BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

To: See attached service list.

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 3rd day of October, 2014, the undersigned filed the attached **Agency's Motion for Leave to File a Reply to Petitioner's Response to the Agency's Cross-Motion for Summary Judgment, and Agency's Reply in Support of Cross-Motion for Summary Judgment** by electronic filing.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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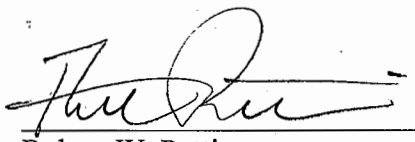
CERTIFICATE OF SERVICE

I, Robert W. Petti, an Assistant Attorney General, certify that on the 3rd day of October, 2014, I caused to be served by U.S. Mail, the foregoing Notice of Filing, Agency's Motion for Leave to File a Reply to Petitioner's Response to the Agency's Cross-Motion for Summary Judgment, and Agency's Reply in Support of Cross-Motion for Summary Judgment to the parties named on the Notice of Filing, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Petitioners,	)	
v.	)	PCB No. 14-106, No. 14-107, No. 14-108 (consolidated)
	)	(Third Party NPDES Appeal-Water)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,	)	
Respondents.	)	

AGENCY'S MOTION FOR LEAVE TO FILE REPLY TO PETITIONER'S RESPONSE TO AGENCY'S CROSS-MOTION FOR SUMMARY JUDGMENT

Now Comes, Respondent, Illinois Environmental Protection Agency, ("Agency"), by and through its attorney, Lisa Madigan, Attorney General of the State of Illinois, and pursuant to 35 Ill. Adm. Code §101.500(e), hereby files the following Motion for Leave to File a Reply to Petitioners' Response to IEPA's and MWRD's Cross Motions for Summary Judgment ("Reply"). In support thereof, the Agency states as follows:

1. Section 101.500(e) of the Illinois Pollution Control Board's ("Board's") procedural rules, provides that a person may reply "as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Admin. Code Sec. 101.500(e).

2. On August 22, 2014, the Agency filed its Cross-Motion for Summary Judgment and Memorandum in Support of its Cross-Motion for Summary Judgment.

3. On September 19, 2014, the Petitioners filed its Response to the Agency's Cross Motion for Summary Judgment. In their Response, the Petitioners, attempt to shift the burden of proof in this third party appeal, misapply precedent to this case that is, in fact, inapplicable, and attempt to describe a violation of the Illinois Environmental Protect Act or Board regulations where none exists, as discussed in the Agency's Reply, a copy of which is attached hereto and incorporated by reference.

4. Accordingly, the Agency would be materially prejudiced if it is not permitted by the Board to reply to these claims in the Response.

Wherefore, the Agency, for the above stated reasons, respectfully requests that the Illinois Pollution Control Board enter an Order granting this Motion for Leave to File a Reply to Petitioners' Response.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRARIE RIVERS NETWORK, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL LAW & POLICY CENTER, FRIENDS OF CHICAGO RIVER, and GULF RESTORATION NETWORK,	)	
Petitioners,	)	
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Respondents.	)	

AGENCY'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

In this appeal, the Petitioners must demonstrate that the Permits, as issued, violate the Act or Board regulations. Petitioners' Response to IEPA's and MWRD'S Cross Motions for Summary Judgment ("Response") attempts to shift the burden of proof, asserting that the Illinois Environmental Protection Agency ("Agency") failed to require phosphorous limits in the Permits that will protect the narrative water quality standards for certain waters that may receive effluent from the Facilities. Despite extensive discussion of this proposition in the Response, the Petitioners fail to provide evidence from the Administrative Record that the limits set for phosphorous and dissolved oxygen in:1) Permit No. IL0028061 ("Calumet Permit"); 2) Permit No. IL0028053 ("Stickney Permit"); and 3) Permit No. IL0028088 ("O'Brien Permit"), (collectively the "Permits"), will cause a violation of any water quality standards in the Illinois

Environmental Protection Act ("Act") or Illinois Pollution Control Board ("Board") regulations. Without this evidentiary presentation the Petitioners cannot meet their burden of proof. For this, and all the reasons stated in the Agency's Cross-Motion for Summary Judgment, summary judgment in favor of the agency is appropriate.

I.

Petitioners Cannot Shift the Burden of Proof to the Agency in a Third Party Permit Appeal.

