BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB and PRAIRIE RIVERS NETWORK,	)	
Petitioners,	)	
v.	)	PCB No. 22 – 69 (NPDES Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and WILLIAMSON ENERGY LLC,	)	
Respondents.	)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board **Agency's Reply in Support of Motion for Summary Judgment** and **Certificate of Service**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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AGENCY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Respondent Illinois Environmental Protection Agency (the "Agency") files this reply in support of its Motion for Summary Judgment ("Agency's Motion"). Petitioners' Response to Respondents' Motions for Summary Judgment ("Petitioners' Response") highlights that Petitioners' central concern in this proceeding is with the Board's general use water quality standard for chloride, based on public comments made during the permitting process that Petitioners now mistakenly characterize as expert testimony. This is a permit appeal, though, not a rulemaking proceeding to re-set the Board's fifty-year-old standard, and the Agency reasonably relied upon that well-established regulatory history in issuing NPDES Permit No. IL 0077666 (the "Permit"). The Board should grant the Agency's Motion.

II. ARGUMENT

A. The Standard for the Board's Review of the Agency's Permitting Decisions Is Whether the Administrative Record Contains "Substantial Evidence" to Support the Agency's Decision

As both Petitioners and Respondent Williamson Energy LLC ("Williamson") correctly stated in their Motions for Summary Judgment, the Board applies the "substantial evidence"

standard in reviewing the Agency's permitting decisions. (Petitioners' Memorandum, at 24; Williamson's Motion at 7-8). *See Waste Management, Inc. v. IEPA*, PCB 84-45 (Nov. 26, 1984), slip op. at 10. The United States Supreme Court recently described the "substantial evidence" standard as follows:

> The phrase "substantial evidence" is a "term of art" used throughout administrative law to describe how courts are to review agency factfinding. *T-Mobile South, LLC, v. Roswell*, 574 U.S. 293, ___, 135 S. Ct. 808, 190 L. Ed. 2d 679 (2015). Under the substantial-evidence standard, a court looks to an existing administrative record and asks whether it contains "sufficien[t] evidence" to support the agency's factual determinations. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938) (emphasis deleted). And whatever the meaning of "substantial" in other contexts, the threshold for such evidentiary sufficiency is not high. Substantial evidence, this Court has said, is "more than a mere scintilla." *Ibid.*; *see, e.g.*, *Perales*, 402 U. S., at 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (internal quotation marks omitted). It means—and means only—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison*, 305 U. S., at 229, 59 S. Ct. 206, 83 L. Ed. 2d 126. *See Dickinson v. Zurko*, 527 U. S. 150, 153, 119 S. Ct. 1816, 144 L. Ed. 2d 143 (1999) (comparing the substantial-evidence standard to the deferential clearly-erroneous standard).

Biestek v. Berryhill, 139 S. Ct. 1148, 1154 (2019). As the Board cited approvingly in *Waste Management*, the "main inquiry" in applying the "substantial evidence" standard "is whether on the record the agency could reasonably make the finding." *Waste Management*, PCB 84-45 (Nov. 26, 1984), slip op. at 9.

In reviewing the Agency's decision to issue the Permit, then, the question for the Board is whether the administrative record contains "such relevant evidence as a reasonable mind might accept as adequate to support [the Agency's] conclusion." *Biesteck*, 139 S. Ct. at 1154. This threshold is "not high." *Id*. With respect to the evidence before the Board in this permit appeal, it should be noted that, contrary to numerous references within Petitioners' Response, there is no "expert testimony" before the Board propounded by any party. (*See* Petitioners' Response, at 8-9, 38-41). The Board has often recognized the distinction between expert testimony, which is made

under oath and subject to cross-examination by interested parties, and a public comment, which is not. *See, e.g.*, *ExxonMobil Oil Corp. v. Illinois EPA*, PCB 11-86 (Dec. 1, 2011), slip op. at 28 ("[T]he Board has consistently held that testimony provided under oath and subject to cross-examination is afforded more weight than public comments."). Petitioners cite to public comments, not expert testimony.

By contrast, the Board certainly may take notice of its own previous rulemaking proceedings setting the State's water quality standards. *East St. Louis v. Touchette*, 14 Ill. 2d 243, 249 (1958) ("A court will take judicial notice of its own records and the facts established therein."); 35 Ill. Adm. Code 101.630(a)(1) (authorizing the Board to take notice of "[m]atters of which the circuit courts of this State may take judicial notice").

