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 Response to Petitioners' 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 RESPONSE TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Respondent Illinois Environmental Protection Agency (the "Agency") files this response to Petitioners' Motion for Summary Judgment ("Petitioners' Motion") and Petitioners' Memorandum in Support of Petitioners' Motion for Summary Judgment ("Petitioners' Memorandum"). Petitioners fail to demonstrate that the Agency's issuance of the Permit violates the Act or the Board's regulations. At its core, Petitioners' Motion challenges the Board's general use water quality standard for chloride, which has been in place for fifty years. Petitioners' challenge to the standard is based on speculative and generalized concerns that would pertain to many other waters across the State and, if successful, would upend the State's NPDES permitting program and usurp the Board's rulemaking authority. Petitioners' Motion is not supported by law or record evidence and should be denied because the Administrative Record reasonably supports the Agency's issuance of NPDES Permit No. IL0077666 (the "Permit").

II. ARGUMENT

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

1. Petitioners Fail to Justify Their Objections to the Chloride-Conductivity Calibration Curves Required by Special Condition 15 of the Permit

Petitioners object to the Permit's requirement in Special Condition 15 that Williamson install permanent conductivity monitors upstream and downstream of the Outfall 011 discharge to continuously monitor correlated chloride concentrations within the Big Muddy River. (Petitioners' Memorandum, at 25-27). Petitioners assert that correlating conductivity to chloride concentrations "will not be easy." (*Id*. at 26). Petitioners fail to substantiate their objections to utilizing calibration curves to monitor chloride concentrations by measuring conductivity.

The general relationship between chloride and conductivity is well-understood. Conductivity is a measure of the ability of water to pass an electrical current. "Because [conductivity] predictably increases with increasing ionic concentration, it is used to measure salinity (usually referring to NaCl) or ionic concentration (for any dissolved salts) (Standard Methods #2510 [APHA, 1992]; EPA method 120.1, 0950A [U.S. EPA, 1982])." (AR at R04834). Among the studies submitted by Petitioner was an acknowledgment of "[a] strong correlation between chloride ions and conductivity" in field sampling. (AR at R03163). Petitioners cite to USGS data showing variability in conductivity in the Big Muddy River. (Petitioners' Memorandum, at 26). However, variability in conductivity in the river does not in any way entail variability in the correlation between conductivity and chloride concentrations in the river. Petitioners otherwise provide no evidence refuting the relationship between chloride and conductivity.

Petitioners assert that there is "no reason to believe that the level of chloride within a given amount of the total dissolved solids measured through measuring conductivity is constant."[1] (Petitioners' Memorandum, at 26). The Agency does not expect the correlation between chloride and conductivity to be constant. That is exactly why Special Condition 15 requires the development of calibration curves, based on sampling before and after Outfall 011 discharges begin, for the Agency's review, approval, and periodic reassessment. Petitioners speculate that road salting "would seem" to impact relative ionic concentrations in the Big Muddy River. (*Id.*). Petitioners' unsupported hypothesis concerning possible impacts of road salting in the discharge's rural setting is best tested by the ongoing monitoring required by the permit, and in no way calls into question the well-understood relationship between chloride concentrations and conductivity. Moreover, nothing in the Permit requires the Agency to approve calibration curves that cannot accurately and protectively measure chloride concentrations. Accordingly, no discharge from Outfall 011 is allowed by the Permit unless and until calibration curves demonstrating a strong correlation between chloride and conductivity and incorporating a protective margin of error have been developed and approved by the Agency.

Petitioners also assert that their public participation rights have been violated because the calibration curves required by Special Condition 15 of the Permit were not developed prior to the Agency's issuance of the Permit. Petitioners maintain that Section 309.109 of the Board's regulations, 35 Ill. Adm. Code 309.109, requires that a "completed permit be shown to the public." (Petitioners' Memorandum, at 27). Petitioners also rely on *Waterkeeper Alliance v. U.S.*

[1] It should be noted that conductivity is not a direct measurement of total dissolved solids, but an indirect measurement through the correlation between total dissolved solids and conductivity. Additionally, Petitioners themselves acknowledged the correlation between chloride and conductivity by stating that "chloride pollution should not be considered in isolation; it must be considered together with the cumulative effects of other dissolved substances which contribute to conductivity." (Petitioners' Memorandum, at 9). To the extent that Petitioners appear to view conductivity as a more useful barometer of water quality than chloride concentrations alone, Special Condition 15 itself vindicates that concern by limiting discharges based on continuously measured conductivity.

