

**No. 1-15-0971
APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT**

FROM THE ILLINOIS POLLUTION CONTROL BOARD

PRAIRIE RIVERS NETWORK,)	
NATURAL RESOURCES DEFENSE)	Petition for Review of an
COUNCIL, SIERRA CLUB,)	Order of the Illinois Pollution
ENVIRONMENTAL LAW & POLICY)	Control Board
CENTER, FRIENDS OF THE CHICAGO)	
RIVER and GULF RESTORATION)	
NETWORK)	
)	
v.)	
)	
ILLINOIS POLLUTION CONTROL BOARD,)	Pollution Control Board
a state agency, ILLINOIS ENVIRONMENTAL)	14-106, 107, 108
PROTECTION AGENCY, a state agency,)	
and METROPOLITAN WATER)	
RECLAMATION DISTRICT OF GREATER)	
CHICAGO, a state agency,)	
)	
Respondents.)	

BRIEF OF PETITIONERS

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NATURE OF THE CASE

This matter is an appeal from an order of Respondent Illinois Pollution Control Board (PCB) granting the motions for summary judgment of Respondents Illinois Environmental Protection Agency (IEPA) and Metropolitan Water Reclamation District of Greater Chicago (MWRD) against citizen environmental organizations Prairie Rivers Network, Friends of the Chicago River, Natural Resources Defense Council, Gulf Restoration Network and Sierra Club (collectively, Citizens) concerning the Citizens' appeal to the PCB of permits issued by IEPA to MWRD. No jury verdict was involved, and no issues are raised on the pleadings.

IEPA issued National Pollution Discharge Elimination System (NPDES) Permits (the "Permits") to MWRD for discharges from three sewage treatment plants (the "Plants"), Calumet, O'Brien (formerly North Side) and Stickney on December 23, 2013. R. 19-44, 114-42, 208-30.¹ On January 27, 2014, the Citizens timely filed their petitions for review before the PCB ("Petitions"), alleging, *inter alia*, that IEPA in granting the Permits had violated 35 Ill. Adm. Code 304.105 and 35 Ill. Adm. Code 309.141(d)(1) and (2) and 35 Ill. Adm. Code 143(a) by failing to ensure that discharges of phosphorus from the Plants would not cause or contribute to violations of water quality standards—including standards regarding minimum dissolved oxygen levels, offensive conditions, and unnatural plant and algal growth; R. 1-68, 100-65, 195-260. The Citizens also

¹ Pages in the PCB's Administrative Record that was filed by Respondent PCB with the Court will be cited as R.___. Pages in the IEPA record that were originally filed with the PCB before being filed with the Court are paginated with their original IEPA pagination and will be cited as IEPA R.___. Where a record cite is included in Petitioners' Separate Appendix, it will be cited to its Appendix page number A.___ as well as to the PCB record.

alleged that IEPA had failed to respond to the Citizens' comments on certain issues in violation of federal requirements and state regulations. The PCB consolidated the appeals of the three permits. R. 98-9.

The parties cross-moved for summary judgment. R. 350-57, 392-408, 411-29.

On December 18, 2014, the PCB denied the Citizens' motion and granted the motions of IEPA and MWRD. A. 1-28, R. 508-35. The PCB denied the Citizens' motion for reconsideration on March 5, 2015. A. 67-78, R.625-36.

ISSUES PRESENTED FOR REVIEW

1. The record shows that IEPA has found that phosphorus pollution is a cause of impairments in waters that receive phosphorus from the permitted facilities, that IEPA did not study what levels of phosphorus cause violations of water quality standards in the receiving water bodies, and that IEPA selected a phosphorus limit of 1.0 mg/L for the Permits because that was the limit to which the discharger had agreed. On this record, did IEPA ensure that phosphorus discharges allowed by NPDES Permits would not cause or contribute to violations of the dissolved oxygen or unnatural plant and algal growth water quality standards as required by 35 Ill. Adm. Code 304.105, 309.141(d)(1) and 309.403(a)?

2. Is there evidence in the record showing that IEPA, as it was required to do by 40 C.F.R. 122.44(d) and 35 Ill. Adm. Code 309.141(d)(2), set a numeric permit limit that was stringent enough to ensure that discharges of phosphorus from the Plants would not cause violations of Illinois water quality standards?

3. Did the PCB err in not directing IEPA to at least require MWRD, as a condition of its permits, to perform studies to determine the proper limits on phosphorus discharges that should be set in the Permits?

4. Did the PCB err in declining to review IEPA's compliance with IEPA regulations that require IEPA to respond to all public comments received on a draft permit following a public hearing?

5. Did the PCB err in granting a motion for summary judgment without construing all facts in favor of the non-moving party?

STATEMENT OF JURISDICTION

The Illinois Environmental Protection Act provides that third parties such as Citizens may appeal decisions on NPDES permit applications by IEPA to the PCB, where the third party is so situated as to be affected by the permitted facility. 415 ILCS 5/40(e). In their petitions to the PCB, the Citizens set forth facts demonstrating that they, through their organizational members, have the requisite interest in the Plants and the water bodies they affect. R. 4-7, 100-06, 198-201.

Section 41(a) of the Illinois Environmental Protection Act provides that final PCB orders may be appealed directly to the Illinois Appellate Court. 415 ILCS 5/41(a). Sections 40(e) and 41(a) of the Act, along with Illinois Supreme Court Rule 335, Section 3-113 of the Administrative Review Law, and the timely-filed Petition for Review, confer jurisdiction upon the reviewing court to hear and decide the instant appeal. 415 ILCS 5/41(a) and 5/40(e); Ill. S. Ct. R. 335; 735 ILCS 5/3-113.

STATUTES, REGULATIONS, AND RELATED MATERIAL INVOLVED

The full text of the relevant statutes and regulations are included in the Appendix to this brief. Relevant excerpts are set forth below.

40 CFR § 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see §123.25).

In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318, and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

(iii) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.

(iv) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

(v) Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

(vi) Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of the following options:

(A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such a criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents; or

(B) Establish effluent limits on a case-by-case basis, using EPA's water quality criteria, published under section 304(a) of the CWA, supplemented where necessary by other relevant information; or

(C) Establish effluent limitations on an indicator parameter for the pollutant of concern, provided:

(1) The permit identifies which pollutants are intended to be controlled by the use of the effluent limitation;

(2) The fact sheet required by § 124.56 sets forth the basis for the limit, including a finding that compliance with the effluent limit on the indicator parameter will result in controls on the pollutant of concern which are sufficient to attain and maintain applicable water quality standards;

(3) The permit requires all effluent and ambient monitoring necessary to show that during the term of the permit the limit on the indicator parameter continues to attain and maintain applicable water quality standards; and

(4) The permit contains a reopener clause allowing the permitting authority to modify or revoke and reissue the permit if the limits on the indicator parameter no longer attain and maintain applicable water quality standards.

(vii) When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.

(2) Attain or maintain a specified water quality through water quality related effluent limits established under section 302 of CWA;

(3) Conform to the conditions to a State certification under section 401 of the CWA that meets the requirements of § 124.53 when EPA is the permitting authority. If a State certification is stayed by a court of competent jurisdiction or an appropriate State board or agency, EPA shall notify the State that the Agency will deem certification waived unless a finally effective State certification is received within sixty days from the date of the notice. If the State does not forward a finally effective certification within the sixty day period, EPA shall include conditions in the permit that may be necessary to meet EPA's obligation under section 301(b)(1)(C) of the CWA;

(4) Conform to applicable water quality requirements under section 401(a)(2) of CWA when the discharge affects a State other than the certifying State;

(5) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of CWA;

(6) Ensure consistency with the requirements of a Water Quality Management plan approved by EPA under section 208(b) of CWA;

(7) Incorporate section 403(c) criteria under part 125, subpart M, for ocean discharges;

(8) Incorporate alternative effluent limitations or standards where warranted by “fundamentally different factors,” under 40 CFR part 125, subpart D;

(9) Incorporate any other appropriate requirements, conditions, or limitations (other than effluent limitations) into a new source permit to the extent allowed by the National Environmental Policy Act, 42 U.S.C. 4321 et seq. and section 511 of the CWA, when EPA is the permit issuing authority. (See § 122.29(c)).

40 C.F.R. § 123.25(a)(31)

(a) All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(31) § 124.17(a) and (c)--(Response to comments);

40 C.F.R. § 124.17(a)

(a) (Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26(404), and 271.14 (RCRA).) At the time that any final permit decision is issued under § 124.15, the Director shall issue a response to comments. States are only required to issue a response to comments when a final permit is issued. This response shall:

(1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(2) Briefly describe and respond to all significant comments on the draft permit or the permit application (for section 404 permits only) raised during the public comment period, or during any hearing.

Illinois Environmental Protection Act, 415 ILCS 5/2 (b) & (c)

(b) It is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them.

(c) The terms and provisions of this Act shall be liberally construed so as to effectuate the purposes of this Act as set forth in subsection (b) of this Section, but to the extent that this Act prescribes criminal penalties, it shall be construed in accordance with the Criminal Code of 2012.

