BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

To: see attached service list

PLEASE TAKE NOTICE that on February 18, 2015, the undersigned electronically filed a Response to Petitioners' Motion for Reconsideration on behalf of the Metropolitan Water Reclamation District of Greater Chicago, a copy of which is herby served upon you.

I HEREBY CERTIFY that I served this Notice and the above referenced Response to Petitioners' Motion for Reconsideration by placing a copy in an envelope, postage prepaid, and depositing it in the U.S. Mail, at 100 East Erie Street, at or before 5:00 p.m. on February 18, 2015.

Dated: February 18, 2015

Respectfully submitted,

METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO

/s/ Ronald M. Hill

By: Ronald M. Hill, General Counsel

Ronald M. Hill #6182803
General Counsel
Metropolitan Water Reclamation District of Greater Chicago
100 E. Erie Street, Third Floor
Chicago, Illinois 60611
312.751.6588

SERVICE LIST

PRARIE RIVERS NETWORK
Kim Knowles
1902 Fox Drive, Suite G
Champaign, Illinois 61820
Telephone: (217) 344-2371

SIERRA CLUB
Albert Ettinger
53 W. Jackson #1664
Chicago, Illinois 60604
Telephone: (773) 818-4825

ENVIRONMENTAL LAW & POLICY CENTER
Jessica Dexter
35 E. Wacker Drive, Suite 1600
Chicago, Illinois 60601
Telephone: (312) 673-6500

NATURAL RESOURCES DEFENSE COUNCIL, INC.
Ann Alexander
20 N. Wacker Drive, Suite 1600
Chicago, Illinois 60606-2903
Telephone: (312) 651-7905

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
Thomas H. Shepard & Robert W. Petti, Assistant Attorney General
69 W. Washington Street, Ste. 1800
Chicago, Illinois 60602
Telephone: (312) 814-5361

ILLINOIS POLLUTION CONTROL BOARD
Bradley P. Halloran, Hearing Officer
James R. Thompson Center, Ste. 11-500
100 W. Randolph Street
Chicago, Illinois 60601
Telephone: (312) 814-8917

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO'S RESPONSE TO PETITIONERS' MOTION FOR RECONSIDERATION

The Metropolitan Water Reclamation District of Greater Chicago ("District"), by its General Counsel, Ronald M. Hill, asks the Illinois Pollution Control Board ("Board") to deny the motion for reconsideration filed by the Prairie Rivers Network, Natural Resources Defense Council, Sierra Club, Environmental Law & Policy Center, Friends of the Chicago River, and Gulf Restoration Network (collectively, "Petitioners). In support thereof, the District states as follows:

I. Introduction

In its order issued on December 18, 2014, the Board unanimously granted summary judgment to the District and the Illinois Environmental Protection Agency ("IEPA") in the above-captioned permit appeals. Specifically, the Board held that, "[b]ased on this record, the Board finds that the Environmental Groups have not met their burden of proof of establishing the

challenged conditions in the permits issued by the Agency violated the Act or Board regulations." Board Op. and Order, 27 (Dec. 18, 2014). Indeed, the Board ruled that "[t]he Agency's condition to limit phosphorus discharges to 1.0 mg/L is consistent with the Board's interim effluent standard and acceptable to prevent a violation of dissolved oxygen standards as well as to prevent offensive or unnatural plant or algal growth in the receiving waters of the three District plants." *Id.*

The Petitioners cannot escape this ruling by simply re-arguing their unsuccessful cross-motion for summary judgment. Yet, their motion for reconsideration attempts to do just that. Petitioners fail to identify any new evidence or change in the law. Nor do they demonstrate that the Board overlooked any material evidence or that it erred in its application of the law. Rather, Petitioners exasperatingly repeat the same old arguments, which ultimately lead to the same conclusion: Petitioners cannot prove that the District's NPDES permits violate the Act or the Board's regulations.

