code 306.304 (of SubtitleC) prohibits overflows from sanitary sewers.

re-noticed whenever significant changes are made to the draft permit after the close of the initial comment period. Specifically, the regulations require as follows:

The Agency shall order the public comment period reopened to receive additional written comments where the Agency significantly modifies the draft permit and the final permit is not a logical outgrowth of the proposed draft permit. In determining if the final permit is a logical outgrowth of the draft permit, the Agency shall consider the following:

- 1) Whether the interested parties could not have reasonably anticipated the final permit from the draft permit;
- 2) Whether a new round of notice and comment would provide interested parties the first opportunity to offer comments on the issue; or
- 3) Whether the provisions in the final permit deviate sharply from the concepts included in the draft permit or suggested by the commenters.

35 Ill. Adm. Code 309.120.

IEPA violated this requirement by its failure to re-open the comment period after making very significant changes to the final Permits. The addition of the 1.0 mg/L phosphorus limit in the final Permits was plainly not a “logical outgrowth” of the draft Permits, which contained *no* limit on phosphorus discharge; and there is no way that Petitioners and other citizens could have anticipated this change. While Petitioners commented generally regarding the need for a WQBEL for phosphorus, the 1.0 mg/L limit is not a WQBEL. Thus, the public has had no opportunity to comment specifically on the proposed 1.0 mg/L limit, explain why it does not constitute a WQBEL, and put into the record data and information showing that the 1.0 mg/L limit will not protect water quality. That failure was particularly egregious and prejudicial in this instance given that IEPA, U.S. EPA, and MWRD engaged in substantive discussions and exchanges of correspondence in developing the new limit, but did not give Petitioners the

opportunity to either participate in those discussions, or even make efforts to ensure that they are reflected in the Administrative Record as completely as possible.

Additionally, the improper language concerning SSOs addressed above was likewise added to the final Permits, with no opportunity for Petitioners to comment upon it.¹⁴ Accordingly, even to the extent the Board may decline to grant the substantive relief requested in Points I-III, the Board should grant summary judgment remanding the Permits with instructions that IEPA re-open the public comment period concerning the 1.0 mg/L phosphorus limit and associated schedule of compliance, and the added language concerning SSOs.

V. IEPA FAILED TO RESPOND TO SIGNIFICANT COMMENTS

The Comments raised the issue of IEPA's failure to include a limit on nitrogen in the Permits. IEPA did not respond concerning that issue in the Responsiveness Summary (although the Agency acknowledged that the issue had been raised). (R. 1332). This failure to respond violated 35 Ill. Adm. Code 166.192(4), which requires "[t]he Agency's specific response to all significant comments, criticisms, and suggestions."¹⁵

Petitioners recognize that the Board recently held that it will not require that the IEPA comply with its own regulations, including § 166.192. *Dynegy* at *42. However, in order to preserve Petitioners' position, and to allow the Board to reconsider the issue in this case, Petitioners urge the Board to require IEPA to comply with all of the regulations that have been enacted under the Illinois Environmental Protection Act.

¹⁴ Petitioners also note that IEPA failed to comply with 35 Ill. Adm. Code 309.119, which requires that modifications to the draft permit sent to U.S. EPA be sent as well to citizens who commented on the draft prior to issuance of the final permit.

¹⁵ These comments, criticisms, and suggestions must have been submitted orally or in writing at the hearing or while the hearing record remains open, which they were. 35 Ill. Adm. Code 166.192 (4).

According to Illinois regulation, the purpose of the subpart containing § 166.192 is to “establish procedures by which the [IEPA] consults interested or affected segments of the public.” 35 Ill. Adm. Code 166.101 (c). These rules cannot simply be ignored. Administrative rules have the “force and effect of law” and agencies must comply with their own rules. *Dep’t of Cent. Mgmt. Servs./Illinois Commerce Comm’n v. Illinois Labor Relations Bd.*, 406 Ill. App. 3d 766, 771(2010) (citing *People v. Scates*, 393 Ill. App. 3d 566, 570 (2009); *Springwood Associates v. Health Facilities Planning Board*, 269 Ill. App. 3d 944, 948 (1995), *superseded by regulation as stated in Dimensions Medical Center, Ltd. v. Suburban Endoscopy Center*, 298 Ill. App. 3d 93, 100 n.1 (1998)). According to Illinois courts, “[w]hen an administrative agency has adopted rules and regulations under its statutory authority for carrying out its duties, the agency is bound by those rules and regulations and cannot arbitrarily disregard them.” *Springwood Associates*, 269 Ill. App. 3d at 948. Therefore, the IEPA’s noncompliance with its own regulations by failing to respond to specific and significant comments must be addressed.