Illinois Environmental Protection Act, 415 ILCS 5/11(a), (b) & (c)

(a) The General Assembly finds:

(1) that pollution of the waters of this State constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish, and aquatic life, impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water, depresses property values, and offends the senses;

(2) that the Federal Water Pollution Control Act, as now or hereafter amended, provides for a National Pollutant Discharge Elimination System (NPDES) to regulate the discharge of contaminants to the waters of the United States;

(3) that the Safe Drinking Water Act (P.L. 93-523), as amended, provides for an Underground Injection Control (UIC) program to regulate the underground injection of contaminants;

(4) that it would be inappropriate and misleading for the State of Illinois to issue permits to contaminant sources subject to such federal law, as well as State law, which do not contain such terms and conditions as are required by federal law, or the issuance of which is contrary to federal law;

(5) that the Federal Water Pollution Control Act, as now or hereafter amended, provides that NPDES permits shall be issued by the United States Environmental Protection Agency unless (a) the State is authorized by and under its law to establish and administer its own permit program for discharges into waters within its jurisdiction, and (b) pursuant to such federal Act, the Administrator of the United States Environmental Protection Agency approves such State program to issue permits which will implement the provisions of such federal Act;

(6) that Part C of the Safe Drinking Water Act (P.L. 93-523), as amended, provides that the United States Environmental Protection Agency shall implement the UIC program authorized therein unless (a) the State is authorized by and under its law to establish and administer its own UIC program, and (b) pursuant to such federal Act, the Administrator of the United States Environmental Protection Agency approves such State program which will implement the provisions of such federal Act;

(7) that it is in the interest of the People of the State of Illinois for the State to authorize such NPDES and UIC programs and secure federal approval thereof, and thereby to avoid the existence of duplicative, overlapping or conflicting state and federal statutory permit systems;

(8) that the federal requirements for the securing of such NPDES and UIC permit program approval, as set forth in the Federal Water Pollution Control Act, as now or hereafter amended, and in the Safe Drinking Water Act (P.L. 93-523), as amended, respectively, and in regulations promulgated by the Administrator of the United States Environmental Protection Agency pursuant thereto are complex and detailed, and the General Assembly cannot conveniently or advantageously set forth in this Act all the

requirements of such federal Act or all regulations which may be established thereunder.

(b) It is the purpose of this Title to restore, maintain and enhance the purity of the waters of this State in order to protect health, welfare, property, and the quality of life, and to assure that no contaminants are discharged into the waters of the State, as defined herein, including, but not limited to, waters to any sewage works, or into any well, or from any source within the State of Illinois, without being given the degree of treatment or control necessary to prevent pollution, or without being made subject to such conditions as are required to achieve and maintain compliance with State and federal law; and to authorize, empower, and direct the Board to adopt such regulations and the Agency to adopt such procedures as will enable the State to secure federal approval to issue NPDES permits pursuant to the provisions of the Federal Water Pollution Control Act, as now or hereafter amended, and federal regulations pursuant thereto and to authorize, empower, and direct the Board to adopt such regulations and the Agency to adopt such procedures as will enable the State to secure federal approval of the State UIC program pursuant to the provisions of Part C of the Safe Drinking Water Act (P.L. 93-523), as amended, and federal regulations pursuant thereto.

(c) The provisions of this Act authorizing implementation of the regulations pursuant to an NPDES program shall not be construed to limit, affect, impair, or diminish the authority, duties and responsibilities of the Board, Agency, Department or any other governmental agency or officer, or of any unit of local government, to regulate and control pollution of any kind, to restore, to protect or to enhance the quality of the environment, or to achieve all other purposes, or to enforce provisions, set forth in this Act or other State law or regulation.

35 Ill. Adm. Code 304.105

In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard. When the Agency finds that a discharge which would comply with effluent standards contained in this Part would cause or is causing a violation of water quality standards, the Agency shall take appropriate action under Section 31 or Section 39 of the Act to require the discharge to meet whatever effluent limits are necessary to ensure compliance with the water quality standards. When such a violation is caused by the cumulative effect of more than one source, several sources may be joined in an enforcement or variance proceeding, and measures for necessary effluent reductions will be determined on the basis of technical feasibility, economic reasonableness and fairness to all dischargers.

35 Ill. Adm. Code 309.141(d)

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:

d) Any more stringent limitation, including those:

1) necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any Illinois statute or regulation (under authority preserved by Section 510 of the CWA),

2) necessary to meet any other federal law or regulation, or

3) required to implement any applicable water quality standards, such limitations to include any legally applicable requirements necessary to implement total maximum daily loads established pursuant to Section 303(d) of the CWA and incorporated in the continuing planning process approved under Section 303(e) of the CWA and any regulations or guidelines issued pursuant thereto;

35 Ill. Adm. Code 309.143

a) Effluent limitations must control all pollutant or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Agency determines are, or may be, discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality. When determining whether a discharge causes, has the reasonable potential to cause or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the Agency shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and, where appropriate, the dilution of the effluent in the receiving water.

35 Ill. Adm. Code 166.192(4) & (5)

a) Responsiveness summary shall be prepared by the Agency. The responsiveness summary shall include:

4) A summary of all the views, significant comments, criticisms, and suggestions, whether written or oral, submitted at the hearing or during the time the hearing record was open;

5) The Agency's specific response to all significant comments, criticisms, and suggestions;

STATEMENT OF FACTS

1. The Draft Permits and the Citizens' Comments

IEPA gave public notice of draft renewed NPDES permits in November 2009. IEPA R. 2015, 2506, 3043. Citizens submitted pre- and post-hearing comments in 2009 and 2010 on the Permits and testified at the public hearing on March 9, 2010. R. 46-52, 144-50, IEPA R. 2051-2062, 2520-2526, 3073-3080 (initial comments); IEPA R. 3399-3425, 3477-3494 (hearing testimony); R. 55-67, 152-63, IEPA R. 5365-5377 (post-hearing comments) (collectively, "Comments").

In their Comments, Citizens discussed, *inter alia*, how phosphorus pollution from the Plants is causing or contributing to non-compliance with applicable water quality standards. R. 48-51, IEPA R. 5370-1. The water quality standards cited were those involving (i) depression of dissolved oxygen levels below numeric levels prescribed in applicable water quality standards, and (ii) violation of the applicable narrative "offensive conditions" and "unnatural sludge" standards set forth at 35 Ill. Adm. Code 302.203 and 302.403, (hereinafter collectively "offensive conditions/unnatural growth standards") which prohibit, *inter alia*, plant or algal growth of other than natural origin.² R. 49, 60, 146, 157, IEPA R. 5370.

² The "offensive conditions" standard applies to general use waters, requiring them to be free from plant or algal growth of other than natural origin. 35 Ill. Adm. Code 302.203. The "unnatural sludge" standard applies to secondary contact and indigenous aquatic life waters, which must be free from unnatural plant or algal growth. 35 Ill. Adm. Code 302.403. Illinois' general use water quality standard for dissolved oxygen requires maintenance of oxygen concentrations to protect aquatic life in most Illinois waters. 35 Ill. Adm. Code 302.206. Illinois' dissolved oxygen standards for secondary contact and indigenous aquatic life waters set minimum thresholds for dissolved oxygen for certain Chicago area waters. 35 Ill. Adm. Code 302.405.

The Citizens objected to the lack of phosphorus and nitrogen limits in the permits necessary to prevent these water quality standards violations, based upon requirements in the Clean Water Act (33 U.S.C. § 1312) and Illinois law (35 Ill. Adm. Code 304.105, 309.141(d)(1) and (2), & 309.143(a)) that such limits be included. The Citizens asked that water quality-based effluent limits (“WQBELs”) be established in permits at levels that are sufficiently stringent to prevent such violations, as required by law. IEPA R. 3398-425, 5365-77. The Citizens further requested in the alternative that, if IEPA did not place enforceable numeric limits on phosphorus and nitrogen discharges in the Permits that were sufficiently stringent to prevent violations of water quality standards, IEPA at least should require that studies be done to determine the proper limits on phosphorus and nitrogen discharges in the future. R. 62-3, 159-60, IEPA R. 5372.

In support of their Petition, the Citizens presented scientific testimony and documentation of the following:

- *Impact of phosphorus and nitrogen levels on algal and plant growth.* The Citizens presented scientific documentation on how high levels of phosphorus and nitrogen discharged by the Plants cause or contribute to growth of excess levels of algae and plants in both receiving and downstream waters. Further, the Citizens documented high phosphorus levels and excess algal and plant growth in the Chicago Area Waterways (or “CAWS”), the Lower Des Plaines River, and the Illinois River. R. 61-62, 158-59, IEPA R. 4719-23, 4735, 5370-72.
- *Impact of excess algal and plant growth on oxygen levels.* The Citizens presented scientific information and expert opinion detailing the relationship

between excess phosphorus and depressed oxygen levels in receiving waters and downstream waters. This information shows that the excess algal and plant growth, which are caused or contributed to by high phosphorus levels, in turn leads to wide fluctuations in dissolved oxygen levels over a 24-hour period, as the plants and algae produce oxygen during daytime hours and breathe it in at night. During the nighttime hours, dissolved oxygen levels plummet to well below the required minimum levels set forth in applicable water quality standards. The Citizens documented that phosphorus from the Plants is contributing to depressed levels of dissolved oxygen as far away as the Gulf of Mexico. IEPA R. 4712-47.