Environmental Protection Agency, 399 F.3d 486 (2d Cir. 2005). However, *Waterkeeper Alliance* involved considerably different facts and is not particularly apposite to the present matter. In contrast, the facts involved in the recent decision, *Black Warrior Riverkeeper, Inc. v. Alabama Department of Environmental Management*, 2022 Ala. Civ. App. LEXIS 17 (Feb. 18, 2022), are more closely analogous, and the court's opinion more instructive.

Waterkeeper Alliance involved challenges by environmental groups to a U.S. Environmental Protection Agency regulation governing NPDES permitting requirements and effluent guidelines for concentration animal feeding operations ("CAFOs"). *See* 399 F.3d at 492-97. The challenged regulation required CAFOs to develop nutrient management plans ("NMPs") that incorporated, *inter alia*, limitations on land application rates and associated stormwater discharges. *Id.* at 499. The challenged regulation did not require review of such NMPs by a permitting authority prior to issuance of an NPDES permit, nor did it require the NMPs to be incorporated into issued NPDES permits. The Second Circuit held that U.S. EPA's failure to require permitting authority review of the NMPs did not "ensure" compliance with applicable effluent limitations and standards in violation of the Clean Water Act. *Id.* at 499. The court further held that U.S. EPA's failure to require the terms of NMPs to be incorporated in NPDES permits violated the Clean Water Act. *Id.* at 502-03.

The Second Circuit in *Waterkeeper Alliance* also held that "the permitting scheme established by the CAFO Rule violates the Clean Water Act's public participation requirements." *Id.* at 503. Specifically, the court held that the rule "effectively shields the [NMPs] from public scrutiny and comment." *Id.* The court objected that U.S. EPA only "expect[ed]" NMPs to be publicly available and that the regulation did not require that they be made publicly available. *Id.* Central to the court's opinion was that the NMPs, by containing the land application rates that

govern the nature of permittees' discharges, constituted the core effluent limitations by which permittees would manage and restrict discharges associated with permitted activities. *See id.* at 502 ("There is no doubt that under the CAFO Rule, the only restrictions actually imposed on land application discharges are those restrictions imposed by the various terms of the [NMP], including the waste application rates developed by the Large CAFOs pursuant to their [NMPs]. Indeed, the requirement to develop a [NMP] constitutes a restriction on land application discharges only to the extent that the [NMP] actually imposes restrictions on land application discharges."). Thus, failing to incorporate such effluent limitations into NPDES permits denied the public the opportunity to provide meaningful comment, and failing to make NMPs publicly available compromised the public's ability to bring citizen suits. *Id.* at 503-04.

Here, chloride-conductivity calibration curves will be reviewed and approved by the Agency and will be available to the public, so *Waterkeeper Alliance* is simply inapplicable. Much more instructive is *Black Warrior Riverkeeper*, involving the Alabama Department of Environmental Management ("ADEM")'s issuance of two individual NPDES permits regulating stormwater discharges from two steel galvanizing plants operated by the permittee. *See* 2022 Ala. Civ. App. LEXIS 17, at *3-*5. For water quality based effluent limitations, both permits required the development of zinc-minimization plans ("ZMPs") within 90 days of the effective date of the permits. *Id.* at *7. The ZMPs required the permittee to develop "a report identifying the potential sources of zinc in the storm-water runoff from the plans and to propose a method of reducing the impact of those sources." *Id*. The report was also required to "include an evaluation of the use of both structural and non-structural controls to minimize the levels of zinc in the discharge" and to provide "an estimate of the anticipated zinc reduction as a result of the implementation of the

controls identified" in the report. *Id.* at *8. The reports were subject to review and approval by ADEM, and the permittee was required to implement the report within 180 days of approval. *Id*.