IEPA’s obligation to comply with the § 166.192 requirement to respond to significant comments – and the Board’s authority to enforce that obligation – is particularly significant given that this requirement is not merely an IEPA rule but a CWA requirement for state programs. To the extent IEPA is not required to comply with the underlying CWA requirement to respond to comments, Illinois’ program is not in compliance with federal law. *See* 40 C.F.R. 124.17(a)(2) (requirement to “[b]riefly describe and respond to all significant comments on the draft permit . . . raised during the public comment period, or during any hearing” made “applicable to state programs” under 40 C.F.R. § 123.25). The § 166.192 requirement to provide a specific response to public comments was implemented by IEPA expressly “to comply with State *and federal* requirements.” 35 Ill. Adm. Code 166.101(g) (emphasis added). The Board

has expressly recognized that §124.17(a)(2) has been made applicable to IEPA permit proceedings. *See American Bottom Conservancy (US Steel Corp. Permit) v. IEPA*, IPCB 2006-171 at 33 (Opinion and Order May 6, 2010)) (“When the final NPDES permit is issued, the Agency does have to issue a written response to comments, which response must, among other things ... ‘respond to all significant comments on the draft permit.’”) *Id.* at 33 (*citing* 40 C.F.R. 124.17(a) and *quoting Illinois Power Co. (Hennepin Power Plant) v. IEPA*, PCB 85-119, slip op. at 3 (Mar. 27, 1986), “40 CFR 124.17 ... is specifically made applicable to states such as Illinois which have permitting authority under the NPDES program pursuant to 40 CFR 123.25”).

In *Dynegy*, this Board declined to review an IEPA Responsiveness Summary. *Dynegy*, 2014 WL 2591592, at *39. In that opinion, the Board took the position IEPA implements rules relating to a Responsiveness Summary at its discretion. *Id.* at 42. The Board also stated that it “would expect that IEPA would provide as complete a document as possible,” *Id.* – but that did not happen here. The Responsiveness Summary directly acknowledged that that the comments addressed both phosphorous *and* nitrogen pollution caused by the wastewater treatment plants, R. 1332, and the Comments highlight the plethora of problems caused by both phosphorous and nitrogen pollution. IEPA, however, ignored the nitrogen portion of the Comments, and completely failed to address the issue. (*Id.*) It further failed to address at all Petitioners’ request for studies to determine the appropriate level of both nitrogen and phosphorus discharge from the Plants in order to establish a WQBEL. IEPA thus did not provide “as complete a document as possible.”

Because the IEPA has failed to comply with its own regulations relating to responding to public comments, Petitioners ask that the Permit be remanded to IEPA with instructions to address Petitioners’ objections regarding the lack of nitrogen effluent limits, and their request for

further studies and monitoring regarding the effects of nitrogen and phosphorous on downstream waters.

CONCLUSION

There are no genuine issues of material fact as to whether IEPA 1) failed to conduct a reasonable potential analysis to establish WQBELs for phosphorus, or in the alternative to include permit conditions requiring that MWRD study the effects of phosphorus and nitrogen on the waters that receive its pollution; 2) failed to provide a justification for the length of the phosphorus compliance schedules in the Permits; 3) included a permit condition that allows MWRD to “work towards” eliminating SSOs, thereby implying that SSOs are not prohibited; 4) failed to put the Permits out for a second public comment period once significant changes were made to the drafts; and 5) failed to respond to Petitioners’ concerns about nitrogen limits and the need for study of the effects of phosphorus and nitrogen by the Plants. Therefore, for the reasons explained above, Petitioners are entitled to judgment as a matter of law. Petitioners ask the Board to grant this motion for summary judgment, and remand the Permits to IEPA with instructions to correct these five errors in the Permits.

Respectfully Submitted,

Dated this 11th day of July, 2014

PRAIRIE RIVER NETWORK, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL LAW & POLICY CENTER, FRIENDS OF CHICAGO RIVER, and GULF RESTORATION NETWORK.



Albert Ettinger
Counsel for Sierra Club & Gulf
Restoration Network
53 W. Jackson, Suite 1664
Chicago, Illinois 60604
773 818 4825
Ettinger.Albert@gmail.com



Jessica Dexter (Reg. No. 6298340)
Environmental Law & Policy Center
35 E. Wacker Dr. Suite 1600
Chicago, Illinois 60601
312-795-3747
jdexter@elpc.org



Kim Knowles (Reg. No.6303731)
Prairie Rivers Network
1902 Fox Drive, Suite G
Champaign, IL 61820
217-344-2371
kknowles@prairierivers.org



Ann Alexander
Natural Resources Defense Council
2 Riverside Plaza, Suite 2250
Chicago, IL 60606
312-651-7905
aalexander@nrdc.org

CERTIFICATE OF SERVICE

I, Jessica Dexter, hereby certify that I have served the attached **Petitioners' Motion for Summary Judgment** and **Petitioners' Memorandum of Law in Support of Their Motion for Summary Judgment** in PCB 2014-106, 107, 108 upon:

Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

via electronic filing on July 11, 2014; and upon the attached service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on July 11, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JD', with a long horizontal flourish extending to the right.

Jessica Dexter
Staff Attorney
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1300
Chicago, IL 60601
312-795-3747

2014-106 Service List

Ronald M. Hill
Lisa Luhrs Draper
Ellen M. Avery
Jorge T. Mihalopoulos
Metropolitan Water District of Greater
Chicago
100 E. Erie Street
Chicago, IL 60611

Thomas H. Shepard
Robert W. Petti
Assistant Attorney General
69 W. Washington St, Ste 1800
Chicago, IL 60602

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph St
Suite 11-500
Chicago, IL 60601

Division of Legal Counsel
IEPA
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794