B. The Permit Ensures Compliance with Water Quality Standards in Compliance with Section 309.141 of the Board's Regulations

1. The Permit's Effluent Limitation for Chloride and Chloride/Conductivity Monitoring Requirements Comply with Board Regulations

Petitioners present a number of arguments objecting to Special Condition 15 as "incomplete." More specifically, Petitioners object to the chloride effluent limitation and chloride/conductivity monitoring set out in Special Condition 15. Petitioners' arguments related to variability of instream conductivity and public participation are addressed in the Agency's Response to Petitioners' Motion for Summary Judgment ("Agency's Response"), which the Agency incorporates by reference herein. (*See* Agency's Response, at 2-7).

Petitioners newly object that the Permit contains "no effective limit for chloride" because "the Permit does not have a fixed concentration or load limits for the discharge, despite 35 Ill. Adm. Code []309.143(b), but instead states a narrative limit that is based on the Permittee determining what it can discharge without causing a violation of water quality standards."

(Petitioners' Response, at 11). Petitioners argue that Section 309.143(b) of the Board's regulations, 35 Ill. Adm. Code 309.143(b), prohibits "simply describ[ing] a procedure for establishing quantitative limitations." (*Id.* at 15).

However, the Permit does specify a quantitative limitation on chloride discharges from Outfall 011. Rather than set a general chloride effluent limitation independent of instream conditions, the Permit incorporates a quantitative limitation that is variable and dependent upon instream conditions. Looking more closely at the mixing zone equation illustrates this point. The Permit provides that:

$$C_{DS} = [C_E Q_E + 0.25 C_{US} Q_{US}]/(0.25 Q_{US} + Q_E)^1 \qquad \text{("Equation 1")}$$

Alternatively, this equation can be rewritten as:

$$Q_E = [0.25 Q_{US} (C_{US} - C_{DS})]/(C_{DS} - C_E) \qquad \text{("Equation 2")}$$

The independent variables Q_{US} and C_{US} represent instream conditions, and their values are provided by monitoring required by Special Condition 15 of the Permit. (AR at R00027). Similarly, the independent variable C_E represents the effluent chloride concentration, which is determined by monitoring required by Special Condition 15 of the Permit. (*Id.*). The value for C_{DS} is a constant of 500 milligrams per liter ("mg/L"), which represents the chloride water quality standard at the edge of the mixing zone. The dependent variable, Q_E, represents effluent flow and constitutes the effluent limitation on chloride discharges in the Permit, which is specified and calculable based on instream conditions and effluent concentration.[2]

Petitioners additionally argue that the Permit's requirement that Williamson develop chloride/conductivity calibration curves for Agency review and approval prior to discharge

[1] C_E = Effluent concentration (mg/L); Q_E = Effluent flow rate (cfs) for Outfall 011; Q_{US}= Upstream flow rate (cfs); C_{US} = Upstream concentration (mg/L); C_{DS} = Downstream concentration (mg/L).

[2] Note that Q_E is a unit of volume. If both sides of Equation 2 are multiplied by the measured effluent concentration of chloride, C_E, then the effluent limitation is expressed in terms of weight or mass.

violates Section 309.146(d) of the Board's regulations, 35 Ill. Adm. Code 309.146(d). Petitioners assert that such regulation "require[s] that the public be shown a final permit and that it must 'specify' monitoring equipment and methods." (Petitioners' Response, at 16).

The Board rejected a similar argument in *Prairie Rivers Network v. Illinois EPA & Black Beauty Coal Company*, PCB No. 01-112 (Aug. 9, 2001) ("*Black Beauty*"). In *Black Beauty*, the Agency issued an NPDES permit to a coal company that, *inter alia*, approved of discharges "only at such times that sufficient flow exists in the receiving stream to insure that water quality standards in the stream beyond the mixing zone will not be exceeded." *Id.* at 47. The permit in *Black Beauty* additionally required that the permittee demonstrate sufficient flow in the receiving stream by determining stream flow rates at the time of discharge. *Id*. at 47-48. To determine receiving stream flow, the permit required the permittee to "submit an operational plan specifying the procedures to be utilized" within 180 days of permit issuance. *Id.* at 48.