II. Standard of Review and Burden of Proof

The regulations governing review of final Board orders dictate that, "[i]n ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Adm. Code § 101.902 (West 2015). The Board has further observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." *People v. Freeman United Coal Mining Co.*, 2013 WL 577871 at *2, PCB No. 10-61 and 11-02 (Feb. 7, 2013). Additionally, "[a] motion to reconsider may specify evidence in the record that was overlooked." *People v. Packaging Personified, Inc.*, 2012 WL 2167529 at *4,

PCB No. 04-16 (Jun. 7, 2012). Importantly, however, the movant has the "burden to specify the facts the tribunal should have considered and the law the tribunal should have applied." *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App. 3d 1, 8 (1st Dist. 1993).

Because Petitioners ask the Board to reconsider its summary judgment on Petitioners' appeal of the District's NPDES permits, it is also necessary to bear in mind the applicable standard of review and burden of proof for permit appeals and motions for summary judgment.

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

Furthermore, a party opposing a motion for summary judgment may not merely rest on its pleadings but must, instead, "present a factual basis which would arguably entitle [it] to a judgment." *Des Plaines River Watershed Alliance, et al. v. IEPA*, 2007 WL 1266926, *16, PCB 04-88 (Apr. 19, 2007) (quoting *Gauthier v. Westfall*, 639 N.E.2d 994, 999 (2d Dist. 1994)). Ultimately, if "the movant's right to relief is clear and free from doubt," then the Board should grant summary judgment. *Id.*

A third-party cannot prevail on its appeal of an NPDES permit unless it proves that "the issuance of the permit violates the Act or Board's regulations." *NRDC, et al. v. IEPA and Dynergy Midwest Gen., Inc.*, 2014 WL 2591592, *34, PCB No. 13-17 (Jun. 5, 2014). Indeed, the Board "must review the entire record relied upon by IEPA to determine whether the third party has shown that IEPA failed to comply with criteria set forth in the applicable statutes and

regulations before issuing the NPDES permit." *IEPA and the Village of New Lennox v. IPCB*, 896 N.E.2d 479, 487 (Ill. App. 3d Dist. 2008).

Although the IEPA's decision to issue a permit must be supported by substantial evidence, "this does not shift the burden away from the petitioners (Environmental Groups), who alone bear the burden in their appeal before the Board to prove that the permit, as issued, violated either the Act or the Board's regulations." *Id.* at 486. Additionally, in examining what constitutes "substantial evidence" for purposes of administrative decisions, the Board has stated that "the main inquiry is whether on the record the agency could *reasonably* make the finding." *Waste Management, Inc. v. IEPA*, 1984 WL 37589, *7, PCB 84-45 (Nov. 26, 1984) (emphasis added).

IV. Argument

The Petitioners appeal must fail because they cannot meet their burden of proving that the District's challenged permits violate the Act or the Board's regulations. In their motion for reconsideration, Petitioners do not identify any new or existing evidence or law that rectifies their shortcomings in satisfying this burden of proof. Rather, they simply reiterate the same old arguments that the Board rejected in ruling on the parties' cross-motions for summary judgment.

Specifically, Petitioners outline eight purported justifications for second-guessing the Board's order on Petitioners' appeals. Those justifications essentially fall into one of three categories: "overlooked" arguments, "overlooked" evidence, and "overlooked" law. The District addresses each of these "justifications" below and demonstrates that none provide a basis for reconsidering the Board's unanimous judgment in this case.

1. Petitioners' claim that the Board "overlooked" their alternative argument is not an appropriate basis for reconsideration; nor does the argument itself have any merit.

Petitioners complain that one of the alternative arguments set forth in their cross-motion for summary judgment "was simply overlooked by the Board," and that this is a basis for reconsideration. Petr. Memo in Support of Mot. for Recon., 5 (Jan. 20, 2015). Yet, just because the Board did not devote any space in its opinion and order to Petitioners' alternative argument does not mean that the Board did not consider it.

The Board is not obligated to discuss every argument put forth by Petitioners in its opinion, and the Board's decision not to do so in this case is no basis for reconsideration. *Rita v. United States*, 551 U.S. 338, 356 (2007). "Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word 'granted' or 'denied' on the face of a motion while relying upon context and the parties' prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge's own professional judgment." *Id.*

The law is also clear that the only purpose of a motion for reconsideration is to bring to the court's attention: (1) newly discovered evidence which was not available at the time of hearing, (2) evidence that was overlooked, (3) changes in the law, or (4) errors in the court's previous application of the existing law." *People v. Packaging Personified, Inc.*, 2012 WL 2167529 at *4, PCB No. 04-16 (Jun. 7, 2012). "Overlooked" arguments are no basis for a motion for reconsideration.