An environmental group challenged the permits' ZMP provisions, arguing that, "by failing to flesh out the effluent limitations in the permits and deferring development of key permit conditions until after the close of the normal permit development process, ADEM has denied the public its full right to participation in the development of permit standards and effluent limitations." *Id.* at *20. On appeal, the Court of Civil Appeals of Alabama upheld the ZMP provisions of the permits. The court distinguished *Waterkeeper Alliance* on multiple grounds, including that it involved a challenge to a regulation rather than to an individual permit decision, that the regulation created a permitting scheme allowing CAFOs to develop their own numerical effluent limitations, and that the numerical limits were to be developed after issuance of NPDES permits without any review by the public or the permitting authority. *Id.* at *23-*24. In contrast, the challenged permits in *Black Warrior Riverkeeper* did not require the permittee "to provide a certain numerical limitation," set forth what was required in the ZMPs and were available for public review and comment, and required review and approval by the permitting authority prior to implementation. *Id.* at *24-*25. The court concluded that the environmental group failed to show that ADEM had violated Alabama's NPDES public participation provisions. *Id.* at *26 ("Further specificity was simply not required by statute or regulation."). *Compare* Ala. Admin. Code r. 335-6-6-.21 *with* 35 Ill. Adm. Code 309.109.

Petitioners' challenge to the calibration curves required by Special Condition 15 is far more similar to the challenged permits in *Black Warrior Riverkeeper* than the U.S. EPA regulation invalidated in *Waterkeeper Alliance*. Petitioners challenge a State-issued individual NPDES permit and not a regulation promulgated by U.S. EPA governing permitting requirements and

effluent guidelines for an entire industry of dischargers. The calibration curves required by Special Condition 15 are subject to review and approval by the Agency prior to discharge and must be periodically reviewed and approved thereafter. Since the calibration curves must be submitted to and approved by the Agency, they will be publicly available documents. *See Waterkeeper Alliance*, 399 F.3d at 503 ("the Rule provides only that a 'copy of the CAFO's site-specific [NMP] must be maintained on site and made available to the Director . . . upon request.'"). The calibration curves do not constitute numeric effluent limitations on Williamson's discharge. Moreover, the requirement to develop calibration curves was incorporated in the Permit and subject to public review and comment, as evidenced by Petitioners' objections regarding the variability of conductivity. (Petitioners' Memorandum, at 26). The Agency therefore met all applicable public participation requirements.

2. The Permit Contains Effluent Limitations for Outfall 011

Contrary to Petitioners' assertions, Special Condition 15 of the Permit contains effluent limitations for chloride, sulfate, nickel, copper, and iron (dissolved). Special Condition 15 of the Permit prohibits discharges not meeting Part 302 water quality standards unless sufficient flow exists in the receiving stream to ensure that water quality standards will be met beyond the mixing zone. (AR at R00027). Thus, any discharge from Outfall 011 that causes or contributes to an exceedance of the numeric water quality standards for chloride, sulfate, nickel, copper, and iron (dissolved) beyond the edge of the mixing zone is prohibited.

To implement these effluent limitations, the Permit provides an equation to calculate chloride concentrations at the edge of the mixing zone and requires monitoring of all variables necessary to calculate such downstream concentrations. (*Id*.) As demonstrated by the Administrative Record, the instream dilution required for chloride discharges far exceeds the

dilution required for sulfate, nickel, copper, and iron (dissolved). (AR at R05972). Therefore, compliance with the Permit's effluent limitation for chloride at the edge of the mixing zone ensures that there is no reasonable probability that sulfate, nickel, copper, and iron (dissolved) water quality standards will be violated. Moreover, even though compliance with the effluent limitation for chloride ensures that water quality standards for sulfate, nickel, copper, and iron (dissolved) will not be violated, the Permit includes additional monitoring for these parameters. Special Condition 15 of the Permit requires that effluent concentrations of sulfate and iron (dissolved) be measured three times per week when Outfall 011 is discharging, and Special Condition 18 of the Permit requires that Outfall 011 effluent concentrations of copper and nickel be measured once per month for the first year and twice per year thereafter. (AR at R00027-R00029). In addition, Special Condition 16(b) of the Permit requires three samples of sulfate, nickel, copper, and iron (dissolved) be collected taken within 10 feet downstream of the edge of the mixing zone per week.[2] (AR at R00028).