Prairie Rivers Network ("PRN") appealed the permit and argued, *inter alia*, that the Agency "should have included in the permit the actual monitoring protocols that Black Beauty must use to demonstrate that adequate mixing is available upon discharge" rather than "inappropriately leav[ing] the monitoring to a side arrangement." *Id.* at 46, 48. PRN based its objection on Section 309.141(d) of the Board's regulations, 35 Ill. Adm. Code 309.141(d), and 40 C.F.R. § 122.48.[3]

The Board rejected PRN's argument, holding that "allowing Black Beauty 180 days from issuance of the permit to develop a monitoring plan is not inconsistent with applicable regulations," and that "the 180-day period provides a reasonable amount of time for Black Beauty to develop

[3] At the time of the Board's decision in *Black Beauty*, Section 309.146(d) had not been adopted by the Board. However, 40 C.F.R. § 122.48(a) and (b) were substantively identical to the requirements now codified in Section 309.146(d) and were applicable to the permit in *Black Beauty* pursuant to Section 309.141(d).

an appropriate plan to comply with the permit condition based on site-specific factors." *Black Beauty*, slip op. at 51. Moreover, the Board noted that, during the 180-day period, the permittee "is still subject to the offsite discharge prohibition" during no flow and low flow conditions. *Id*. In contrast, Special Condition 15 of the Permit more strictly prohibits ***any*** discharge from Outfall 011 until a site-specific monitoring plan is reviewed and approved by the Agency. (AR at R00027). The *Black Beauty* decision, along with the other arguments incorporated herein by reference, demonstrates that Special Condition 15 is consistent with the Board's regulations. (*See* Agency's Response, at 2-7).

2. The Permit Does Not Provide for the Elimination of All Chloride Monitoring

With one exception, the arguments presented in Section II.B of Petitioners' Response are identical in substance to the arguments presented in Petitioners' Memorandum. The Agency provided its responses to these arguments in its Response, which the Agency incorporates by reference herein. (*See* Agency's Response, at 7-11).

Petitioners raise one additional argument with respect to Special Condition 15(b)(ii). Petitioners assert that Special Condition 15(b)(ii) "does not specifically state what monitoring may be eliminated, but lists chloride monitoring as among the types of monitoring that might be eliminated." (Petitioners' Response, at 19). Pursuant to Petitioners' interpretation of Special Condition 15(b)(ii), the Permit allows the Agency to eliminate all downstream chloride monitoring, which, if eliminated, would vitiate "the whole pretense that there are enforceable permit limits for Outfall 011." (*Id.*).

But Special Condition 15(b)(ii) is unambiguous and self-contained. It requires quarterly downstream monitoring of discharge rate, sulfate, chloride, and hardness in the Big Muddy River at a location sufficiently downstream from the discharge to ensure complete mixing. (AR at

R00028). It then allows Williamson to request a reduction or elimination of this quarterly monitoring requirement after ten quarterly samples have been collected. (*Id.*). It does not provide for the reduction or elimination of chloride/conductivity monitoring required by Special Condition 15(a), nor does it provide for the reduction or elimination of the monthly downstream, upstream, and effluent chloride monitoring associated with maintaining calibration curves.[4] Thus, Petitioners' concern that Special Condition 15(b)(ii) may result in the elimination of downstream chloride monitoring is unfounded.

3. The Act Does Not Require Third-Party Monitoring

The arguments presented in Section II.C of Petitioners' Response are identical in substance to the arguments presented in Petitioners' Memorandum. The Agency provided its responses to these arguments in its Response, which the Agency incorporates by reference herein. (*See* Agency's Response, at 11-12).

C. The Administrative Record Supports the Agency's Determination Regarding Phosphorus in the Outfall 011 Discharge, but the Agency Concedes That the Administrative Record Could Better Support Its Conclusions on the Intermittent Nature of Outfall 001 Through 008 Discharges and Ammonia in the Outfall 011 Discharge

Section III of Petitioners' Response raises two specific issues that have arisen during the course of this proceeding. First, Petitioners assert that the Permit "allows chronic violation" of water quality standards for cadmium, copper, nickel, and zinc. (Petitioners' Response, at 22). Second, Petitioners assert that the Permit should contain limits for phosphorous and ammonia in the Outfall 011 discharge, based on 2019 sampling data contained within the administrative record.