Moreover, the specific argument that Petitioners believe the Board "overlooked" is their flawed claim that the Board must compel the District to perform studies regarding the impacts of phosphorus on the waterway in order "to ensure that proper water quality-based effluent limits can be developed..." Petitioners fail to identify any new or existing laws that would require a

publicly-owned treatment works to perform such studies for purposes of developing water quality-based effluent limits.

To the contrary, in Illinois, the Board is the entity that determines and promulgates statewide water quality standards and IEPA, through its permitting and watershed management programs, develops and imposes water quality-based effluent limits. 415 ILCS 5/5, 5/13. The Board recognized this in its Order and underscored that it had not yet "promulgated numeric water quality standards for phosphorus or nitrogen in streams," and that, "[a]ccordingly, the Agency is not required to establish effluent limits to ensure that the District plants meet a nonexistent numeric water quality standard." Board Op. and Order at13.

Moreover, the State is currently working on developing such standards and effluent limits. Indeed, the State has initiated the "Illinois Nutrient Reduction Strategy" ("Nutrient Study"), which is an ongoing and comprehensive analysis regarding the impact of phosphorus on Illinois waters. *See http://www.epa.state.il.us/water/nutrient/*. Not only are the Petitioners familiar with the Nutrient Study, but they even serve as members of a "Policy Working Group" that is actively participating in it. *Id.*

Yet, because they are frustrated with the pace of the study and the State's process for developing water quality-based effluent standards, the Petitioners attempt to circumvent it by demanding that the Board force the District to conduct such a study on its own, presumably at the preferred pace of Petitioners. However, neither the facts nor the law cited in Petitioners' motion for reconsideration support this end-around approach.

Accordingly, the Petitioners cannot meet their burden of proving that the absence of a requirement to study the waterway somehow renders the permits in violation of the Act or the Board's regulations.

2. The Board's Opinion does not overlook Sections 304.105, or 309.141(a) and 143(a) of the Illinois Administrative Code

Petitioners perplexingly argue that reconsideration is appropriate because the "[t]he Opinion does not discuss the implications of 35 Ill. Adm. Code 304.105 or 35 Ill. Adm. Code 309.141(a) that require the IEPA 'ensure' that limits are placed in the permits that prevent violations of water quality standards. Nor does the opinion discuss the language of 35 Ill. Adm. Code 309.143(a) requiring limits on pollutants that have the 'reasonable potential' to cause violations of water quality standards." Petr. Memo in Support of Mot. for Recon. at 5.

Yet, the Board discusses these regulations throughout its opinion. *See* Board Op. and Order at 8, 9, 13, and 16. And in applying them, the Board unequivocally held that phosphorus limits in the District's permits are sufficient to ensure that water quality standards are not violated. Specifically, the Board ruled that "the 1.0 mg/L effluent limit on phosphorus imposed by the Agency in the permits is consistent with the Act and Board regulations," and that "there is no information in the record to conclude that the 1.0 mg/L effluent limit on phosphorus…would violate the standards for dissolved oxygen at 35 Ill. Adm. Code 302.206 and 302.405; unnatural sludge at 35 Ill. Adm. Code 302.403; or offensive conditions at 35 Ill. Adm. Code 302.203 in the receiving waters for the plants." *Id.* at 17. To the contrary, "[t]he Agency's condition to limit phosphorus discharges to 1.0 mg/L is consistent with the Board's interim effluent standard and acceptable to prevent a violation of dissolved oxygen standards as well as to prevent offensive or unnatural plant or algal growth in the receiving waters of the three District plants." *Id.* at 27.

Petitioners' motion for reconsideration is written as if the District's permits provide no limit on phosphorus discharges. Indeed, Petitioners perplexingly emphasize that "[t]he law requires that if there is a reasonable potential that the discharge may cause or contribute to a

violation of water quality standards that a numeric water quality-based effluent limit should be placed on the discharge." Petr. Memo in Support of Mot. for Recon. at 7.