The Response ignores the clear obligation that Petitioners, as third party appellants, have the burden of proving whether the record demonstrates that the issuance of the Permits violates the Act or Board regulations, and any attempt to shift this burden to the Agency is not supported by law. The Board's scope of review and standard of review are the same whether a permit applicant or a third party brings a petition for review of an NPDES permit. *Prairie Rivers Network v. PCB et al.*, 335 Ill. App. 3d 391 (4th Dist. 2002) and *Joliet Sand & Gravel Co. v. PCB*, 163 Ill. App. 3d 830 (3rd Dist. 1987), citing *IEPA v. PCB*, 118 Ill. App. 3d 772 (1st Dist. 1983). The distinction between the two types of NPDES permit appeals is which party bears the burden of proof. Under Section 40(e)(3) of the Act, in a third party NPDES permit appeal, the burden of proof is on the third party. 415 ILCS 5/40(e)(3) (2012); *Prairie Rivers*, 335 Ill. App. 3d 391. Therefore, in third party appeal proceedings, the question before the Board is: whether the third party proves that the permit as issued will violate the Act or Board regulations. *Joliet Sand & Gravel*, 163 Ill. App. 3d 830, 833; *Prairie Rivers*, 335 Ill. App. 3d at 401.

The Petitioners cannot prevail on appeal unless they prove 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 Lenox v. IPCB,* 896 N.E.2d 479, 487 (3d Dist. 2008). Although the Agency's decision to issue a permit must be supported by substantial evidence, "this does not shift the burden away from the petitioners, who alone bear the burden in their appeal before the Board to prove that the permit, as issued, violates either the Act or the Board's regulations." *Id.* at 486 (emphasis added). Therefore, the standard the Board employs in reviewing the Agency's decision is whether the Petitioners have established that the record demonstrates issuance of the permit violates the Act or Board regulations. *Des Plaines River Watershed Alliance v. IEPA*, PCB 04-88 at 11 (April 19, 2007) (*"New Lenox"*).

In the Response, Petitioners' attempt to change the Board's articulated standard of review and burden of proof. Petitioners assert that regardless of the context of a third party appeal, where evidence is not present in the record to support the absence of additional permit conditions, the Board must remand the permits for correction. (Pet. Resp. at 3). This attempt to shift the burden of proof to the Agency is not supported by law and not representative of the standard of review and burden of proof in third party appeals pursuant to Section 40(e) of the Act. Instead, as discussed in the cases above, the burden of proof is clearly with the Petitioners to demonstrate, by evidence contained in the Administrative Record, that the requirements for phosphorous and dissolved oxygen in the Permits violate the Act or Board Regulations.

In this matter, the Petitioners do not, and cannot, meet this threshold, and summary judgment in favor of the Agency is appropriate.

II.

The Agency Established Requirements for Dissolved Oxygen and Phosphorous in the Permits Pursuant to Board Regulations.

The Permits, on their face, address both phosphorous and dissolved oxygen in the Facilities' effluent, and the Petitioners fail to present any evidence from the Administrative Record to demonstrate that the requirements in the Permits are in violation of the Act or Board regulations.[1] Instead, Petitioners merely allege that because waters designated as impaired for aquatic life due to low dissolved oxygen and phosphorous will receive discharged waters from the Facilities, the Facilities are causing a violation. (Pet. Resp. at 5, 11, and 14).[2] However, the Petitioners present no evidence that the newly incorporated requirements for dissolved oxygen and phosphorous in the Permits are so insufficient that they will cause a violation of the Act or Board regulations.

Instead, Petitioners speculate that the requirements for dissolved oxygen and phosphorous in the Permits, derived from Board regulations, may not be adequate to prevent a violation of narrative water quality standards. (Pet. Resp. 5-12). Based on this speculative assertion, the Petitioners argue that according to the Board's finding in *New Lenox*, the Permits must be remanded for further sturdy. However, not only has the Agency established effluent limits for both dissolved oxygen and phosphorous in each of the Permits, something that was not done in *New Lenox*, but the facts of *New Lenox* are simply not applicable to this matter.

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[1] Incredibly, the Petitioners go so far as to suggest that the Agency "threw up its hands" and failed to establish limitations on Phosphorous in the Permits. (Pet. Resp. at 4). This assertion is simply not true, and review of the Permits clearly establishes that limits for phosphorous are required. (R. at 2157, 2644, and 3330).

[2] The waters Petitioners reference as receiving phosphorous from the Facilities are:1) a segment of the Little Calumet River, upstream from the Calumet Facility; 2) a segment of the North Shore Channel, upstream of the O'Brien Facility; and 3) a lake or lakes connected to Illinois River at least 107 miles from the discharge point, which are actually backwater lakes that do not receive direct discharges from the Facilities. (Pet. Resp. at 11; R. at 1135-36, 1303, 1333, 2522, and 5371).

First, it is inarguable that the Agency established requirements for phosphorous in the Permits.[3] In fact, the 1.0 mg/L effluent limit for phosphorus represents a nearly 50% reduction in the current phosphorous discharge from the Facilities. (R. at 2157, 2644, and 3330). This limit on phosphorous is consistent with the 1.0 mg/L monthly average effluent standard for phosphorous adopted by the Board and set forth in 35 Ill. Adm. Code 304.123(g) for discharges into General Use waters for new or expanded facilities with a design average flow ("DAF") of one-million gallons per day or a total effluent phosphorous load of 25 pounds per day. [4] Consequently, if the Facilities were entirely new or expanded facilities that met the DAF or total effluent load standard in Section 304.123(g), the Facilities would be obligated to meet the Board's adopted limit of 1.0 mg/L for phosphorous. While the Facilities are neither new nor expanded, the 1.0 mg/L phosphorus limit in the Permits represents a more stringent limitation on the discharge and represents a clear reduction in the phosphorous output from the Facilities. This is substantially distinct from the facts of *New Lenox,* where no limitation for phosphorous was established and the administrative record clearly demonstrated that there would be an increase in phosphorous loading to impaired waters.