[4] Curiously, Petitioners appear to have changed their thoughts on Special Condition 15(b)(ii) sometime between filing Petitioners' Motion for Summary Judgment and Petitioners' Response. *Compare* Petitioners' Memorandum, at 28 ("[Special Condition 15] provides some monitoring conditions, ***many of*** which may be eliminated in two and a half years") (emphasis added) *with* Petitioners' Response, at 17 ("[Special Condition 15] provides some monitoring conditions, which may be eliminated in two and a half years").

The Agency disagrees that the Permit is insufficiently protective of the State's water quality standards. The Agency concedes, though, that the Agency's analysis with respect to Outfalls 001 through 008, and with respect to ammonia in Outfall 011, is not fully reflected in the administrative record.

First, as stated in the Agency's Motion, for discharges from Outfalls 001 through 008, the Agency only assessed the reasonable potential to exceed acute water quality standards due to the intermittent nature of such discharges. (Agency's Motion, at 9-10). This assessment is based on longstanding Agency practice, since, by their nature, certain intermittent discharges—including stormwater discharges—are temporally restricted, either by permit condition or natural conditions, and therefore cannot reasonably cause exceedances of chronic water quality standards. However, the Agency concedes that the administrative record and the Permit itself do not precisely define Outfalls 001 through 008 as intermittent or stormwater-only discharges.

Second, as to phosphorous and ammonia, Petitioners have made several references to the impairment status of the Big Muddy River. Petitioners reference the Illinois' 2018 Section 303(d) List and state that downstream segments of the Big Muddy River are impaired by phosphorus and low dissolved oxygen. (Petitioners' Response, at 25, 33). The Illinois' 2020/2022 Section 303(d) List removed the dissolved oxygen impairment of segments N-11, N-12, and N-99, and no segment of the Big Muddy River is listed as impaired for total phosphorus.[5]

Petitioners argue that sampling data in the administrative record indicates that significant levels of deoxygenating wastes—namely, phosphorus and ammonia—are present in the proposed

[5] *See* Illinois' 2020/2022 Section 303(d) List, at 7, *available at* https://www2.illinois.gov/epa/topics/water-quality/watershed-management/tmdls/Documents/A1_Streams_FINAL_5-26-22.pdf.

discharge.[6] Regarding phosphorus, the Agency disagrees with Petitioners' characterization of the data as indicating "significant phosphorus levels." (Petitioners' Response, at 25). Regarding ammonia, while the Agency does not agree with Petitioners' conclusion that the data demonstrates that discharges of ammonia from Outfall 011 will cause or contribute to violations of water quality standards, the Agency concedes that the administrative record does not contain all information that would support the Agency's position.

First, the administrative record does not indicate "significant phosphorus levels" in the proposed Outfall 011 effluent. The data in the administrative record show a maximum concentration of phosphorus of 0.13 mg/L; the average of the phosphorus samples is 0.068 mg/L.[7] (AR at R01296-R01301). Since Illinois does not have a numeric water quality standard for phosphorus, Petitioners point to one sample exceeding the Illinois Nutrient Science Advisory Committee ("NSAC") recommended criteria and the Wisconsin phosphorus water quality standard cited therein. (Petitioners' Response, at 25 n. 20). Petitioners do not note that all of the samples are below other states' numeric standards—such as Minnesota's 0.15 mg/L south region standard—or listing criteria—such as Indiana's 0.3 mg/L. (*Id.*) Furthermore, sewage treatment plants in the Big Muddy River watershed have been issued NPDES permits incorporating monthly average phosphorus limits of 1.0 mg/L and a January 1, 2030 deadline to meet a 0.5 mg/L annual rolling geometric mean.[8] And yet, neither the receiving stream nor downstream segments of the Big Muddy River are impaired for total phosphorus, and the administrative record—including Petitioners' comments—does not contain any evidence of algal blooms in the Big Muddy River.

[6] To the extent Petitioners suggest that the Agency withheld this data from the public at the time of the December 18, 2019 public hearing, the administrative record shows that this information was received by the Agency as supplemental information on January 17, 2020. (AR at R00503).

[7] Per Agency practice, samples below the minimum detection limit are calculated at half the detection limit for purposes of averaging.

[8] *See, e.g.,* NPDES Permit No. IL0029734 (Bureau ID W0770500013) and NPDES Permit No. IL 0023248 (Bureau ID W1990550003), *available at* https://external.epa.illinois.gov/DocumentExplorer/Attributes.

