

ILLINOIS POLLUTION CONTROL BOARD
June 19, 2014

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

ORDER OF THE BOARD (by J.A. Burke):

These consolidated cases involve three petitions filed by Prairie Rivers Network, Natural Resources Defense Council, Sierra Club, Environmental Law & Policy Center, Friends of the Chicago River, and Gulf Restoration Network (collectively, petitioners) seeking Board review of three National Pollutant Discharge Elimination System (NPDES) permits issued by the Illinois Environmental Protection Agency (Agency) to the Metropolitan Water Reclamation District of Greater Chicago (District). The Agency issued the permits for three separate District facilities in Cook County known as the O'Brien, Calumet, and Stickney Water Reclamation Plants.

On May 15, 2014, the District requested that the Board grant a partial stay of the effectiveness of the NPDES permit issued for the Stickney plant during the pendency of this proceeding. Specifically, the District seeks a stay of Special Condition 18 relating to a phosphorous effluent limitation. Motion (Mot.) at 2. Petitioners responded on May 29, 2014 (Resp.), opposing the motion. The Agency did not respond to the motion. The fourteen day period for responses to the District's motion has ended which means that the Agency is deemed to have waived any objection to the Board granting such a stay. *See* 35 Ill. Adm. Code 101.500(d).

For the reasons stated below, the Board grants the District's motion and orders a stay of Special Condition 18 of the NPDES permit issued to the Stickney plant which is the subject of the January 27, 2014 petition docketed as PCB 14-108 (Pet.). The stay shall remain in effect during the pendency of this proceeding or until further order of the Board.

DISTRICT REQUEST FOR STAY

The District seeks a stay of Special Condition 18 in the NPDES permit issued for the Stickney plant. Mot. at 2. The District describes Special Condition 18 as setting forth “a forty nine (49) month schedule of design and construction milestones for the District to meet in order to achieve a phosphorous monthly average concentration effluent limitation of 1.0 mg/L and associated loading limitation.” *Id.* The District notes that petitioners challenge the phosphorous limitation on the basis that a phosphorous effluent limit of 1.0 mg/L (milligrams per liter) will not prevent effluent from impairing receiving and downstream waters. *Id.* at 3, citing Pet. at ¶¶ 26-38. The District argues that Special Condition 18 requires the District “to expend significant resources” to achieve the 1.0 mg/L limit. *Id.* If the Board determines that the 1.0 mg/L limit is insufficient, the District “may have to re-evaluate, re-design, and/or re-construct the infrastructure in progress” to meet the 1.0 mg/L limit. *Id.*

PETITIONERS’ OBJECTION TO STAY

Petitioners object to the Board granting the stay requested by the District and ask that the Board deny the request. Resp. at 1. Petitioners concede that their petition seeks lower numerical phosphorous limits than 1.0 mg/L. Resp. at 2. Petitioners explain that Illinois does not have a numeric water quality standard for phosphorous except for certain lakes. *Id.* Illinois does have dissolved oxygen standards and narrative standards. *Id.*, citing 35 Ill. Adm. Code 302.203, 302.403. Petitioners argue that the Board should remand the permits, including the Stickney permit, to the Agency to impose “proper numeric phosphorous permit limits” to meet these standards. *Id.*

BOARD DISCUSSION

Initially, the Board notes that in addition to the three dockets consolidated in this proceeding, the District petitioned the Board for review of the NPDES permits issued for the O’Brien and Calumet plants. *See Metropolitan Water Reclamation District of Greater Chicago v. IEPA*, PCB 14-104, (Jan. 24, 2014) and *Metropolitan Water Reclamation District of Greater Chicago v. IEPA*, PCB 14-103, (Jan. 24, 2014). The Illinois Administrative Procedure Act (IAPA) requires that certain permits are stayed in their entirety during appeals. 5 ILCS 100/10-65(b) (2012). Although the District did not cite to the IAPA, the permits relating to the O’Brien and Calumet plants are subject to the automatic stay provisions of the IAPA. *See* Mot. at 2; Resp. at 1, n. 1.