- *IEPA impairment findings.* The Citizens summarized findings by IEPA that the receiving waters are impaired for aquatic life, with phosphorus and low dissolved oxygen listed as potential causes. R. 49, 61-62, 158-59, IEPA R. 5370-72.
- *Levels of phosphorus correlated with algal and plant growth.* The Citizens offered expert testimony, scientific treatises, and water quality criteria developed by the United States Environmental Protection Agency (“U.S. EPA”) and other states showing that levels of phosphorus in the water bodies need to be far below 1.0 mg/L in order to prevent violations of the dissolved oxygen and offensive conditions/unnatural growth standards. IEPA R. 4385, 4714, 5371.

2. IEPA Consideration of the Final Permits

After the close of the public comment period and following review of data supplied by MWRD, U.S. EPA officials stated that IEPA should conduct a “reasonable potential” analysis³ of the effects of MWRD phosphorus discharges on water quality in light of the numerous waters that had been listed as potentially impaired by phosphorus. IEPA R. 463-64, 482-83, 488-89. IEPA and U.S. EPA then made a joint plan for an extensive study of the effects of MWRD phosphorus discharges that was detailed in a group of documents in early October 2011. IEPA R. 1112-57. This plan listed the violations of dissolved oxygen standards and offensive conditions/unnatural growth in some of the waters affected by the Plants. IEPA R. 1135-36.

Subsequently, through a letter dated October 26, 2011, MWRD told IEPA that it would be willing to treat its discharges of phosphorus from the Stickney and Calumet Plants to a 1.0 mg/L concentration level.⁴ IEPA R. 1160-66. However, plans to develop proper scientifically-based phosphorus limits continued for over a year after MWRD agreed to the 1.0 mg/L limit. The administrative record indicates that MWRD initially agreed to participate in such a “phosphorus impact” study, and that its monitoring and research department was working on a proposal as late as December 6, 2012. IEPA R. 1259-60. Later in December, 2012, however, MWRD decided that it did not want a phosphorus impact study because it did not “believe that the District performing such a study [would] be productive.” IEPA R. 1273.

³ A reasonable potential analysis is a Clean Water Act requirement, the procedure for which is set forth at 40 CFR § 122.44 (d).

⁴ This letter was sent after Petitioners NRDC, Prairie Rivers Network and Sierra Club sent MWRD a Notice of Intent to Sue MWRD in U.S. District Court in a citizen suit enforcement action concerning permit violations associated with MWRD’s phosphorus discharges on March 1, 2011. IEPA R. 1092-96.

MWRD also asserted, in a memo sent to IEPA on December 21, 2012, that the Agency's phosphorus impairment listings in waters receiving phosphorus pollution from the Plants were not scientifically justified; and further asserted that the algae-related impairments in segments of the Little Calumet (HA-05) and the North Shore Channel (HCCA-02) were "upstream" of its Plants and therefore not associated with them. IEPA R. 1274-76. During a May 16, 2013, conference call, U.S. EPA and IEPA agreed that MWRD's position that its phosphorus pollution was not a potential cause of aquatic life impairments and violations of water quality standards was incorrect. In a memo written after the May 16, 2013, conference, IEPA reaffirmed its findings that the Calumet-Sag Channel and the Chicago Sanitary and Ship Canal ("CSSC") were impaired, potentially by phosphorus, stating, "Permit fact sheet reflects current listed impairments and causative pollutants that IEPA verified and listed for each 303(d) cycle. There is no reason to alter permit fact sheets in response to MWRD's comments." IEPA R. 1303.

Regarding MWRD's contention that certain impaired segments in the Little Calumet River and the North Shore Channel were "upstream" of its Plants, U.S. EPA made clear that the Little Calumet segment HA-05, which is listed by IEPA as impaired by algal growth, does receive effluent from the Calumet Plant. (Email clarifying that Calumet plant discharges to two Little Calumet River segments: HA-05 and HA-04. IEPA R. 2576.) Also, in a PCB administrative proceeding to set water quality standards for Chicago area waterways, R08-09, which IEPA used in making its decisions on the Permits, IEPA R. 1318, MWRD presented expert testimony that both "upstream" segments—the Little Calumet River segment, HA-05, east of the Calumet Plant, and the North Shore Channel segment, HCCA-02, to the north of the O'Brien Plant discharge

point—actually receive flows from the Plants. A. 59-63, R. 576-80. The PCB accepted this evidence presented by MWRD in that proceeding on this point and found in its November 21, 2013 decision in R08-09(C) that portions of the Chicago Area Waterways system were subject to flow reversals. A. 35, R. 554.

3. The Final Permits and the Responsiveness Summary

On December 23, 2013, IEPA issued the final Permits. The Permits included only the 1.0 mg/L total phosphorus limit agreed to by MWRD. The Permits contained no requirement to perform a phosphorus impact study to develop scientifically-based limits. R. 114-42 (Calumet Permit); R. 19-44 (O'Brien Permit); and R. 211-36 (Stickney Permit).

Along with the permits, IEPA issued its Responsiveness Summary covering all three Plants. IEPA R. 1329-62. Concerning the Comments identifying phosphorus-related impairments in waters of the Chicago Area Waterway System (CAWS) that receive phosphorus from the three Plants and the need for numeric limits stringent enough to prevent violations of water quality standards, the Responsiveness Summary states:

For the benefit of the hearing record, the 2012 draft Illinois Integrated Water Quality Report and Section 303(d) List status of the receiving waters for the three MWRDGC plants is as follows:

Terrence J. O'Brien – North Shore Channel (Stream Code HCCA-04) - fully supporting Indigenous Aquatic Life Uses

Calumet – Little Calumet River (Stream Code HA-04) – fully supporting Indigenous Aquatic Life Uses

Stickney – Chicago Sanitary and Ship Canal (Stream Code GI-03) – Indigenous Aquatic Life Uses impaired with potential causes given as total phosphorus, dissolved oxygen (non-pollutant) and ammonia.

Given that the North Shore Channel and Little Calumet River are fully supporting Indigenous Aquatic Life Uses, phosphorus is not a cause of impairment because no impairment exists in the stream segments directly receiving the discharges. The North Shore Channel is upstream of the Chicago Sanitary and Ship Canal, which has the aforementioned total phosphorus potential cause of impairment. Further downstream from the Little Calumet River, the Calumet Sag Channel is listed as impaired for Indigenous Aquatic Life Use with a potential cause given as total phosphorus. Therefore, it is true that at least one CAWS segment downstream of all three plants has a potential cause of impairment due to total phosphorus. The District has agreed to implement enhanced biological phosphorus removal at all three plants in order to achieve a monthly average Total Phosphorus limit of 1.0 mg/L.

IEPA R. 1333.

The Responsiveness summary did not discuss the purported “upstream” portions of the North Shore Channel (HCCA-02) and the Little Calumet (HA-05) that have repeatedly been found to be impaired by low dissolved oxygen and offensive conditions/unnatural growth.

The Responsiveness Summary sets forth no data or scientific analysis regarding whether the 1.0 mg/L limit is sufficiently stringent to protect against violations of the dissolved oxygen, offensive conditions/unnatural algal growth water quality standards. It also does not reference any of the Clean Water Act regulations, incorporated into Illinois law, requiring IEPA to ensure that water quality standards are not exceeded.

Finally, the Responsiveness Summary identifies the Citizens’ comment that IEPA should limit nitrogen. IEPA R. 1332. However, it contains no response to this comment.

4. The Proceedings before the PCB

In petitions before the PCB filed January 27, 2014, Citizens alleged, based upon law and documentation in the Permit record, that the Permits should be remanded because, *inter alia*, IEPA had failed to comply with Clean Water Act and Illinois law

requirements to establish a phosphorus limit in the Permits that is sufficiently stringent to ensure that there would not be violations of water quality standards caused by the phosphorus discharge. R. 1-68, 100-65, 195-260.

The parties cross-moved for summary judgment. R. 350-57, 392-408, 411-29. On December 18, 2014, the Citizens' motion was denied and the motions of the IEPA and MWRD were granted. The PCB issued an Opinion and Order. (PCB Opinion) A. 1-27, R. 508-35. The Citizens' motion for reconsideration was denied on March 5, 2015. A. 67-78, R. 625-36. This appeal timely followed.

ARGUMENT

I. SUMMARY OF ARGUMENT

A fundamental requirement of the Clean Water Act is that NPDES permits may not permit the discharge of pollutants that have the reasonable potential to cause or contribute to the violation of any applicable water quality standard. 33 U.S.C. § 1312, 40 C.F.R. § 122.44(d). To protect Illinois waters and to enable Illinois to assume control over NPDES permitting of Illinois discharges, the General Assembly enacted 415 ILCS 5/11, requiring incorporation of CWA requirements into the Illinois permitting program. Following this mandate, the PCB adopted regulations that require IEPA to place limits in permits that are sufficiently “stringent” to “ensure” that NPDES permits prevent discharges of a pollutant that, alone or in combination with other sources of pollution, has a reasonable potential to cause a violation of any water quality standard. 35 Ill. Adm. Code 304.105, 309.141(d)(1) and 309.143(a). IEPA must also “ensure” that NPDES permits are sufficiently stringent to comply with federal regulations. 35 Ill. Adm. Code 309.141(d)(2).