Such facts support the Agency's conclusion that the low concentrations of phosphorus in the proposed effluent will not cause any violations of the State's general use water quality standards.

Second, Section 355.203 of the Agency's regulations, 35 Ill. Adm. Code 355.203, requires the Agency to set total ammonia nitrogen effluent standards based on stream specific data. Such effluent limitations also account for seasonal variation, and separate limits are set for summer, spring/fall, and winter. The 2019 data that the Agency relied upon to evaluate Outfall 011 discharges corresponds to the spring/fall and winter seasons. (AR at R01296-R01301). The Agency disagrees with Petitioners' argument that the data indicate a reasonable potential for exceedances of the total ammonia nitrogen water quality standard, derived pursuant to Section 355.203 for the spring/fall and winter seasons.[9] However, the Agency concedes that the administrative record does not contain the requisite stream-specific data that would be necessary to support that reasonable potential analysis.

D. The Permit Protects Existing Uses of the Big Muddy River

1. The Board's Antidegradation Requirements Do Not Require That the Agency Ignore the Board's General Use Water Quality Standards

With one exception, the arguments presented in Section IV.A of Petitioners' Response are identical in substance to the arguments presented in Petitioners' Memorandum. The Agency provided its responses to these arguments in its Response, which the Agency incorporates by reference herein. (*See* Agency's Response, at 12-16).

Petitioners add one additional argument regarding interpretation of the Board's regulations. Essentially, Petitioners contend that the Agency's reliance on the Board's general use chloride water quality standard—set by the Board to be protective of general uses, including for aquatic

[9] To the extent that Petitioners suggest that the general use total ammonia nitrogen water quality does not adequately protect the aquatic life designated use, Petitioners should petition the Board to amend the standard. *See* 35 Ill. Adm. Code 302.202, 302.212, 355.203.

life—negates the use of the word "and" in Section 302.105(c)(2)(B) of the Board's regulations. (Petitioners' Response, at 28-29). Were Petitioners to identify detrimental impacts on an existing use not protected by the general use water quality standard, then Section 302.105(c)(2)(B) would require the Agency to ensure that such use is additionally protected. But Petitioners fail to identify ***any*** existing use that would be impacted by the proposed Outfall 011 chloride discharges. Impliedly, Petitioners contend that chloride discharges will have a negative impact on aquatic life. However, the chloride water quality standard—like all other general use water quality standards—was set to be protective of aquatic life. *See* 35 Ill. Adm. Code 302.202 and 302.208; *In the Matter of Water Quality Standards Revisions*, PCB R71-14 (Mar. 7, 1972), at 6. As detailed in the Agency's Response, if Petitioners are concerned that the Board's general use water quality standard for chloride is not protective of aquatic life, then Petitioners should petition the Board to amend the standard.

2. The Agency Concedes That the Administrative Record Does Not Contain an Analysis of the Reverse Osmosis Reject Stream's Potential Contributions to the Outfall 011 Discharge

As Williamson discussed in its Response in Opposition to Petitioners' Motion for Summary Judgment ("Williamson's Response"), reject water from the reverse osmosis ("RO") plant will be treated through the facility's sedimentation ponds prior to mixing with Outfall 011 effluent, and effluent from Outfall 011 must meet all limitations and conditions of the Permit, which are protective of existing uses and water quality standards. (Williamson's Response, at 3). Therefore, the Permit is protective of Illinois water quality standards. However, the Agency concedes that the administrative record does not contain an analysis that specifically estimates or otherwise quantifies the RO reject stream's potential contribution to the proposed Outfall 011 discharge.

3. The Agency Reasonably Relied Upon the Long-Standing General Use Water Quality Standard for Chloride in Setting the Permit's Limits

With the exception of the RO reject issue discussed in Section II.D.2, above, the arguments presented in Section IV.B of Petitioners' Response are identical in substance to the arguments presented in Petitioners' Memorandum. The Agency provided its responses to these arguments in its Response, which the Agency incorporates by reference herein. (*See* Agency's Response, at 12-16).