Petitioners' objection—and the confusing theory crafting that accompanies it—is premised entirely on Petitioners' reliance on *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 808 F.3d 556 (2d Cir. 2015), and *Prairie Rivers Network v. Illinois Pollution Control Board*, 2016 IL App (1st) 150971, for the essential premise that the Agency "cannot set effluent limits simply by telling the permittee not to violate water quality standards." However, the Permit's effluent limitation for Outfall 011 does not consist of a simple prohibition of water

[2] Petitioners contend that "[e]xcept perhaps with regard to chloride, it is impossible to discern how the public will determine if there has been a violation without filing a Freedom of Information Act request and conducting a scientific investigation." (Petitioners' Memorandum, at 29). However, pursuant to Special Conditions 3, 4, and 5 and Standard Condition 12(e)(1) of the Permit, effluent and instream data for sulfate, nickel, copper, and iron (dissolved) will be submitted to the Agency and available for public inspection. (AR at R00025, R00031).

quality standard violations, and the cases cited by the Petitioners support the effluent limitation incorporated into the Permit.

In *Natural Resources Defense Council*, environmental groups challenged a general permit issued by U.S. EPA regulating ship ballast water discharges. *See* 808 F.3d at 567-70. The challenged general permit contained a condition requiring that permittees' discharges "must be controlled as necessary to meet applicable water quality standards." *Id.* at 578. The court held that this general permit condition did not ensure compliance with water quality standards because it "is insufficient to give a shipowner guidance as to what is expected or to allow any permitting authority to determine whether a shipowner is violating water quality standards." *Id*. Crucially, the general permit condition consisted solely of the requirement that discharges "be controlled as necessary to meet applicable water quality standards" and failed to state "how [it] will ensure compliance" with such standards. *Id*. The court's opinion does not prohibit the incorporation of water quality standards into an effluent limit; rather, it requires that an effluent limit articulate specific actions, practices, or procedures that ensure compliance with water quality standards. *See id*. 578-79. In accord with the court's opinion, the Permit contains ample instruction and requires sufficient data collection to guide Williamson on how to comply with water quality standards and to inform the Agency if and when water quality standards are violated.

In *Prairie Rivers Network*, the Illinois Appellate Court—relying on the *Natural Resources Defense Council* decision—held that a special condition prohibiting discharges from causing or contributing to violations of water quality standards "gave no guidance as to what was expected from the [permittee], nor did it allow the IEPA to determine whether the [permittee] was violating water quality standards." 2016 IL App (1st) 150971, ¶ 41. Notably, the court held that this permit condition was insufficient as it related to prohibiting violations of ***narrative*** water quality standards

caused by a pollutant for which (1) there was no numeric water quality standard and (2) the derived numeric limit effluent limit incorporated into the permit was held invalid. *See id.* ¶ 35. Thus, the special condition was insufficient to the extent that it simply prohibited the permittee from causing or contributing to "sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin" without guiding the permittee's conduct or allowing the Agency to identify violations. *See* 35 Ill. Adm. Code 302.203. Here, the Board has promulgated ***numeric*** water quality standards for chloride, sulfate, nickel, copper, and iron (dissolved); the Permit provides extensive guidance to Williamson on how to operate its discharge in compliance with those standards; and the Agency will be able to identify violations based on extensive monitoring and reporting requirements.