One of the federal regulations with which IEPA must “ensure” compliance, 40 C.F.R. § 122.44(d), requires, among other things, that state permitting agencies determine whether there is a reasonable potential for any pollutant to cause violations of water quality standards. If there is, the agency must place a numeric limit on the discharge of the pollutant calculated to prevent violations of water quality standards from occurring.

Here, the record is clear that there was a reasonable potential for phosphorus discharges from the Plants to cause a violation of applicable water quality standards regarding dissolved oxygen and offensive conditions/unnatural growth. In fact, there is far more than evidence of a potential—there is evidence in the form of findings by IEPA biologists that the water quality standards *already are* being violated in numerous water bodies receiving phosphorus pollution from the Plants.

Thus, IEPA was obligated to perform a reasonable potential analysis to determine what numeric limits on the discharge of phosphorus would be stringent enough to ensure that water quality standard violations would not occur. However, instead of making this determination, IEPA placed a 1.0 mg/L limit in the Permits simply because that was the limit to which MWRD agreed. IEPA has never even pretended that the 1.0 mg/L limit was based on a calculation of the limit necessary to prevent phosphorus pollution from causing violations of water quality standards. The IEPA Responsiveness Summary acknowledges that MWRD’s request was the basis for choosing 1.0 mg/L as the limit. Moreover, all the evidence in the record shows that the 1.0 mg/L limit is far from sufficiently stringent to protect against the types of water quality impairments known to be caused by phosphorus pollution.

The PCB Opinion contains nothing to indicate whether or how the PCB concluded that IEPA had ensured that phosphorus discharges would not cause violations of water quality standards. The PCB cites nothing in the record that suggests that the 1.0 mg/L limit is sufficiently stringent, because there *is* nothing. Further, the PCB Opinion never even mentions the key federal regulation, 40 C.F.R. § 122.44(d), with which IEPA was required to “ensure” compliance under 35 Ill. Adm. Code 309.141(d)(2).

Additionally, the PCB Opinion contains statements concerning factual matters that are not supported by anything in the record and that are, in fact, completely contradicted by it. In so doing, the PCB was not only factually incorrect, but applied the incorrect summary judgment standard—*i.e.*, it did not construe all facts and inferences in favor of Citizens. After stating that certain matters were subject to “dispute,” A. 17, R. 524, it granted summary judgment.

Because there is absolutely no evidence in the record to support conclusions 1) that IEPA ever calculated what phosphorus limits are stringent enough to protect against violations of water quality standards; 2) that a limit of 1.0 mg/L ensures that discharges of phosphorus allowed by the Permits will not cause or contribute to violations of water quality standards in compliance with 35 Ill. Adm. Code 304.105, 309.141(d)(1) or 309.143(a); or 3) that IEPA complied with 35 Ill. Adm. Code 309.141(d)(2) by ensuring compliance with federal regulation 40 C.F.R. § 122.44(d), the PCB decision must be reversed and the Permits remanded to IEPA for calculation of science-based numeric phosphorus limits that comply with the law.

In addition, the PCB also rejected without substantive discussion the Citizens' alternative argument that studies of the current and potential effects of phosphorus pollution on the CAWS be made a condition of the Permits to facilitate proper calculation of phosphorus limits in the future. Particularly given the failure of IEPA to place science-based numeric phosphorus limits in the Permits, IEPA should not be allowed to perpetuate the problem by failing to require collection of information that could be critical in the next permit cycle.

Finally, the PCB did not correct IEPA's failure to respond to the Citizens' comments concerning the problem of nitrogen pollution. This also was error.

II. STANDARD OF REVIEW

A. PCB Standard of Review

Here the PCB was presented with cross-motions for summary judgment. PCB may grant a motion for summary judgment only when there is no genuine issue of material fact and the record before the Board, including the pleadings, exhibits, discovery documents, and affidavits, demonstrates a clear right to judgment as a matter of law. 35 Ill. Adm. Code 101.516(b); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 129-32 (1992); see also, 735 ILCS 5/2-1005(c).

The law requires that the PCB's decision on a permit appeal be rendered solely upon the administrative record, with the burden of proof on the petitioners, here the Citizens. 415 ILCS 5/40(e). The relevant determination on a permit appeal under that section of the Act is whether the permit as issued would "violate the Act or Board

regulations.” *Prairie Rivers Network v. Ill. Pollution Control Bd.*, 335 Ill. App. 3d 391, 401 (2002), *appeal denied*, 203 Ill. 2d 569 (2003) (internal quotations omitted). The petitioners in a permit appeal can carry their burden of proof by showing that the record makes clear that IEPA failed to comply with one or more of the regulations governing the issuance of permits. *Ill. EPA v. Ill. Pollution Control Bd.*, 386 Ill. App. 3d 375, 384 (2008). Also, it is well-established that IEPA permitting decisions must be supported by substantial evidence. *Ill. EPA*, 386 Ill. App. 3d at 382.

B. Appellate Standard of Review

The standard of review on appeal from a grant of summary judgment is *de novo*. *Tyson Foods v. Dep’t of Revenue*, 312 Ill. App. 3d 64, 69 (1999), *appeal denied*, 188 Ill. 2d 584 (2000). “On appeal, the reviewing court must ascertain whether the trial court correctly determined that the pleadings presented no issue of material fact and, if there were no such issue, whether the court correctly entered the judgment.” *Bd. of Trustees v. City of Chicago*, 317 Ill. App. 3d 569, 571 (2000).

The ordinary appellate standard of review that otherwise applies to appellate review of an administrative decision has been summarized as follows:

“Where courts review administrative decisions, factual findings are reviewed as to whether they are against the manifest weight of the evidence. *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 386-87, 925 N.E.2d 1131, 339 Ill. Dec. 10 (2010). Pure questions of law are reviewed *de novo*. *Id.* at 387. On a mixed question of law and fact, the determination of an administrative agency is reviewed for clear error. *Id.*

People ex rel. Madigan v. Burge, 2014 IL 115635, ¶71 (2014); see also *Ill. EPA*, 386 Ill. App. 3d at 383-84 (the reviewing court must determine whether decisions of the PCB

were supported by evidence in the record; or, conversely, whether the PCB ignored evidence in the record that contradicts its reasoning). *Cf. People v. Ill. Pollution Control Bd.*, 119 Ill. App. 3d 561, 566 (1983), *aff'd*, 103 Ill. 2d 441 (1984) (reversing PCB decision that ignored evidence regarding alternative disinfection technologies); *Marathon Oil Co. v. EPA*, 242 Ill. 3d 200, 206 (1993) (reversing PCB decision as against manifest weight of the evidence, although party appealing had burden below).

However, the manifest weight of the evidence standard should not come into play in this Court's review, because the PCB should not have made any findings regarding disputed facts in its decision on the summary judgment motions.

III. THE PCB ERRED IN NOT REQUIRING THAT IEPA ENSURE THAT DISCHARGES OF PHOSPHORUS WILL NOT CAUSE OR CONTRIBUTE TO VIOLATIONS OF WATER QUALITY STANDARDS.

The record is clear that IEPA did not comply with federal and state law requirements that it set numeric permit limits stringent enough to prevent discharges of phosphorus from the Plants from causing or contributing to violations of water quality standards. The PCB erred by not requiring IEPA to comply with the law.

A. The Law Requires IEPA to Set Numeric Permit Limits that Ensure that Dissolved Oxygen Standards and Offensive Conditions/Unnatural Growth Standards Will Not be Violated.

State law, including federal Clean Water Act provisions incorporated by reference, requires IEPA to include effluent limits in permits where necessary to prevent violations of water quality standards. 35 Ill. Adm. Code 304.105, 309.141(d)(1)-(2), 309.143(a); 40 C.F.R. § 122.44(d). Here, the Board has established water quality standards for dissolved oxygen, 35 Ill. Adm. Code 302.206 and 302.405, as well as narrative "offensive conditions" and "unnatural sludge" water quality standards

prohibiting plant and algal growth of other-than-natural origin. 35 Ill. Adm. Code 302.203 and 302.403. IEPA has acknowledged that waters receiving pollution discharges from the Plants are violating these standards. Yet IEPA included only an arbitrary 1.0 mg/L effluent limit for phosphorus in the Permits, without any analysis of whether this number (which is 20 times or more of what was identified as the natural level of phosphorus in Illinois waters, IEPA R. 4716) will achieve compliance with standards or even come close. The administrative record does not contain any evidence supporting 1.0 mg/L as a phosphorus limit stringent enough to prevent violations of the dissolved oxygen and offensive conditions/unnatural growth water quality standards.