In light of Petitioners' references to the purported "expert testimony" provided by some public commenters to the Agency, it is worth underscoring the regulatory history of the chloride water quality standard that the Agency relied upon in setting the Permit's limits. As discussed in Section I, *infra*, there has been no "expert testimony" provided in this proceeding. No witness has provided sworn testimony subject to cross-examination. This stands in stark contrast to the multiple Board rulemaking proceedings over the year, through which the chloride water quality standard was set, and through which its continued protectiveness might have been reviewed. In 1972, the Board set the standard at 500 mg/L. *In the Matter of Water Quality Standards Revisions*, PCB R71-14 (Mar. 7, 1972), at 6. Since that time, the chloride standard has remained unchanged, despite being subject to review in multiple rulemaking proceedings since its adoption, including proceedings within the past fifteen years.

In *In the Matter of Triennial Review of Sulfate and Total Dissolved Solids Water Quality Standards*, PCB R07-9 (Sept. 4, 2007), slip op. at 26, for example, the Board determined that the Board's existing sulfate and chloride (500 mg/L) standards "adequately address toxicity of dissolved salts" and that "a TDS standard is not necessary." Notably, in that proceeding, environmental groups, including Petitioners, expressed "concerns about water with high calcium levels and chloride levels ***higher than 500 mg/L***." *Id*. at 15 (emphasis added). To address the

environmental groups' concern, the Board added regulatory language requiring sulfate standards to be determined on a case-by-case basis where chloride concentrations exceed 500 mg/L after considering, among other things, input from USEPA. R07-9 (Jun. 19, 2008), slip op. at 9-10. USEPA's public comment demonstrated its approval of the Board's chloride water quality standard, stating that "Illinois' approved water quality standards specify that the concentration of chlorides in general use waters must be equal to or less than 500 mg/L in order to protect the uses of general use waters." R07-9, PC #10, Att. 1 (Dec. 5, 2007).

Just seven years ago, in *In the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River*, PCB 08-9(D) (Jun. 18, 2015), at 41, the Board adopted a year-round chloride standard of 500 mg/L in the Chicago Area Waterway System and Lower Des Plaines River. Notably, USEPA submitted a public comment in which it did not object to the 500 mg/L chloride standard, and stated that it would be consistent with 40 C.F.R. § 131.11 (requiring "water quality criteria that protect the designated use"). PCB 08-9(D), P.C. #1404 (Apr. 30, 2014), at PDF pages 6-7.

More recently, in *In the Matter of Amendments to General Use Water Quality Standards for Chloride*, PCB R18-32 (May 21, 2018), a member of the public proposed season-specific water quality standards ranging from a low of 230 mg/L as a chronic water quality standard during May 1 to November 30, to a high of 1,010 mg/L from December 1 through April 30. While the proponent ultimately voluntarily dismissed this proposal, it should be noted that a commenter on behalf of municipal dischargers asserted in a public comment that:

> [W]e have found that our municipal client base is in compliance with the current chlorides water quality standard of 500 mg/L. Modification of the standard to a seasonal standard with a May - November chronic limit of 230 mg/L will have significant and unintended impacts. These impacts include required upgrade or replacement of numerous, well-functioning, potable water treatment facilities as well as banning or limiting the use of private home-based water softening systems.

PCB R18-32, P.C. #2 (Jan. 16, 2018), slip op. at 4.

In light of this consistent regulatory history, the public comments referred to by Respondents do not support a decision by the Board to disapprove the Agency's use of the fifty-year-old general water quality standard for chloride in its NPDES permitting decisions. Fundamentally, Petitioners' objections are premised on generalized statements on chloride interactions with ambient stream conditions. Petitioners believe that these generalized statements demonstrate that the chloride water quality standard fails to protect the aquatic life designated use in any receiving stream located upstream of a segment impaired for dissolved oxygen, which may well describe every stream segment in the State of Illinois. Again, the proper forum for Petitioners to revisit the general use water quality standard for chloride would be before the Board in a petition to amend the standard. In that manner, Petitioners' claims regarding the adequacy of the Board's chloride water quality standard could be made subject to cross-examination, and the entire regulated community—not just a single discharger—could provide its views to the Board.

More to the point, the issue before the Board in this permit appeal is not, based on a preponderance of the evidence, whether the Board's chloride standard is adequately protective of aquatic life. The issue before the Board is whether the Agency's decision to rely on that long-standing regulation as the basis for Outfall 011's chloride limit was supported by "substantial evidence." *Waste Management, Inc. v. IEPA*, PCB 84-45 (Nov. 26, 1984), slip op. at 10. Fifty years of consistent regulatory and permitting practice is undoubtedly "relevant evidence as a reasonable mind might accept as adequate to support [the Agency's] conclusion," and therefore sufficient to meet the "not high" threshold. *Biesteck*, 139 S. Ct. at 1154.