3. Special Condition 16(c), (d), and (e) of the Permit Are a Valid Exercise of the Agency's Authority to Impose Reasonable Conditions Related to Past Compliance History

As explained in the Agency's Motion for Summary Judgment ("Agency's Motion"), Special Conditions 16(c), (d), and (e) are intended to operate as an automatic cease-and-desist provision. (Agency's Motion, at 8). These provisions were incorporated into the Permit pursuant to the Agency's authority under Section 39(a) of the Act, 415 ILCs 5/39(a) (2020), to impose reasonable conditions related to an applicant's past compliance history. (AR at R00052). Moreover, they are not the Permit's primary effluent limitation on Outfall 011 discharges; those limitations are contained in Special Condition 15, as described above. Thus, were Special Condition 16(c), (d), and (e) removed from the Permit, the Permit would still contain effluent limitations ensuring that water quality standards are met beyond the mixing zone.

Petitioners object that once the automatic cease-and-desist is triggered, Williamson can resume the discharge upon a showing that water quality standards "can be met." (Petitioners'

Memorandum, at 29-30). Petitioners argue that a showing under this standard could consist solely of Williamson "reaffirming what [the Agency] already believes and explaining that the substantial and extended violations 10 feet below the mixing zone were due to operator error or bad luck." (*Id.* at 30). By definition, these automatic cease-and-desist provisions will not come into effect unless the discharge is conducted in fundamental noncompliance with the effluent limitations contained in Special Condition 15. The Petitioners' concern that the Agency would simply rubberstamp resumption of the discharge is thus unwarranted. Rather, the Agency would not approve resumption of the discharge until Williamson demonstrates that the cause of its inability to comply with Special Condition 15 has been rectified.

4. The Act Does Not Require Third-Party Monitoring

Section 39(a) of the Act states that, "[i]n granting permits, the Agency may impose reasonable conditions specifically related to the applicant's past compliance history with this Act as necessary to correct, detect, or prevent noncompliance." 415 ILCS 5/39(a) (2020). From this statutory language, Petitioners conclude that the Act "plainly requires that there be monitoring in addition to self-reporting." (Petitioners' Memorandum, at 30). Petitioners go one step further and argue that "[t]he Permit should clearly include a provision requiring the Permittee to pay the United States Geological Survey, the Illinois State Water Survey or some other disinterested party to conduct continuous monitoring at the edge of the mixing zone and below the Pond Creek discharge for every parameter that might be affected by the operation of the Pond Creek coal mine." (*Id.* at 31).

Petitioners do not explain, as a matter of statutory construction, how the General Assembly's grant of authority to the Agency in Section 39(a) translates into a requirement of third-party monitoring. The language of Section 39(a) grants discretionary authority in the Agency to

impose additional conditions on a permittee based on past noncompliance. *See, e.g., People v. Robinson*, 217 Ill. 2d 43, 53 (2005) ("Legislative use of the word 'may' is generally regarded as indicating a permissive or directory reading, whereas use of the word 'shall' is generally considered to express a mandatory reading."). As noted above, the Agency used this discretion to incorporate automatic cease-and-desist provisions in Special Condition 16(c), (d), and (e). The entire National Pollutant Discharge Elimination System—not just in Illinois, but nationally—is fundamentally premised on self-monitoring and self-reporting. Petitioners fail to cite any authority that Section 39(a) requires the Agency to impose any specific conditions through its permitting process, let alone to make an exception to this fundamental premise of the NPDES program.

B. The Permit Protects Existing Uses in the Big Muddy River

At the heart of this matter, Petitioners are unhappy with the Board's statewide water quality standard for chloride. Petitioners argue that the general use water quality standard of 500 milligrams per liter ("mg/L") for chloride is "grossly inadequate to protect the designated use of the Big Muddy for aquatic life." (Petitioners' Memorandum, at 32). Petitioners implore the Agency to seek out alternative water quality standards for chloride, such as federal recommended chloride criteria or a total dissolved solids ("TDS") standard. (*Id.*; Petition for Review, ¶ 11). In addition to directly decrying the obsolescence of the chloride water quality standard, Petitioners seek to compel the Agency to revisit the standard by reassessing chloride's "cumulative, interactive effects with numerous pollutants." (Petitioners' Memorandum, at 32). Specifically, Petitioners state that discharges of chloride, sulfate, and heavy metals in concentrations below State numeric criteria will favor development of cyanobacteria. (*Id*. at 33; Petition for Review, ¶ 12). Petitioners also contend that chloride and sulfate discharges will release mercury contained within the sediment, requiring a Williamson-specific chloride limit as low as 31 mg/L. (Petitioners' Memorandum, at

34). The common thread tying together Petitioners arguments is that the Board's water quality standard for chloride is woefully inadequate, and—absent Board action to update the standard—the Agency must take the initiative and impose heightened chloride standards to protect existing uses through the NPDES permitting program it administers.