The applicable incorporated federal requirement set forth at 40 C.F.R. § 122.44(d) specifically requires that NPDES permits set limits to prevent discharges from violating not only *numeric* water quality standards (such as the applicable numeric dissolved oxygen minimum levels), but *any* water quality standards “including State narrative criteria for water quality” (such as the narrative offensive conditions/unnatural growth standards).

Illinois does not currently have a numeric phosphorus water quality standard that would allow easy calculation of a permit limit. However, the law nonetheless requires that IEPA develop a numeric permit limit on the discharge of phosphorus to prevent phosphorus pollution from causing a violation of the dissolved oxygen or offensive conditions/unnatural growth standards. Federal regulations identify several options available to IEPA to accomplish this. As explained in *American Paper Inst. v. United States EPA*, 40 C.F.R. § 122.44(d)(1)(vi) was enacted to prevent precisely the sort of mistake that IEPA made here:

On its face, section 301 [of the Clean Water Act] imposes this strict requirement as to all standards—*i.e.*, permits must incorporate limitations necessary to meet standards that rely on narrative criteria to protect a designated use as well as standards that contain specific numeric criteria for particular chemicals. The distinctive nature of each kind of criteria, however, inevitably leads to significant distinctions in how the two types of criteria are applied to derive effluent limitations in individual permits. When the standard includes numeric criteria, the process is fairly straightforward: the permit merely adopts a limitation on a point source's effluent discharge necessary to keep the concentration of a pollutant in a waterway at or below the numeric benchmark. Narrative criteria, however, present more difficult problems: How is a state or federal NPDES permit writer to divine what limitations on effluent discharges are necessary to assure that the waterway contains, for example, "no toxics in toxic amounts"? Faced with this conundrum, some permit writers threw up their hands and, contrary to the Act, simply ignored water quality standards including narrative criteria altogether when deciding upon permit limitations. . . .

To address these difficulties, the EPA promulgated the regulation under attack here, 40 C.F.R. § 122.44(d)(1)(vi). That rule requires NPDES permit writers to use one of three mechanisms to translate relevant narrative criteria into chemical-specific effluent limitations. Specifically, the regulation provides that a permit writer must establish effluent limits from narrative criteria by using (1) a calculated numeric water quality criterion derived from such tools as a proposed state numeric criterion or an "explicit state policy or regulation interpreting its narrative water quality criterion"; (2) the EPA recommended numeric water quality criteria, but only on a "case-by-case basis" and "supplemented where necessary by other relevant information"; and/or (3) assuming certain conditions are met, limitations on the discharge of an "indicator parameter," *i.e.*, a different pollutant also found in the point source's effluent.

996 F.2d 346, 350 (D.C. Cir. 1993).

Applying 40 C.F.R. § 122.44(d)(1)(vi), U.S. EPA has repeatedly set numeric phosphorus limits for sewage treatment plants at 0.1 mg/L based on an analysis of what limits were stringent enough to prevent violations of Massachusetts narrative standards substantially similar to the Illinois dissolved oxygen and offensive conditions/unnatural growth standards. These limits—which are an order of magnitude lower than the limit established in the Permits—have been upheld by the U.S. EPA Environmental Appeals

Board and a federal appellate court. *Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA*, 690 F.3d 9, 30-31 (1st Cir. 2012), cert. denied, 133 S. Ct. 2382 (2013) (upholding 0.1 mg/L phosphorus limit based on U.S. EPA criteria and national, regional and local studies); *In re City of Attleboro, Mass. Wastewater Treatment Plant*, 14 E.A.D. 398, 399-400 (EAB 2009) (upholding limit of 0.1 mg/L phosphorus to prevent violation of narrative and numeric standards based on EPA Gold Book criteria). The Environmental Appeals Board has even remanded a limit of 0.1 mg/L of phosphorus (one tenth of the limit in the Permits) as potentially not stringent enough, because the record in that case did not show that the limit ensured that an applicable narrative standard would not be violated. *In re City of Marlborough, Mass. Easterly Wastewater Treatment Plant* 12 E.A.D. 235, 250, 2005 EPA App. LEXIS 14 (EAB 2005).

Precedent established by the PCB in cases involving a sewage treatment plant operated by the Village of New Lenox further supports the requirement that IEPA must include limits on phosphorus in permits as necessary to prevent violations of dissolved oxygen and narrative standards. In *Des Plaines River Watershed Alliance v. Ill. EPA*, the PCB overturned an NPDES permit granted by IEPA for a sewage treatment plant because, among other reasons, IEPA had failed to “assure” that the discharge was limited so that it would not cause violations of dissolved oxygen and offensive conditions standards regarding plant and algal growth. 2007 Ill. ENV LEXIS 149 (PCB 04-88 Apr. 19, 2007 Opinion and Order at 44-45, 50-51); see also *Ill. EPA*, 386 Ill. App. 3d at 385-86 (upholding PCB decision remanding permit that failed to establish limits necessary to assure protection of dissolved oxygen and offensive conditions standards).

In their comments to IEPA, the Citizens presented these citations and specifically directed the IEPA to data that could be used in identifying numeric effluent limits for these permits: the U.S. EPA phosphorus criteria for this Eco-region (0.077 mg/L) and the Wisconsin phosphorus water quality standard (0.1 mg/L). IEPA R. 4567. To be clear, Citizens do not argue that the U.S. EPA and Wisconsin criteria are water quality standards that directly apply in Illinois. The applicable water quality standards are the offensive condition/unnatural growth standards and the dissolved oxygen standards. However, because Illinois has no applicable numeric water quality standard for phosphorus, the U.S. EPA and Wisconsin criteria are the sort of data that 40 C.F.R. § 122.44(d)(1)(vi)(A) requires IEPA to use in setting numeric effluent limits on phosphorus to protect against violations of the dissolved oxygen standards and the offensive condition/unnatural growth standards.

IEPA has never claimed in the course of this proceeding to have set a numeric limit on phosphorus to ensure protection of water quality standards or compliance with 40 C.F.R. § 122.44(d), either via the 1.0 mg/L standard that MWRD volunteered for or through any other means. IEPA argued before the PCB only that it addressed the matter with Special Condition 5 of the Permits, which states, “the effluent, alone or in combination with other sources shall not cause the violation of any water quality standard outlined in 35 Ill. Admin. Code § 302.” R. 421.

Citizens agree that including this special condition in the Permits at least affords citizens an opportunity to enforce violations of water quality standards through citizen suits. But relying on Special Condition 5 to ensure compliance with water quality standards certainly does not meet the requirements of 40 C.F.R. § 122.44(d)(1)(v), which

calls for “chemical-specific limits” in NPDES permits. Relying on a general blanket condition represents an abdication by IEPA of its basic responsibilities under the Clean Water Act and the Illinois regulations—not to mention rendering enforcement and compliance assurance substantially more complex and costly than they ought to be under the Clean Water Act framework.

Relying on a permit condition telling the permittee not to cause violations of water quality standards is also inadequate to protect water quality standards for a number of practical reasons, in addition to being inconsistent with federal law. First, this approach turns what is required to be a forward-looking permit limit designed to prevent violations of water quality standards into a “catch-me-if-you-can” enforcement issue. Further, the condition does not provide guidance as to what monitoring should be required or otherwise lend itself to efficient enforcement. Finally, it leaves it up to the discharger to decide what is necessary to meet water quality standards until corrected through an enforcement action. In this case, MWRD does not even acknowledge that its phosphorus discharges are causing or contributing to violations of the dissolved oxygen and narrative water quality standards.

B. The PCB Erred In Failing to Require that IEPA Ensure that the Permits Comply with Water Quality Standards and State and Federal Law.

The PCB erred by failing to determine whether IEPA complied with the following Illinois regulations:

- 35 Ill. Adm. Code 304.105 or 309.141(d)(1): requiring the agency “ensure” that limits are placed in NPDES permits that prevent violations of water quality standards.

- 35 Ill. Adm. Code 309.143: requiring limits on pollutants that have the “reasonable potential” to cause violations of water quality standards.
- 35 Ill. Adm. Code 309.141(d)(2): requiring IEPA to impose any requirement necessary to meet any federal law or regulation, thereby incorporating 40 C.F.R. § 122.44(d), which the PCB never mentions.

To “ensure” means “to make certain.” *Corey H. by Shirley P. v. Bd. of Educ.*, 995 F. Supp. 900, 913 (N.D. Ill. 1998); American Heritage College Dictionary (3d Ed.). Surely, one does not “make certain” that pollution allowed by permits will not violate water quality standards without first 1) studying the potential impacts of the pollution on the receiving streams; 2) determining what is necessary to prevent impacts that violate water quality standards; and 3) including limits in the permit to prevent such violations. 40 C.F.R. § 122.44(d).

Similarly, the language requiring a permitting authority to establish NPDES permit limits on pollutants that have a “reasonable *potential*” to cause violations of water quality standards establishes that existing violations need not be proven before a pollutant limit is required. 35 Ill. Adm. Code 309.143(a) (emphasis added). “Potential” means, *inter alia*, “capable of being” and “having possibility, capacity or power.” American Heritage College Dictionary (3d Ed.); see also Webster’s Third New International Dictionary (1993) (potential means “existing in possibility: having the capacity or a strong possibility for development into a state of actuality”).