IEPA *has* placed numeric effluent limits on the District's phosphorus discharges. In fact, the permit limits imposed on the District will result in a nearly fifty percent reduction in phosphorus discharges. (R. at 1276). Petitioners have not met their burden of proving that this dramatic reduction will somehow violate water quality standards. Indeed, they cannot even prove that current discharges from the District's plants violate water quality standards. Moreover, nothing provided in Petitioners' motion for reconsideration rectifies their shortcomings in satisfying this burden of proof.

3. Petitioners' argument regarding upstream flow does nothing to satisfy their burden of proof

Because none of the stream segments downstream from the District's plants are impaired for unnatural plant or algal growth, the Petitioners must once again resort to arguing that the District's effluent flows upstream. Petr. Memo in Support of Mot. for Recon. at 8-10. Yet, they point to nothing in the record that quantifies the amount of flow or contribution of phosphorus that can be attributed to this alleged upstream discharge. *See Id.*

Moreover, even if true, this argument is futile because it fails to acknowledge that there are many factors that can cause or contribute to algal growth, and nothing in the record suggests a correlation between the District's effluent and upstream algae.

"Generally, algae are limited by either nutrients (N or P), light, or habitat (substrate in the case of perphyton)." (R. at 304). Importantly, "[i]n Illinois, analyses of several water quality surveys have failed to show a significant correlation between any form of nutrients and chlorophyll *a* measured either in the water column or extracted from a substrate (Terrio, 2007).

This indicates the lack of nutrient limitation in most Illinois streams, and suggests that phytoplankton are light limited since nutrients are generally available in high concentrations." *Id.*

However, even if there was evidence in the record of phosphorus-limited algae upstream of the District's plants (which there is not), the Petitioners still could not meet their burden of proving that a nearly fifty percent reduction in the District's phosphorus discharge would somehow violate the narrative standard for unnatural plant or algal growth.

Moreover, contrary to the suggestion in Petitioners' motion, the IEPA is not prohibited from permitting the District's discharge into impaired waters. *NRDC, et al. v. IEPA and Dynergy Midwest Gen., Inc.*, 2014 WL 2591592, **35-38, PCB No. 13-17 (Jun. 5, 2014) (affirming IEPA's decision not to set an effluent limit for power plant's potential mercury discharges into mercury-impaired water body). The U.S. Supreme Court has held that the Clean Water Act ("CWA") does not mandate a ban on discharges into a waterway that is in violation of water quality standards, and it has further held that the CWA "vests in the [US]EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution." *Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992).

Accordingly, without more, Petitioners' claims regarding the upstream flow of effluent are immaterial to the Board's holding in this case.

4. Petitioners' claims regarding DO violations are not supported by evidence

Petitioners claim that the Board overlooked portions of the record showing that discharges of phosphorus are causing violations of the water quality standards for dissolved oxygen ("DO"). Petr. Memo in Support of Mot. for Recon. at 10-13. They fail, however, to identify any such evidence. *See Id.* Indeed, there is no evidence in the record demonstrating a

correlation between phosphorus discharges from the plants and DO concentrations in the receiving waters.

Remarkably, Petitioners emphatically contend that the permits will violate DO standards without even mentioning those permits' stringent limits on biochemical oxygen demand and suspended solids, which are the sole parameters that the Board has designated for regulating "deoxygenating wastes." 35 Ill. Adm. Code 304.120. Additionally, the Petitioners' motion completely disregards the permits' provisions regarding combined sewer overflows and the District's corresponding Long Term Control Plan, despite the fact that these measures provide another layer of protection with respect to DO. Nor do the Petitioners acknowledge the extraordinary requirements in the permits with regard to the operation of in-stream aeration facilities, which pump DO directly into the plants' receiving waters.

IEPA wrote the abovementioned provisions into the District's permits to prevent violations of the Board's water quality standards for DO. Without addressing these provisions, the Petitioners cannot meet their burden of proving that the permits will violate DO standards.

Nevertheless, Petitioners ignore the permits' DO-related provisions and, instead, exclusively focus on nutrient limits. In doing so, Petitioners seemingly imply that nutrients are the only concern relative to the DO standards.