4. The Administrative Record Supports the Agency's Conclusion Regarding Groundwater Drawdown

The Agency incorporates by reference herein its argument, contained in the Agency's Motion, in response to Petitioners' position regarding "degrading effect on existing uses of the alteration of stream flows in the vicinity of the mine." (Petitioners' Petition, ¶ 10; *see* Agency's Motion, at 11). The Agency additionally notes that Petitioners fail to cite any authority regarding the applicability of Section 302.105 of the Board's regulations to secondary, attenuated impacts completely disconnected from the antidegradation analysis' primary concern: increased pollutant loading from discharges permitted by and regulated pursuant to the NPDES program.

E. The Agency's Consideration of Alternatives and Impacts on the Community at Large Met Antidegradation Requirements

With one exception, the arguments presented in Section V of Petitioners' Response are identical in substance to the arguments presented in Petitioners' Memorandum. The Agency provided its responses to these arguments in its Response, which the Agency incorporates by reference herein. (*See* Agency's Response, at 16-19). With respect to alternatives to the Outfall 011 discharge, Petitioners continue to overlook the supplemental alternatives analysis submitted by Williamson in 2019 and relied upon by the Agency in issuing the Permit. (AR at R00087, R05887-R05894).

With respect to the requirement in Section 302.105(c)(2)(B)(iv) of the Board's regulations, 35 Ill. Adm. Code 302.105(c)(2)(B)(iv), that the Agency conclude that "[t]he activity that results in an increased pollutant loading will benefit the community at large," Petitioners provide a bit more detail on the argument they failed to develop in their Memorandum, but still fail to cite any legal authority for their contentions. Petitioners impliedly assert that, to meet the standard in Section 302.105(c)(2)(B)(iv), the Agency must balance all societal aspects of the activity under

review and make a policy judgment if that activity should be allowed within the State of Illinois, or prohibited.

Petitioners cite no authority for this expansive interpretation of the Agency's authority under Section 302.105(c)(2)(B)(iv), which is contradicted by the regulation's plain language. Section 302.105(f)(1) of the Board's regulations, 35 Ill. Adm. Code 302.105(f)(1), sets forth the information a permit applicant must provide as "necessary for the Agency to determine that the permit application meets the requirements of [Section 302.105]." Among this required information is "[t]he purpose and anticipated benefits of the proposed activity," which benefits may include, among others, "[a]n increase or the retention of current employment levels at a facility." 35 Ill. Adm. Code 302.105(f)(1)(C). Nothing in the regulation requires the applicant to submit information about negative societal impacts of the proposed activity, such as would support the balancing review envisioned by Respondents. Instead, the regulation explicitly recognizes "retention of current employment levels at a facility" as a "benefit" that would be sufficient to allow the Agency "to determine that the permit application meets the requirements of [Section 302.105]." 35 Ill. Adm. Code (f)(1). Accordingly, Respondents' argument should be rejected, as the Agency reasonably found a benefit to the community at large based on continuing local employment and tax revenues associated with the mine (AR at R00090, R05888-R05889, R06181, R08323-R08324, R08327-R08328).

III. CONCLUSION

For the reasons stated above, the Agency requests that, because there is no genuine issue of material fact and because the Petitioners cannot sustain their burden of proving that the Permit, as issued, would violate the Act or the Board's regulations, the Board enter an order: 1) finding

that the Agency is entitled to summary judgment as a matter of law; 2) granting the Agency's Motion for Summary Judgment; and 3) finding that the Permit be upheld.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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CERTIFICATE OF SERVICE

I, Katie J. Johnson, certify that on the 23rd day of November, 2022, I caused to be served by Electronic Mail the foregoing **Notice of Filing** and **Agency's Reply in Support of Motion for Summary Judgment** to the parties listed below:

For the Petitioners

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For the Pollution Control Board

Carol Webb, Hearing Officer
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Via E-Mail

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

/s/ Katie J. Johnson
Katie J. Johnson
Administrative Clerk
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katie.johnson@ilag.gov