However, the Act does not authorize the Agency to reassess the Board's judgment with respect to water quality standards. The Act delegates authority to the Board to promulgate regulations establishing the State's water quality standards. *See* 415 ILCS 5/13(a)(1), 27 (2020). This authority extends to site-specific water quality standards. *See, e.g.,* 35 Ill. Adm. Code Part 303. Additionally, the Board is empowered to adopt adjusted standards—standards that are different from standards of general applicability—upon a petitioner's request and an adjudicatory determination. *See* 415 ILCS 5/28.1 (2020). In turn, the Act authorizes the Agency to issue permits, including NPDES permits, upon a showing from an applicant that permitted operations will not cause violations of the Act or the Board's regulations. *See* 415 ILCS 5/39(a) (2020). The Board's regulations require that permits contain, *inter alia*, limits necessary to meet water quality standards, 35 Ill. Adm. Code 309.141(d), and protect existing uses, 35 Ill. Adm. Code 302.105(a), (c)(2).

Section 302.202 of the Board's regulations states that the "General Use standards ***will protect*** the State's water ***for aquatic life*** . . . , wildlife, agricultural use, secondary contact use and most industrial uses and ***ensure the aesthetic quality of the State's aquatic environment***." 35 Ill. Adm. Code 302.202 (emphasis added). The Board has adopted numeric water quality standards for chloride, sulfate, iron (dissolved), nickel, and copper. *See* 35 Ill. Adm. Code 302.208(e), (g), (h). The Board has also adopted a numeric water quality standard for mercury. *See* 35 Ill. Adm. Code 302.208(f).

The Board adopted the current numeric water quality standard for chloride in 1972, predating even the U.S. Environmental Protection Agency's initial approval of the State's NPDES program in 1977. *In the Matter of Water Quality Standards Revisions*, PCB R71-14 (Mar. 7, 1972), at 6. Given the Board's judgment that the chloride water quality standard is protective of Illinois waters, Petitioners' direct attack on the standard must fail. The Agency, in issuing permits to individual dischargers, may not simply choose to ignore a numeric standard adopted by the Board because Petitioners believe that federal recommended criteria instead should apply to a specific discharger. More appropriately, Petitioners should petition the Board to amend the chloride water quality standard. The Agency also may not simply substitute a TDS standard for the chloride standard. The Board has previously determined that the sulfate and chloride water quality standards "adequately address toxicity of dissolved salts" and that "a TDS standard is not necessary." *In the Matter of: Triennial Review of Sulfate and Total Dissolved Solids Water Quality Standards*, R07-9 (Sept. 20, 2007), at 26.

The information introduced by Petitioners into the record does not justify diverging from decades of regulatory and permitting consistency. Even the scant citations in Petitioners' brief demonstrate that the "science developed in the past decade" regarding protective chloride levels is far from settled. (Petitioners' Memorandum, at 32). As the sole support in its Argument for the inadequacy of the Board's five-decade-old numeric water quality standard for chloride, Petitioners cite to a YouTube video that is not part of the administrative record. (*Id.* at 32 n.21). At 1:09 in the video, the speaker, describing a chloride research project in Illinois, states that: "Based on ***some*** of the data the we've collected, we've ***started to think*** that ***maybe*** the current Illinois water quality standard of 500 milligrams per liter is ***possibly*** not as protective enough to maintain healthful aquatic communities." (*Id.*) (emphasis added). To the extent the Board were even to consider the

video, it undercuts Petitioners' argument that "the Illinois chloride standard is far from protective as was shown by much evidence in the record." (*Id*. at 32). Again, if the Board's chloride standard is revisited, it should be in a rulemaking proceeding of general applicability, based on sworn testimony, not in the permitting process, based on extra-record YouTube videos.