Yet, Petitioners cannot cite any evidence in the record establishing a connection between the District's nutrient discharges and the DO levels in the waterway. Indeed, the fact that none of the stream segments downstream of the District's plants are impaired for unnatural plant or algal growth suggests that factors other than nutrients are to blame for any issues related to DO. Additionally, "numerous studies conducted in Illinois for the purpose of determining defensible

nutrient standards have failed to show any correlation between [total phosphorus] and…*dissolved oxygen*." (R. 1212; *see also* R. 304) (emphasis added).

Absent a direct correlation between the plants' nutrient discharges and DO in the waterway, the Petitioners cannot establish that IEPA acted unreasonably in issuing the District's permits. Moreover, by imposing a 1.0 mg/L phosphorus limit on the District, IEPA will reduce phosphorus discharges from the District's plants by nearly fifty percent. Petitioners have not met their burden of proving that this significant reduction in phosphorus output and the multitude of DO-related restrictions in the District's permits will somehow result in violations of the Board's water quality standards for DO. Nothing provided in Petitioners' motion for reconsideration rectifies their shortcomings in satisfying this burden of proof.

5. Case law regarding distant downstream responsibility is immaterial to the Board's holding

Petitioners complain that the Board overlooked case law which establishes the precedent that "IEPA may not permit discharges that may cause or contribute to a violation of water quality standards in any water segment, even segments that are well downstream of the discharge point." Petr. Memo in Support of Mot. for Recon. at 13. Presumably, Petitioners raise this point in support of their claim that the District's discharges are somehow responsible for impairments in Lake Senachwine and Lake Depue, which are backwater lakes adjacent to the Illinois River that are located 117 and 105 miles downstream of the District's Stickney plant, respectively.

Yet, nothing in the Petitioners' motion or the record establishes that any significant amount of nutrients from the District's plants ever reaches these distant lakes. To the contrary, a number of other point and non-point sources of nutrients directly drain into Lakes Senachwine and Depue and appear to be the cause of any impairments. Indeed, according to IEPA's website, "[l]and use is predominantly agricultural" in the watershed surrounding those lakes

(*http://www.epa.state.il.us/water/water-quality/report-1996/fact-sheets/fact-sheet-11.html*). Additionally, a local sewage treatment plant unrelated to the District *directly* discharges into Lake Depue (NPDES public notice/fact sheet for Village of Depue Sewage Treatment Plant, *http://www.epa.state.il.us/public-notices/2010/depue-stp/index.pdf*).

Petitioners cannot rely on impairments in these distant backwater lakes to satisfy their burden of proving that the IEPA was unreasonable in imposing effluent limits that will reduce the District's phosphorus discharges by nearly fifty percent; nor can they prove that this dramatically reduced discharge will violate any of the Board's narrative water quality standards. Accordingly, the abovementioned precedent cited in Petitioners' motion for reconsideration is immaterial to the Board's holding in this case.

6. There is sufficient evidence in the record for the Board to conclude that the 1.0 mg/L limit is adequate to prevent water quality violations

Petitioners argue that the "Opinion overlooks evidence that a 1.0 mg/L limit is not adequate to prevent violations of the unnatural sludge, offensive conditions and dissolved oxygen standards." Petr. Memo in Support of Mot. for Recon. at 14. They even go so far as to state that "[t]here is…*abundant* evidence in the record that 1.0 mg/L is far too lax to ensure that phosphorus discharges will not cause violations of the dissolved oxygen, unnatural sludge and offensive conditions standards." Petr. Memo in Support of Mot. for Recon. at 15 (emphasis added).