Even if the reality that phosphorus pollution from the Plants has caused impairments were disputable, the potential that it *can* do so is not. No one disputes that the levels of phosphorus present in the waters that receive phosphorus from the Plants

have the potential to cause low dissolved oxygen levels and offensive conditions/unnatural growth. The level of phosphorus allowed by the permits is over ten times higher than the criteria recommended by U.S. EPA, IEPA R. 507, 1753, 4385-88, and 5 to 10 times greater than the Minnesota and Wisconsin standards. R. 440 n.2, IEPA R. 4567. *Ensuring* that phosphorus from the Plants does not cause a violation of water quality standards requires determining the *potential* effects of that phosphorus or at least requiring studies so that the actual effects of the pollution can be determined in the future.

Consistent with this interpretation of the regulations, the *New Lenox* case PCB and appellate decisions confirm that IEPA must assure compliance with state water quality standards by setting permit limits if there is any reasonable potential of the discharge causing a violation of water quality standards. *Ill. EPA*, 386 Ill. App. 3d at 383, *Des Plaines Watershed Alliance v. Ill. EPA*, 2007 Ill. ENV LEXIS 149. Indeed, in *New Lenox* the PCB overturned an IEPA permit decision precisely because the agency had failed to set phosphorus limits that assured that dissolved oxygen and offensive condition/unnatural algal growth standards would not be violated.

The only explanation the PCB offered for its refusal to follow its own precedent and that of the Appellate Court is that the *New Lenox* decisions were decided under the antidegradation regulation, 35 Ill. Adm. Code 302.105, while this case turns on application of 35 Ill. Adm. Code 304.105, 309.141(d) and 309.143. A. 18, R. 525. But there is no real basis for a distinction. The antidegradation standard requires IEPA to “assure” that increased discharges do not cause a violation of water quality standards, 35 Ill. Adm. Code 302.105(c)(2)(B), while 35 Ill. Adm. Code 309.141 requires IEPA to “ensure” that limitations on discharges are sufficiently strict to prevent violations of

water quality standards and federal law. There is no basis to argue that “ensure” means something substantially different than “assure” in this context. The relevant meaning of “assure” is the same as that of “ensure.” American Heritage College Dictionary (3d Ed.) (assure means “To make certain, ensure”).

IEPA should have set numeric limits on the discharge of phosphorus to ensure that numeric and narrative water quality standards are not violated. Nothing in the record supports an argument that 1.0 mg/L phosphorus ensures compliance with those standards. Thus, IEPA violated Illinois law in its issuance of the Permits. The PCB erred by failing to remand the Permits to IEPA with instructions that IEPA do what it is legally required to do.

C. The PCB Apparently Based its Decision in Whole or in Part on Findings that are Not Supported by the Record or that are Irrelevant.

While the record is clear that IEPA did not ensure that phosphorus discharges allowed by the Permits would not cause violations of water quality standards, it is unclear from the PCB opinion whether the PCB ever concluded (without evidence) that the IEPA did ensure what it needed to ensure, or whether the PCB chose for some reason not to apply the applicable regulations at all.

The latter appears to be the case, as the PCB made no explicit finding that IEPA had ensured compliance with water quality standards pursuant to the applicable regulations. However, The PCB Opinion nevertheless contains a number of statements on the subject of the impact of phosphorus on water quality and attainment of standards that must be addressed because they might be thought to be relevant to the issues here.

Depending on how those statements are understood, they are either irrelevant or totally contradicted by the record.

1. The PCB Incorrectly Characterized As Disputed the Reasonable Potential for Phosphorus to Cause Impairments and Violations of the Dissolved Oxygen Standards in the Receiving Waters

The PCB Opinion states that the significance of findings that phosphorus has caused water quality impairments and violations of dissolved oxygen standards in waters affected by the Plants is subject to “dispute.” A. 17, R. 524. The PCB Opinion can be read to imply that if such impairments and violations have not been proven, IEPA need not take steps in permitting to ensure against them. However, as discussed above, the regulations focus on the “reasonable potential” for water quality violations and do not allow IEPA to ignore that potential until it has become an unfortunate fact. In any event, MWRD contesting whether phosphorus has caused violations does not relieve IEPA of the duty to ensure that phosphorus does not cause violations.

Moreover, PCB’s characterization of the evidence of already-occurring violations of water quality standards as disputed creates three distinct problems vis à vis the standards for granting summary judgment. First, PCB’s use of the word “dispute” appears to signal that PCB found a genuine issue of material fact. However, as explained below, the record does not show any *genuine* dispute about whether water quality standards violations are occurring. At most, one of the parties expressed doubt about the violations that were identified.

Second, when deciding the MWRD and IEPA motions for summary judgment, PCB should have construed any inferences surrounding the questions MWRD raised about water quality standards violations in favor of Citizens (as the non-moving party).

Instead, as discussed further below, PCB appears to have given MWRD's concerns even greater weight than the factual evidence presented by IEPA.

Third, even if PCB had identified a legitimate genuine issue of material fact, it was incorrect for PCB to make a finding about those facts at this stage in the proceeding—especially a finding that is not even supported by substantial evidence. If a genuine issue of material fact truly exists, PCB should not have granted summary judgment at all. Instead the law requires that the PCB deny all motions for summary judgment and move on to a stage of the proceeding (such as a “trial on the papers”) where the PCB can assume its fact finding role. *Ill. EPA*, 386 Ill. App. at 390-92.⁵

Whatever path it may have taken to get there, PCB got the facts wrong: the evidence does not support a conclusion that there are no water quality standard violations. The PCB Opinion recognizes in the abstract that phosphorus may cause or contribute to violations of dissolved oxygen standards. A. 16, R. 523. In fact, IEPA has listed phosphorus as a cause of impairment in a number of waters that receive discharges from the Plants under Section 303(d) of the Clean Water Act, and has specifically listed phosphorus as a cause even after the change in listing criteria mentioned by the PCB Opinion. A. 17 R. 524. The waters so listed include segments in the Calumet Sag Channel, H-01, the Chicago Sanitary and Ship Canal, segments GI-02, GI-03, GI-06, the North Shore Channel, HCCA-02, the Chicago River, HCB-01, and the Little Calumet River, HA-05. Each of these waters is listed as impaired by low dissolved oxygen and

⁵ A trial on the papers is a means to reach a decision on the merits, but based on the paper record rather than on a live trial or hearing, which is pointless in a case based solely on an administrative record. See, Morton Denlow, “Trial on the Papers: An Alternative to Cross-Motions for Summary Judgment,” 46 Federal Lawyer 30 (Aug. 1999) (*available at*: http://www.ilnd.uscourts.gov/home/JUDGES/DENLOW/papers.htm#N_11_).

phosphorus. A. 46-57, R. 564-74. A 303(d) listing of a water body as impaired by the state is at least a *prima facie* showing that it is in fact impaired. *Ala. Dept. of Env. Mgmt. v. Ala. Rivers Alliance, Inc.*, 14 So. 3d 853, 864, 866-68 (Ala. Civ. App. 2007).

The PCB Opinion additionally discusses some elements in the record that seem to suggest that the Board believes that impairments found by IEPA should be given less weight than would normally be afforded agency findings. In particular, the Opinion mentions that the “District claims that the Agency abandoned [the IEPA listing] approach as to phosphorus.” A. 17, R. 524. However, IEPA continued to list these waters as impaired under its new approach and any notion that official IEPA agency findings, which have been forwarded for approval to U.S. EPA under federal law, were made lightly or mechanically is simply false. The agency biologists who observed the waters made the impairment findings after fully considering the facts, and did so recently. Indeed, the record is clear that MWRD made the same denials to the US. EPA and IEPA officials that phosphorus has caused impairments that it later made to the PCB. MWRD’s denials were rejected by the biologists who did the assessment. The May 29, 2013 memo regarding a conference call between IEPA and U.S. EPA officials states:

MWRD is attempting to make another program’s decision by influencing the permit fact sheet language and arguing to exclude listed impairments. Permit fact sheet reflects current listed impairments and causative pollutants that IEPA verified and listed for each 303(d) cycle. There is no reason to alter permit fact sheets in response to MWRD’s comments. Outcome: IEPA agrees with EPA, phosphorus listings shall remain in all 3 permits.

IEPA R. 1303.

Further, the PCB Opinion mentions the dissolved oxygen effluent limits that are placed in the Permits, A. 17, R. 524, but it is unclear how the PCB Opinion views the

significance of these Permit limits. In fact, requiring minimum levels of dissolved oxygen *in the effluent* does little or nothing to protect against phosphorus fueling plant or algal blooms that reduce dissolved oxygen levels *in the Chicago River and other water bodies*. There is nothing in the record to suggest that the dissolved oxygen effluent conditions will prevent violations of dissolved oxygen standards caused by phosphorus pollution. In fact, as well-understood by science, phosphorus pollution leads to plant and algal growth that will take the dissolved oxygen out of the water. IEPA R. 4718-23. Indeed, the PCB itself has recognized that dissolved oxygen effluent limits are not sufficient to protect dissolved oxygen levels in receiving waters from the effects of phosphorus-fueled algal growth. 386 Ill. App. 3d at 386 (imposition of permit effluent limits for dissolved oxygen and pH is not sufficient to assure protection against violations in receiving waters of dissolved oxygen or pH standards due to nutrient pollution).