Petitioners' arguments with respect to "cumulative, interactive effects" call for the Agency to effectively set site-specific water quality standards for chloride, sulfate, and heavy metals in a broad subset of waters to which general use numeric water quality standards apply. Petitioners argue that—because the receiving stream is impaired for mercury and water segments miles downstream are impaired for dissolved oxygen (and, according to Petitioners, phosphorus)—the Agency must set effluent limits for chloride, sulfate, and "heavy metals" at levels far below the general use numeric water quality standards for such parameters due to their general interactive effect with ambient stream conditions.[3] (*Id.* at 33-34; Petition for Review, ¶ 12). In Illinois, there are hundreds of stream segments impaired for dissolved oxygen, phosphorus, or mercury. *See* 2020/2022 Illinois Integrated Water Quality Report and Section 303(d) List, Appendix A-1.[4] According to Petitioners, in any proposed discharge upstream of such stream segments, the Agency must ignore the Board's general use numeric water quality standards for chloride, sulfate, and heavy metals—set by the Board to be protective of existing uses—and set effluent limits at levels that will ensure some alternate numeric standard is met. Petitioners make these arguments based on generalized scientific assessments of instream chemistry that would similarly apply to hundreds of stream segments in Illinois. With regard to cyanobacteria, Petitioners identify no evidence in

[3] Notably, the Administrative Record supports the Agency's conclusion that there is no reasonable probability that discharges of mercury or phosphorus from Outfall 011 will cause or contribute to violations of water quality standards. (AR at R00412, R00423, R00434, R00445, R00456, R00467, R00478, R00489, R00500, R01296-R01301, R21204-R21265).

[4] *Available at* https://www2.illinois.gov/epa/topics/water-quality/watershed-management/tmdls/Documents/A1_Streams_FINAL_5-26-22.pdf.

the Administrative Record that would indicate blue-green algal blooms are occurring downstream of the discharge. The Agency cannot ignore the Board's general use numeric water quality standards and incorporate site-specific standards based on the arguments made by Petitioners; rather, such arguments more appropriately would be presented to the Board in a petition to amend the Board's standards.

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

Petitioners contend that the Agency's antidegradation analysis for the Outfall 011 discharge failed to assure that "[a]ll technically and economically reasonable measures to avoid or minimize the extent of the proposed increase in pollutant loading have been incorporated into the proposed activity" and "[t]he activity that results in an increased pollutant loading will benefit the community at large." (Petitioners' Memorandum, at 35-36); 35 Ill. Adm. Code 302.105(c)(2)(B)(iii), (iv). Petitioners misread the record and fail to support their arguments with any on-point legal authority.

With respect to alternatives to the Outfall 011 discharge (35 Ill. Adm. Code 302.105(c)(2)(B)(iii)), Petitioners focus exclusively on the alternatives analysis Williamson submitted in connection with its Permit application. (AR at R08324-R08337, R08341-R08354). Petitioners argue the Agency relied uncritically on this analysis and, in doing so, failed to evaluate the costs of alternative treatment technologies or to analyze the possibility of combining multiple alternatives. (Petitioners' Memorandum, at 35-36).

Petitioners are wrong on multiple counts. The Agency did not rely exclusively on the initial alternatives analysis, but also on a supplemental analysis that Williamson submitted in December 2019. (AR at R00087, R05887-R05894). The supplemental analysis provided additional information on the costs of alternatives, including for: (i) reverse osmosis used in conjunction with

deep well injection and with crystallization (AR at R05890-R05891); (ii) deep well injection of mine infiltration water (AR at R05892); (iii) evaporation—which, it was concluded, would need to be used in conjunction with deep well injection or crystallization (AR at R05893); and (iv) crystallization as a standalone treatment (AR at R05894). In short, the Agency received and considered the information Petitioners claim is lacking in the record.