Petitioners fail, however, to identify this "abundant" evidence in the record. Instead, they once again rely on out-of-state standards and reference the U.S. EPA's "Nutrient Criteria Guidance Manual," none of which apply to the specific waterway in question. *Id.*

Petitioners also attempt to support their argument by referencing a District study relating to the effluent of a plant that is not at issue in these appeals. *Id.* However, Petitioners erroneously

interpret the study's conclusion. Specifically, Petitioners state that, after studying the effects of reducing its phosphorus discharge to 1.0 mg/L, "MWRD concluded that it could not see any improvement in water quality." *Id.*

Yet, the District never concluded that it did not see any improvement in water quality. To the contrary, significant decreases in receiving-stream phosphorus levels were observed. (R. at 283). What the District *did* report was that no effect was observed on DO levels, algae, or biota. *Id.* This is not surprising in light of the fact that "numerous studies conducted in Illinois have failed to show any correlation between [total phosphorus] and algae, dissolved oxygen, or biota in Illinois streams." (R. at 1212). Accordingly, the District study referenced by Petitioners undercuts rather than supports their arguments against the 1.0 mg/L phosphorus limit.

Moreover, in disputing the adequacy of the 1.0 mg/L limit, Petitioners tellingly ignore the fact that this was the level selected by the Board as its interim phosphorus limit for new and expanding wastewater treatment plants. Compliance with this Board-approved limit will reduce the phosphorus discharge from the District's three biggest plants by nearly fifty percent. None of the evidence provided in Petitioners motion for reconsideration satisfies Petitioners' burden of proving that this dramatic reduction will somehow violate the Act or Board's regulations.

7. Petitioners re-argument for an opening of the record is meritless

Petitioners once again argue that "35 Ill. Adm. Code 309.120 requires the Agency to reopen the public comment period when the Agency significantly modifies a draft permit and the final permit is not a logical outgrowth of the proposed permit." Petr. Memo in Support of Mot. for Recon. at 16. However, Petitioners fail to mention the criteria that the above-cited regulation provides for determining whether the final permit is a logical outgrowth of the proposed permit.

Specifically, Section 309.120 states that: "[i]n 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." *Id.*

In this case, the Petitioners cannot argue that they "could not have reasonably anticipated the final permit" where, during the comment period, they demanded that the permits "should include limits on phosphorus…that require the removal of these pollutants and/or require systemic measures to reduce the plant's phosphorus discharges." (R. at 2053). The logical outgrowth of this comment was that the District's final permits would include limits on phosphorus. They did; in fact, those limits will reduce the plants' phosphorus discharges by nearly fifty percent.

While the Petitioners raised numerous objections to the draft Permits in their comments, their principal contention was that the permits lacked effluent limits for nutrients. (R. 3398-3325, 5365-5377). Indeed, Petitioners inundated the record with nutrient-related literature in an attempt to support their position. (*See* Public Hearing Exhibits, R. at 3503 – 5544). Accordingly, they cannot reasonably argue that a new round of notice and comment would provide their *first* opportunity to offer comments on the issue of nutrient limits or that the final permits "deviate sharply" from the concepts they suggested.

Accordingly, the Board was correct in holding that "these issues were raised during the public comment period and then addressed in the final permit as logical outgrowths of the draft

permits." Board Op. and Order at 26. Nothing provided in Petitioners' motion for reconsideration warrants a contrary ruling.

8. The Board applied the proper standard for summary judgment

In their motion for reconsideration, Petitioners complain that the "Opinion failed to apply the proper standard for summary judgment" because it "appears to have identified several factual matters as being in 'dispute.'" Petr. Mot. for Recon. at 6. However, Petitioners do not elaborate on this point in their motion and seem to abandon it altogether in their memorandum in support. *See Id.* and Petr. Memo in Support of Mot. for Recon.

Moreover, "a dispute over an *immaterial* fact does not preclude granting an otherwise properly supported motion for summary judgment." *City of Quincy v. IEPA*, 2010 WL 2547531 at *29, PCB No. 08-86 (Jun. 17, 2010) (emphasis added). Nothing in Petitioners' motion contradicts the Board's finding that "[h]ere, none of the parties have raised any contested issue of *material* fact…" (Op. 10) (emphasis added).

V. Conclusion

For all the reasons stated above, the District requests that the Board deny Petitioners' motion for reconsideration.

Dated: February 18, 2015

Respectfully submitted,

METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO

/s/ Ronald M. Hill

By: Ronald M. Hill, General Counsel

Ronald M. Hill
Lisa Luhrs Draper
Ellen M. Avery
Jorge T. Mihalopoulos
100 E. Erie Street
Chicago, Illinois 60611
312.751.6594
Attorney ID: 28138