The record is clear that daily swings in dissolved oxygen levels caused by photosynthetic activity can be caused by plant or algal growth that is stimulated by phosphorus pollution. Phosphorus discharged with the effluent will not immediately have any effect on dissolved oxygen in the effluent, and will not even have an effect in the receiving water bodies until there has been time for plants or algae in the receiving waters to use that phosphorus. Thus, even if the effluent has a high level of dissolved oxygen in the pipe coming out of the plant, there may be dissolved oxygen violations downstream as biological activity caused by phosphorus pollution leads to crashes in the dissolved oxygen level during periods of darkness. These phenomena were described by Dr. Michael Lemke of the University of Illinois, who explained that low dissolved oxygen levels causing fish kills were caused by phosphorus pulsing into Illinois River

side channel lakes from river water. IEPA R. 4718-23. There is nothing in the record to the contrary.

2. Uncontested Record Evidence Shows that There have been Violations of the Offensive Conditions/Unnatural Growth Standards in Water Bodies that Receive Pollution from the Plants

The PCB Opinion repeatedly states that “the record does not contradict that unnatural plant or algal growth has not been observed in the receiving stream segments.”

A. 17, R. 524 (PCB Opinion at 17, 18). On the contrary, however, the record unambiguously shows that unnatural plant and algal growth *has been* observed in receiving stream segments.

Again here, PCB failed to implement the correct standard for summary judgment when it granted the IEPA and MWRD motions. First, it appears PCB identified an issue of material fact in error, where no genuine issue exists. Second, PCB failed to construe all facts and inferences in favor of Citizens. Third, PCB engaged in premature fact finding, and in the process found facts that are not even supported by record evidence. Although Citizens do not believe there is a genuine issue of material fact, the solution at the summary judgment stage is not to resolve the factual dispute, but to deny the motions for summary judgment and proceed to a trial on the papers.

The record shows 1) that the discharge points of the O'Brien and Calumet Plants are respectively the dividing line between the stream segments north and south of the O'Brien Plant and east and west of the Calumet Plant; 2) that all four of these segments receive pollution from the two Plants; and 3) that the segment north of the O'Brien Plant

(HCCA-02) and east of the Calumet Plant (HA-05) have consistently been found by IEPA to be impaired by unnatural plant or algal growth.⁶

In 2012, the IEPA officials in charge of making assessments of Illinois waters specifically listed segment HA-05 on the Little Calumet River as impaired by “aquatic algae” (code #479). R. 564-69. They also found that segment HCCA-02 of the North Shore Channel was impaired by aquatic algae. R. 571. These segments directly receive pollution from (respectively) the Calumet and the O’Brien Plants, as the Plants discharge at the demarcation of two segments of the Little Calumet (HA-04 and HA-05) and the North Shore Channel (HCCA-02 and HCCA-04). As was said by a U.S. EPA official regarding the Calumet plant:

The demarcation for HA-04 and HA-05 is exactly at the discharge point for the Calumet plant. So from a practical perspective that means that the receiving segment is not just HA-04 but both HA-04 and HA-05.

IEPA R. 2576.

The record in PCB R08-09, which IEPA used in making its decisions on the Permits, IEPA R. 1318, likewise clarifies that both Little Calumet River segment HA-05 (to the east of the discharge point for the Calumet Plant) and North Shore Channel

⁶ Even with regard to the other two segments that receive phosphorus directly from the O’Brien and Calumet Plants, the IEPA Responsiveness Summary comment, IEPA R. 1335, that Agency biologists “did not observe” unnatural plant or algal growth mentioned in the Opinion, A. 17, R. 524, is most notable for what it does not say. The question from the public was whether the agency “regularly monitored for unnatural plant or algal growth.” The IEPA response never answers that question. Instead, it states that agency personnel did not observe such algal growth during their monitoring activities at a few of the stations below the Plants, leaving the questioner to guess whether the agency personnel even looked for unnatural plant or algal growth at those monitoring stations. In any event, we do know that the IEPA assessment biologists, whatever they saw or did not see during their monitoring activities, were not dissuaded from listing phosphorus as a cause of the impairment in the Calumet Sag Channel and CSSC. Instead, they “verified” that those impairment assessments were correct.

segment HCCA-02 (to the north of the O'Brien discharge point) directly receive effluent from the Calumet and O'Brien Plants, respectively. Indeed, the PCB held in its decision in R08-09 (C) of November 21, 2013 that portions of the CAWS were subject to flow reversals. A. 35, R. 554. The PCB had heard testimony of Dr. Charles Melching and others who testified as experts on behalf of MWRD. A. 59-63, R. 576-80. Specifically, Dr. Melching testified that effluent from the Calumet and O'Brien Plants flows in both directions from the outfalls. A. 63, R. 580. Dr. Melching further testified that the very "concept" of "upstream and downstream" made no sense as to the North Shore Channel because "more often than not, the north side plant is backing up into the North Shore Channel." Further, as recently as July, 2013, IEPA testified to the PCB in R08-09 (D) that the reason for one of its proposals to the PCB in that proceeding was that wastewater moved in both directions from the Calumet and O'Brien Plants: "There is not really an upstream in this case." A. 66, R. 583.

The PCB may, of course, rely on its own prior finding and testimony it has heard offered by the very parties now before the Board. *ESG Watts v. Pollution Control Bd.*, 282 Ill. App. 3d 43, 54-55; 668 N.E. 2d 1015 (1996). The PCB never explained why in this case, it ignored testimony given before it as well as its own holding in a related case. Certainly, never in the course of this proceeding has IEPA or MWRD attempted to deny that segments HA-05 or HCCA-02, which have been listed as impaired by aquatic algae, receive effluents from the Calumet and O'Brien Plants, respectively.

3. The PCB Ignored Either the Law or the Science Concerning Downstream Violations of Water Quality Standards

The PCB Opinion apparently overlooked or disregarded the law that permits may not allow discharges that cause or contribute to violations of water quality standards in

downstream waters. The Opinion apparently attaches importance to the supposed fact (not supported by the record) that there is no evidence of low dissolved oxygen or unnatural plant or algal growth in the “direct receiving” stream segments of the Plants. A. 17-18, R. 524-525.⁷ However, the law is clear that IEPA may not permit discharges that may cause or contribute to a violation of water quality standards in *any* water segment, even segments that are well downstream of the discharge point. *Arkansas v. Oklahoma*, 503 U.S. 91, 94, 105-07 (1992) (discharges in Arkansas could not be allowed if they would cause a violation of water quality standards in Oklahoma, 39 miles downstream); *In re Proposed Determination of No Significant Ecological Damage for the Joliet Generating Station*, 1989 Ill. ENV LEXIS 1204 *37 (PCB 1989) (discharges of effluent from power plants in Joliet could not be allowed to cause violations of water quality standards downstream in Des Plaines River near Channahon, Illinois). Indeed, Illinois regulations recognize that phosphorus discharges can cause or contribute to impairments of water quality standards miles below the discharge point and presumes such adverse effects will occur to lakes as far as 25 miles downstream of the discharge. *See* 35 Ill. Adm. Code 304.123(c).

As a matter of science, it is well established that phosphorus pollution can travel great distances and often causes adverse effects well downstream from the discharge point at locations where the other necessary requirements for plant or algal growth (*e.g.*

⁷ This quoted statement is factually incorrect because, as discussed above, IEPA has repeatedly found such violations in segments (HCCA-02 and HA-05) that are known to receive pollutants directly from the Plants. Also, the CSSC, the Calumet Sag Channel and the North Branch of the Chicago River have been consistently listed as violating dissolved oxygen standards. R.564, 566, 567, 570, IEPA R. 1135.

light, proper flow conditions) give the algae an opportunity to grow.⁸ The record is undisputed that pollution discharged by MWRD can contribute to problems in the Gulf of Mexico. IEPA R. 4781-5129.

There is nothing in the law or the record that supports the conclusion that phosphorus pollution is not causing harm if the immediate receiving segment is not listed as impaired. As was stated by Dr. Lemke in testimony placed in the record, “[E]ven when unnatural phosphorus loadings do not immediately affect the stream segment they initially entered, they may affect downstream waters.” IEPA R. 4714.

4. The PCB Disregarded Uncontested Evidence that a 1.0 Mg/L Limit is Not Adequate to Prevent Violations of the Unnatural Sludge, Offensive Conditions and Dissolved Oxygen Standards.

