BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCE DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK and SIERRA CLUB,	)	
Petitioners,	)	
v.	)	PCB No. 13-17 (Third-Party NPDES Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and DYNEGY MIDWEST GENERATION, INC.,	)	
Respondents.	)	

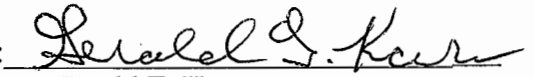
NOTICE OF ELECTRONIC FILING

TO: Attached Service List

PLEASE TAKE NOTICE that on April 21, 2014, I electronically filed with the Clerk of the Illinois Pollution Control Board, Respondent's, Illinois Environmental Protection Agency, Reply Memorandum of Law in Support of Respondent's Cross-Motion for Summary Judgment, a copy of which is attached and served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: 

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Dated: April 21, 2014

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CERTIFICATE OF SERVICE

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on this 21st day of April, 2014, I caused to be served electronically the attached Reply Memorandum of Law in Support of Respondent's Cross-Motion for Summary Judgment, upon the following persons:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCE DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK and SIERRA CLUB, Petitioners, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and DYNEGY MIDWEST GENERATION, INC., Respondents.	)	PCB No. 13-17 (Third-Party NPDES Permit Appeal)

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

NOW COMES, Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, ("Illinois EPA" or "Agency"), by and through, Lisa Madigan, Attorney General of the State of Illinois, and, for its reply in support of its cross-motion for summary judgment, again respectfully requests the Illinois Pollution Control Board ("Board") enter summary judgment in favor of the Illinois EPA and against the Petitioners, NATURAL RESOURCE DEFENSE COUNCIL, PRAIRIE REVIERS NETWORK and SIERRA CLUB ("Petitioners") in that there exist herein no genuine issues of material fact and that the Petitioners have failed to sustain their burden of proving that the NPDES permit, as issued, would violate the Act or Board regulations. Therefore, Illinois EPA is entitled to judgment as a matter of law, the NPDES permit should be upheld and Petitioners' motion for summary judgment should be denied.

I. INTRODUCTION

Before moving into the substance of its reply, it is worth repeating the burden of proof applicable in this situation. Section 40(e)(3) of the Illinois Environmental Protection Act ("Act")

provides that the burden of proof shall be on the petitioner in third-party NPDES permit appeals such as this. 415 ILCS 5/40(e)(3) (2012). In the context of a third party appeal, the Board is reviewing the issuance of a permit. Thus, this review is similar to a review of contested conditions. In the case of a permit issued with conditions, the Board must determine that as a matter of law the application as submitted to the IEPA demonstrates that no violations of the Act or Board rules will occur if the requested permit is issued. Jersey Sanitation v. IEPA, PCB 00-82 (June 21, 2002) *aff'd* IEPA v. Jersey Sanitation and PCB, 336 Ill. App. 3d 582, 784 N.E.2d 867 (4th Dist. 2003). Therefore, the Board will look at the language of the permit and the entire record to determine if the permit as issued violates the Act or Board regulations. The Board will not limit the review of the IEPA's decision to reasoning articulated in one document in the record. To limit the Board's review in such a manner ignores the substantial case law, which establishes that the Board reviews the IEPA's decision based on the record before the IEPA. *See e.g.,* Jersey Sanitation PCB 00-82; Browning-Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (2nd Dist. 1989); John Sexton Contractors Company v. Illinois (Sexton), PCB 88-139 (Feb. 23, 1989). Des Plaines River Watershed Alliance, et al. v. IEPA and the Village of New Lenox, PCB 04-88, pg. 14-15, April 19, 2007.

Petitioners spend so much effort discussing what is not in the record that they ignore what is in the record. The permit and the record as a whole demonstrate that the permit as issued does not violate the Act or the Board regulations and as such Petitioners have failed in meeting the burden required to have the permit remanded to the Agency.