However, the District did not appeal the conditions of the NPDES permit issued for the Stickney plant. Mot. at 2. Rather, the Stickney permit is solely the subject of the third-party appeal filed by petitioners. Accordingly, the automatic stay provisions of the IAPA do not apply to the permit issued for the Stickney plant. The District, therefore, requests that the Board grant a discretionary stay of the effectiveness of Special Condition 18 in the NPDES permit issued for the Stickney plant. Mot. at 2.

The Board has the authority to grant discretionary stays from permit conditions. *Community Landfill Co. and City of Morris v. IEPA*, PCB 01-48, PCB 01-49 (consol.), slip op. at 4 (Oct. 19, 2000). The Board considers whether (1) a certain and clearly ascertainable right

needs protection; (2) irreparable injury will occur without the injunction; (3) no adequate remedy at law exists; and (4) there is a probability of success on the merits. *Id.*, citing Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 1-2 (Aug. 31, 1989). The Board has not found it necessary to address each factor to grant a discretionary stay. *See id.* at 5. In deciding whether to grant a discretionary stay, the Board also considers the likelihood of environmental harm if a stay is granted. Community Landfill, PCB 01-48, PCB 01-49 (consol.), slip op. at 4, citing Motor Oils, PCB 89-116, slip op. at 2.

The District argues that it will be irreparably harmed if required to comply with the phosphorous limit. Mot. at 4. The District argues that it would need to spend resources to achieve the phosphorous limit and may need to re-evaluate, re-design, or re-construct its infrastructure if the phosphorous limit changes. *Id.* Petitioners respond that the District “failed to offer facts” and offered merely an “unsupported conclusion” that the District would suffer irreparable harm. Resp. at 3. Petitioners counter that the District’s “evaluation, design and construction to reach 1.0 mg/L [total phosphorous] will likely not prove wasteful if in the future [the District] is required to do a better job of removing phosphorous from its wastewater.” *Id.* Citing a United States Environmental Protection Agency report, petitioners state that enhanced biological nutrient removal technology will allow the District to achieve phosphorous concentrations less than 0.3 mg/L and there is “little reason to fear [the District] will suffer any harm by completing the work necessary to meet the 1.0 mg/L limit.” *Id.* at 4.

The District argues that its requested stay would not result in environmental harm. Mot. at 3. The District explains that its previous permit did not contain an effluent limit for phosphorous. *Id.* at 3-4. However, the District agreed “to undertake measures to reduce phosphorous” before issuance of the new Stickney permit. *Id.* at 4. Petitioners respond that granting the stay has “potential for serious environmental harm.” Resp. at 4. Petitioners cite to the Agency’s 2012 list of impaired waters and claim that “aquatic life uses in the waterways downstream from the Stickney [plant] are impaired by excess phosphorous.” *Id.* Thus, delaying implementation of controls needed to attain the 1.0 mg/L limit, will also delay “the removal of phosphorous pollution” and other pollutants. *Id.* at 4-5.

The Board is persuaded that the District’s requested stay is warranted. Special Condition 18 requires that “a phosphorous monthly average concentration effluent limitation of 1.0 mg/L and associated loading limitations shall become effective forty-nine (49) months from the effective date of this Permit.” Pet. Exh. 1 at 21. The condition continues by setting nine deadlines for the District to complete specific activities, including construction, and report its progress to the Agency. *Id.* at 22. The District may need to alter any plans it has made to comply with Special Condition 18 if the numerical limit is altered as a result of the pending appeals. If the District complied with the condition and then petitioners prevailed, such cost may be lost. The Board previously granted partial stays for similar reasons. *See* Spectrum Preferred Meats, Inc. v. IEPA, PCB 13-63 (July 11, 2013). This cost of compliance during the appeal would impose an irreparable hardship on the District.

The Board has considered the representations of the District, the objections of the petitioners, and the absence of any Agency response to the motion. Exercising its discretion, the Board grants a stay of Special Condition 18 in the NPDES permit issued for the Stickney plant.

By this ruling, the Board makes no findings on the merits of the permit appeal. The partial stay remains in effect until the Board takes final action in this appeal or the Board orders otherwise.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 19, 2014 by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Clerk
Illinois Pollution Control Board