Even putting aside the supplemental analysis, Petitioners misread the initial alternatives analysis submitted by Williamson. (AR at R08324-R08337, R08341-R08354). Petitioners submit that this analysis relied "in large part on [a forty-year-old] IPCB opinion on the costs of alternatives"; it did not. (Petitioners' Memorandum, at 35) (citing AR at R08328). The analysis cited to evidence introduced in four separate Board proceedings, including as recently as 2012, for the proposition that reverse osmosis treatment of the full Outfall 011 discharge would not be practicable. (AR at 08328-R08329). Petitioners also assert that the analysis did not provide any details on the potential efficacy of constructed wetlands to address the proposed Outfall 011 discharge; it did. The analysis stated that pilot wetlands at two other mines had design treatment of less than 100 gallons per minute (or less than 144,000 gallons per day)—a small fraction of the contemplated Outfall 011 discharge. (AR at 08337). Both the original and supplemental alternatives analyses support the Agency's conclusion that there are no additional "technically and economically reasonable measures" to avoid the Outfall 011 discharge. 35 Ill. Adm. Code 302.105(c)(2)(B)(iii).

With respect to the supposed lack of benefits to "the community at large" associated with the Outfall 011 discharge (35 Ill. Adm. Code 302.105(c)(2)(B)(iv)), Petitioners include in their Argument two cursory sentences, with no supporting legal authority. (Petitioners' Memorandum, at 36). Petitioners therefore have forfeited this issue.

> A reviewing court is not simply a depository into which a party may dump the burden of argument and research. . . . A court of review is entitled to have the issues clearly defined and to be cited pertinent authority. A point not argued or supported by citation to relevant authority fails to satisfy the requirements of Supreme Court Rule 341(h)(7), (i) . . . . Failure to comply with the rule's requirements results in forfeiture.

People ex rel. Ill. Dep't of Labor v. E.R.H. Enters., 2013 IL 115106, ¶ 56. Put another way by the Court: "Both argument and citation to relevant authority are required. An issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of [Rule 341]." *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010). The Board looks to Illinois Supreme Court Rules for guidance, including to Rule 341, in the absence of other controlling Board procedural rules. 35 Ill. Adm. Code 101.100(b); *City of Lake Forest v. IEPA*, PCB No. 92-36 (July 30, 1992), slip op. at 1 (citing Rule 341).

Petitioners' contentions with respect to impacts on "the community at large" are a "vague allegation of error" and cannot support reversal of the Agency's permitting decision. *Vancura*, 238 Ill. 2d at 370.[5] 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). The Agency evaluated the discharge's potential impacts on surface water quality and imposed appropriate permit conditions. *See* Sections II.A and II.B, above. Any issues related to mine subsidence are to be addressed by the Illinois Department of Natural Resources pursuant to the Surface Coal Mining Land Conservation and Reclamation Act, 225 ILCS 720/1.1 *et seq*. (2020). With respect to the climate impacts of continued mining operations, the Agency keenly shares Petitioners' concerns with climate change, but not Petitioners' apparent legal premise that the Board's regulations authorize the Agency to

[5] To the extent that Petitioners have included other undeveloped arguments within Petitioners' Motion and Petitioners' Memorandum, the Agency in response incorporates by reference its Motion for Summary Judgment, and notes that Petitioners have waived these issues by failing to properly argue them.

deny an NPDES permit application solely because the proposed discharge is connected with fossil fuel use. The Agency reasonably concluded all applicable antidegradation requirements were met. 35 Ill. Adm. Code 302.105(c)(2)(B)(iii), (iv).

III. CONCLUSION

For the reasons stated above, Petitioners' Motion for Summary Judgment is not supported by law or record evidence and fails to demonstrate that the Agency's issuance of the Permit violates the Act or the Board's regulations. The Board should deny Petitioners' Motion because the Administrative Record reasonably supports the Agency's issuance of the Permit.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
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CERTIFICATE OF SERVICE

I, Katie J. Johnson, certify that on the 4th day of November, 2022, I caused to be served by Electronic Mail the foregoing **Notice of Filing** and **Agency's Response to Petitioners' Motion for Summary Judgment** to the parties listed below:

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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.

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