II. REASONABLE POTENTIAL TO EXCEED ANANLYSIS

Petitioners would appear to argue that the Agency ignored its obligations and is creating unwritten exceptions to the NPDES permitting process. (Pet. Reply, Pg. 5).[1] The Agency is not

[1] Reference to the Petitioners Reply filed in this matter will be as follows: (Pet. Reply, Pg.___).

relying on unwritten discretion, acting irrationally or even nonsensical as Petitioners characterize the Agency's conduct in issuing this permit. (Pet. Reply, Pgs. 5 and 7). To the contrary, the Agency was following the prescribed regulations. In fact the Board's NPDES regulations specifically provide in part:

> **Section 309.141 Terms and Conditions of NPDES Permits**
>
> In establishing the terms and conditions of each issued NPDES Permit, the Agency shall apply and ensure compliance with all of the following, whenever applicable:
>
> (h) 3) Reasonable potential to exceed.
>
> A) The first step in determining if a reasonable potential to exceed the water quality standard exists for any particular pollutant parameter is the estimation of the maximum expected effluent concentration for that substance. That estimation will be completed for both acute and chronic exposure periods and is termed the PEQ. The PEQ shall be derived from representative facility-specific data…

35 Ill. Adm. Code §309.141(h) 3). Set out in the Board's regulations is the requirement that any potential to exceed analysis be based on "facility-specific data". For the Petitioners to claim that the Agency has created an unwritten exception in the face of this regulation tests the grounds of rationality. Thus monitoring for the life of the permit was a reasonable permit condition. More importantly, in reply to the Petitioners argument that the Agency should have conducted a potential to exceed analysis is that as the Agency's Responsiveness Summary made quite clear that "All water quality standards will continue to be met in the Illinois River." (R. 678). [2]

Further, the reference to the Met-South Responsive Summary is not meant to introduce extra record information it was only meant as a point of illustration that the Agency requires "facility-specific data" to conduct the potential to exceed analysis. Whereas the Agency's

[2] Reference to the Agency Administrative Record filed in this matter will be as follows: (R.___).

emphasis on striking references to the draft ELG was that it did not exist at the time of permitting, so logically it cannot be part of the Agency Record.

Additionally, as argued in the Agency's initial memorandum the Petitioners reliance on the e-mail exchange between Marcia Whillhite and Bob Mosher is disingenuous. The decision to require monitoring was not arbitrary. There was no available date for the permitees site and the data from the other site was unclear. The Agency was not making any assumptions; it was requiring monitoring to allow the Agency to develop facility-specific data, as required by the regulations. In light of the requirement for facility-specific data it is hard to fathom how this conduct is irrational. (Pet. Reply, Pg. 8).

For these reasons the Petitioners first argument for remand must fail. The Administrative Record supports the Agency's decision, Petitioners have failed to meet their burden that granting of this permit would result in a violation of the Act or the Board's regulations. As such denial of the Petitioners' summary judgment and the granting of the Agency's cross-motion for summary judgment is appropriate. The Agency's grant of Dynegy's NPDES permit should be upheld

III. ANTIDEGRADTION

Petitioners argue that the Agency has flouted and glossed over the Board's Antidegradation requirements. (Pet. Reply, Pg. 16). Such argument ignores that review of the available materials contained in the Administrative Record, the explanation provided by the Agency in the Responsiveness Summary (R. 546) and the modification of the permit after the public hearing.

The Board's Antidegradation Regulations state as follows:

> C) Utilize the following information sources, when available:
>
> i) Information, data or reports available to the Agency from its own sources;
>
> ii) Information, data or reports supplied by the applicant;

iii) Agency experience with factually similar permitting scenarios; and

iv) Any other valid information available to the Agency.

35 Ill. Adm. Code §302.105(c)(2)(C). Nowhere does it say that the Agency must obtain information from each of the enumerated areas, nor does the Petitioner offer any legal argument that the Agency must do so. The sliding scale refers to the language, "The Board indicated that implementation procedures for antidegradation reviews should allow the Agency to decide on a case-specific basis what level of review is appropriate." In the Matter of: Revisions to the Antidegradation Rules, PCB R01-13, at Pg. 3, February 21, 2002. What this language means is that in some cases there will be a robust level of review and other cases, the Agency's review can slide down to a less robust level of review. That is exactly what took place in this instance. And again it bears repeating that the Antidegradation Analysis is to be utilized when there is an increased loading of pollutants. 35 Ill. Adm. Code §302.105(f). The Agency found that, "Whatever low levels that are discharged from the ash pond represent a decrease loading to the environment. (R. 602).

For these reasons the Petitioners second argument for remand must also fail. The Administrative Record supports the Agency's decision, Petitioners have failed to meet their burden that granting of this permit would result in a violation of the Act or the Board's regulations. As such denial of the Petitioners' summary judgment and the granting of the Agency's cross-motion for summary judgment is appropriate. The Agency's grant of Dynegy's NPDES permit should be upheld.