In *New Lenox,* the Board addressed the grant of an NPDES permit for an expanded treatment facility that allowed for increased loading of phosphorous into a water way listed as impaired for, among other parameters, dissolved oxygen, algal growth, and phosphorous. *New Lenox*, at pages 4-8 and 25. The NPDES permit at issue in *New Lenox* did not require a

[3] The Petitioner's Appeal challenges the phosphorous limit established in the Permits, but based on the extensive discussion of dissolved oxygen in the Response it is noteworthy that the Permits contain extensive monitoring requirements for dissolved oxygen in addition to the phosphorous requirements discussed above. (R. at 2137-2162, 2624-2649, 3310-3335).

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

limitation on the discharge of phosphorous from the facility. *Id.* at 7. Because of this, and because of the clear increase in phosphorous loading from the expanded facility, the Board found that the Agency should have done more to assure that the impact of the increased loading would not cause a violation of the Act or Board regulations. *Id.* at 43-44.

The facts before the Board in this matter are substantially different. Here, there is no expansion of the Facilities and there is not an increase in phosphorous loading into the receiving waters from the Facilities. Instead, the Permits actually require a reduction in phosphorous loading by establishing limitations on the phosphorous discharges from the Facilities. (R. at 2157, 2644, and 3330). It is inarguable that, unlike *New Lenox* where no phosphorous limitations were considered, the Permits each require that the discharge of phosphorous be limited to 1.0 mg/L, which represents a decrease in phosphorous being discharged from each of the Facilities, and is akin to the Board regulation for phosphorous discharges in 35 Ill. Admin Code 304.123(g). (R. at 1404, 2208, and 2704). Thus, it is clear, that the conditions at issue in this matter are substantially distinct from the facts before the Board in *New Lenox*. Indeed, the Agency did consider the impact of the Facilities' phosphorous discharge, as evidenced by the adoption of the 1.0 mg/L limitation on phosphorous applicable to new or expanded facilities in the Board regulations. Accordingly, any reliance on *New Lenox* is misplaced.

III.

Petitioners Fail to Demonstrate that the Permits Violate the Act or Board Regulations.

Finally, the Petitioners have referenced specific impaired waters as receiving effluent from the Facilities, but make no showing that this fact, alone, is a violation of the Act or Board regulations. (Pet. Resp. at 5-11). The waters discussed in the Response are a segment of the

Little Calumet River (upstream from the Calumet Facility), a segment of the North Shore Channel (upstream of the O'Brien Facility) and a lake or lakes connected to Illinois River. (Pet. Resp. at 11). It is the Petitioners' contention that because phosphorous discharged from the Facilities may reach these impaired waters, the Permits may violate the Act or Board regulations. (Pet. Resp. at 5-11). To support this conjecture, the Petitioners offer a narrative that includes reference to facilities in other states, and regulations in other states, that provide for more stringent limitations on phosphorous discharges than exist here. (Pet. Resp. at 6,7,8, 10, and 11).

While discussion of what is being done around the country in case specific instances is certainly instructive for a discussion of phosphorous limitations in general, it is not relevant to establishing a violation of Act or Board regulations in this matter. In fact, the Petitioners do not present any evidentiary support from the Administrative Record to establish that phosphorous in effluent from the Facilities, discharged in accord with required limits, will cause a violation of the narrative standard found in the Act or Board regulations. The Petitioners' conjecture that the discharge from the Facilities may cause a violation simply because it comes in contact with waters listed as impaired on the Agency 303(d) List is not sufficient for the Petitioners to meet their burden, and Petitioners have failed to demonstrate that the Permits, as issued, violate the Act or Board regulations.

Accordingly, for the reasons stated above, summary judgment in favor of the Agency is appropriate.

IV.

CONCLUSION

For all the reasons stated above, and the reasons stated in the Agency's Cross-Motion for Summary Judgment and supporting memorandum, the Petitioners cannot sustain their burden of proving that the Permits, as issued, would violate the Act or Board regulations. The Agency is entitled to summary judgment and requests the Board enter an order: 1) denying Petitioners' Motion for Summary Judgment; 2) finding that Illinois EPA is entitled to summary judgment as a matter of law; 3) granting Illinois EPA's Cross-Motion for Summary Judgment; and 4) finding that the NPDES permits must be upheld.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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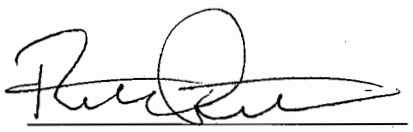

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