IV. BEST PROFESSIONAL JUDGMENT

Petitioners spend a very small portion of their brief refuting the Agency's position that it did properly exercise its Best Professional Judgment ("BPJ"). The reason for this is obvious; the

Agency has discretion on this point, Petitioners offer no legal precedent for their statement that Board's effluent limits do not constitute BAT and the Board has stated to the contrary. (Pet. Reply, Pg. 35). The ability to determine BAT on a case-by-case basis allows the Agency to imposing a monitoring requirement in Dynegy's permit. The purpose of the monitoring is to determine whether Dynegy's discharge exceeds any state-wide water quality standard (which is significantly lower than the state-wide effluent limit) or effluent limit for mercury. As pointed out in the Agency's opening brief, US EPA found such an approach acceptable. (R. 634).

Additionally, as set out in the Agency's opening memorandum, the Agency concluded, that mercury is not anticipated to increase in concentration in the discharged effluent and due to the permits monitoring requirement the Agency will be alerted to concentration increases above the water quality standard. (R. 684). It is not the monitoring that is the TBEL as the Petitioners argue (Pet. Reply, Pg. 35), it is the technology based limits contained in the Board's effluent limits found at 35 Ill. Adm. Code, Part 304 and the water quality standard for mercury found at 35 Ill. Adm. Code, Part 302. Specifically these limits are as follows, the effluent limit for mercury is 0.5 µg/l (35 Ill. Adm. Code §304.126(a)) and the water quality standard for mercury, which is set at 0.012 µg/l. 35 Ill. Adm. Code §302.208(f). Again it needs to be repeated, based on the information contained in the Administrative Record the Agency concluded that, "All water quality standards will continue to be met in the Illinois River." (R. 678).

For these reasons the Petitioners third argument for remand must also fail. The Administrative Record supports the Agency's decision, Petitioners have failed to meet their burden that granting of this permit would result in a violation of the Act or the Board's regulations. As such denial of the Petitioners' summary judgment and the granting of the Agency's cross-motion for summary judgment is appropriate. The Agency's grant of Dynegy's NPDES permit should be upheld.

V. RESPONSIVENESS SUMMARY

The Agency followed its own rules, provided a specific response, Petitioner is upset because it did not get the response it wanted. This is no reason to accuse the Agency of subterfuge. Petitioner would appear to be confusing the Board's role in an enforcement action with it role in a permit appeal. The instant proceeding is a permit appeal in which the Petitioners bear the burden of proof. The Board must determine that as a matter of law the application as submitted to the IEPA demonstrates that no violations of the Act or Board rules will occur if the requested permit is issued. The Responsiveness Summary, as set out in the Agency's opening brief cited to numerous instances where the Agency specifically addressed the comments and the reasons why it was issuing the permit. (See Responsiveness Summary responses No. 2, 7, 8, 9, 13, 14, 33 and 55; R. 677, 678, 679, 680, 684 and 688).

Petitioners argue and cite many cases that the Agency must follow its rules, the Agency did follow its rules and did respond specifically, again the Petitioners issue is, it did not like the responses it received. For these reasons the Petitioners final argument for remand must also fail. The Administrative Record supports the Agency's decision, Petitioners have failed to meet their burden that granting of this permit would result in a violation of the Act or the Board's regulations. As such denial of the Petitioners' summary judgment and the granting of the Agency's cross-motion for summary judgment is appropriate. The Agency's grant of Dynegy's NPDES permit should be upheld.

VI. CONCLUSION

For the foregoing reasons and those arguments made in the Agency's Memorandum in Support of its Cross-Motion for Summary Judgment, Illinois EPA asks the Board enter an order granting its Cross-Motion for Summary Judgment, denying Petitioners' Motion for Summary

Judgment and in that there exist herein no genuine issues of material fact and that the Petitioners have failed to sustain their burden of proving that the NPDES permit, as issued, would violate the Act or Board regulations, Illinois EPA is entitled to judgment as a matter of law and the NPDES permit should be upheld.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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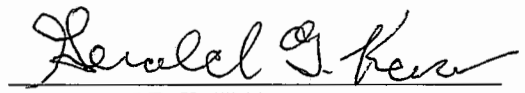
By: 

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