The PCB Opinion states that “there is no information in the record that the 1.0 mg/L effluent limit on phosphorus or omission of a nitrogen limit would violate the standards for dissolved oxygen at 35 Ill. Adm. Code 302.206 and 302.405; unnatural sludge at 35 Ill. Adm. Code 302.403 or offensive conditions at 35 Ill. Adm. Code 302.203 in the receiving waters for the plants.” A. 17, R. 524.⁹

In the first instance, this statement reflects application of a wholly inappropriate standard that is inconsistent with federal and state permitting requirements. It was incumbent upon IEPA to *ensure* that the phosphorus limit would *not* allow MWRD’s effluent to cause or contribute to water quality standards violations, rather than the

⁸ As admitted by a former MWRD General Superintendent, MWRD’s phosphorus is a significant portion of the load even in the Mississippi River. IEPA R. 4387-88.

⁹ It is not clear what this statement means or how a permit limit could violate a water quality standard. The question is whether the 1.0 mg/L limits in the Permits are sufficiently stringent to prevent pollution from the Plants from causing violations of the water quality standards.

Citizens' obligation to prove that such violations *would* occur. 35 Ill. Adm. Code 309.141(d)(1).

In fact, there is abundant evidence in the record that 1.0 mg/L is far too lax to ensure that phosphorus discharges will not cause violations of the dissolved oxygen and offensive conditions/unnatural growth standards. As Dr. Lemke stated, "Total phosphorus (TP) concentration of most uncontaminated surface water is between 0.01 to 0.05 ppm P."¹⁰ IEPA R. 4716; *see also* IEPA R. 4324. All of the science and data in the record is clear that reducing phosphorus levels to 1.0 mg/L will not solve or prevent any problem. 1.0 mg/L is at least 5 to 10 times too high.¹¹ U.S. EPA, other states and scientists who have studied to what levels the concentrations of phosphorus must be limited to control plant and algal growth and protect dissolved oxygen standards agree that levels must be less than 0.2 mg/L or lower, one fifth of the level allowed by the Permits. R. 445-48, IEPA R. 283, 4714-26, 5371. Indeed, MWRD itself, at IEPA's request, reduced its phosphorus discharge as an experiment at its Egan sewage treatment plant to the same level it intends to reduce it to under these permits, 1.0 mg/L. At the conclusion of this experiment, MWRD concluded that this did not alleviate the water quality issues that were found in the water bodies to which the Egan plant discharges. IEPA R. 304. This is not a surprising conclusion given the science showing that much lower levels of phosphorus are necessary to prevent violations.

¹⁰ 0.01 to 0.05 ppm is equal to 0.01 to 0.05 mg/L.

¹¹ There is some water in the CAWS that is not Plant effluent and, thus, there is some dilution of the Plants' effluent such that a discharge of 1.0 mg/L will result in phosphorus levels in the CAWS that are less than 1.0 mg/L some of the time. On remand, IEPA can make allowance for whatever level of clean water is available to dilute the Plants' effluent down to the concentration level needed to prevent violations of the dissolved oxygen and plant and offensive conditions/unnatural growth standards.

The PCB may not make a decision based on reasoning that is not supported by facts in the record, nor may it ignore evidence that is in the record. *See People v. Ill. Pollution Control Bd.*, 119 Ill. App. 3d at 561 (PCB was “arbitrary and unreasonable” when it ignored evidence). No one in the course of this proceeding has suggested that a 1.0 mg/L phosphorus limit will end impairments from phosphorus pollution or prevent potential violations of water quality standards and there is nothing in the record to support a 1.0 mg/L limit. 1.0 mg/L was picked because that is the limit to which MWRD agreed. To our knowledge, no one (other than IEPA in this case) has ever suggested that allowing the discharger to choose its permit limits is a proper way to set such limits.

IV. THE PCB PRESENTED NO BASIS TO REJECT CITIZENS' ALTERNATIVE REQUESTED RELIEF OF REQUIRING STUDIES CONCERNING THE EFFECT OF PHOSPHORUS POLLUTION

The administrative record establishes that phosphorus pollution from the three Plants has caused violations of water quality standards in water segments that receive phosphorus directly from the Plants and in segments into which that water flows. However, even assuming, *arguendo*, that there is doubt as to whether phosphorus discharges from the Plants *have caused* water quality violations, it is beyond debate that the discharges *could be* having these effects and that they *might well* have these effects in the future. *Cf. People v. Pollution Control Bd.*, 103 Ill. 2d at 450 (PCB could not ignore uniform expert opinion). This possibility alone was sufficient to trigger the requirement of reasonable potential analysis. At a minimum, however, it should have triggered a requirement that MWRD conduct studies following issuance of the permit, as the Citizens requested in the alternative.

It is nothing new to require studies as a condition of NPDES permits to resolve scientific uncertainty. Indeed, numerous studies were required as a condition of the last set of NPDES permits for these Plants in order to develop plans for pollution prevention, to identify sensitive areas and to assist IEPA and the PCB in the development of proper standards for the Chicago Waterway System. IEPA R. 1372, 1375, 1379. If there was uncertainty as to the violation or potential violation of water quality standards, at a minimum data should be collected that will resolve the uncertainty. *See Des Plaines River Watershed Alliance v. Ill. EPA*, 2007 Ill. ENV LEXIS 149 *141-42 (PCB 2007) (studies required by PCB to determine if copper limit was necessary when tests done did not lead to clear results).

The Permits as issued do not merely fail to ensure that the receiving waters will be protected from phosphorus pollution during the time period governed by these Permits. As things have been left, the IEPA may not have the facts that it believes are critical to setting proper water quality-based phosphorus limits even in the next round of permits in 2018.

As an alternative to setting proper water quality-based effluent limits for phosphorus now, Citizens ask that the Permits be remanded to consider what studies can be done by MWRD to ensure that proper water quality-based effluent limits can be developed when the permits are renewed. Performance of those studies should be made a condition of the permits.

V. THE PCB ERRED IN DECLINING TO ENFORCE IEPA'S REGULATION REQUIRING RESPONSE TO CITIZEN COMMENTS

IEPA's regulations required it to respond to the Citizens' post-hearing comments concerning the lack of a nitrogen limit in the Permit. Specifically, 35 Ill. Adm. Code

166.192(4) and (5) requires that, where a public hearing has been held on a NPDES permit, IEPA must prepare a responsiveness summary that includes “[a] summary of all the views, significant comments, criticisms, and suggestions, whether written or oral, submitted at the hearing or during the time the hearing record was open” and “[t]he Agency's specific response to all significant comments, criticisms, and suggestions.” IEPA failed to comply with this requirement.

Citing its decision in *Nat. Res. Def. Council v. Ill. EPA*, 2014 Ill. ENV LEXIS 193 (PCB 2014), the PCB declined to review whether the Responsiveness Summary responded to Citizens' comments. A. 25, R. 532.

The PCB's response was in error in two major respects. First, the PCB provides no legal basis for declining to enforce IEPA's required compliance with its own regulations, and none exists. Second, the Clean Water Act regulations under which authority to implement the federal NPDES permitting program was delegated by U.S. EPA to IEPA expressly require that delegated programs include a responsiveness summary requirement such as that embodied by part 166.192. The PCB's refusal to enforce that requirement puts Illinois' delegated NPDES program out of compliance with Clean Water Act requirements and in violation with the clearly expressed will of the General Assembly. 415 ILCS 5/11(a)(7).

The fact that part 166.192 is an IEPA-promulgated regulation rather than a PCB-promulgated regulation is of no significance to the PCB's authority and obligation to enforce it. Part 166.192 was promulgated pursuant to the implementing and authorizing provisions of the Illinois Act at 415 ILCS 5/4.¹² The Illinois Act grants the PCB

¹² This was expressly acknowledged by IEPA in proceedings before the Board. R. 418.

authority to conduct proceedings “upon complaints charging violations of this Act, *any rule or regulation adopted under this Act*, any permit or term or condition of a permit, or any Board order.” 415 ILCS 5/5(d) (emphasis added). The PCB also “has the authority to act as otherwise provided by law.” 35 Ill. Adm. Code 101.106(c). The Act also specifies that third-party NPDES permit appeals are to be conducted pursuant to the rules specified in 415 ILCS 5/32-33. *See* 415 ILCS 5/40(e)(3), referencing 5/40(a), incorporating 5/32-33 by reference. Section 5/33 states as follows:

After due consideration ... the Board shall issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances. It shall not be a defense to findings of violations of the provisions of this Act, [or] **any rule or regulation adopted under this Act**, . . . that the person has come into compliance subsequent to the violation.

415 ILCS 5/33(a) (emphasis added). Additionally, both the PCB and the IEPA are bound to “comply with *all* requirements, prohibitions, and other provisions of the Act *and of regulations adopted thereunder*.” 415 ILCS 5/47(a) (emphasis added).

CONCLUSION

The PCB failed to require IEPA to ensure that discharges of phosphorus from MWRD's sewage treatment Plants do not cause or contribute to violations of quality standards in violation of Illinois law. The PCB also failed to require IEPA to respond to the Citizens' comments concerning the need for nitrogen limits in the Permits.

Accordingly, this Court should reverse the December 18, 2014, Opinion and Order of the PCB in Case No. PCB 13-017, and order such other relief as this Court deems just and proper.

Respectfully submitted this 17th day of June, 2015 by:



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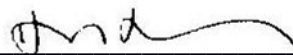
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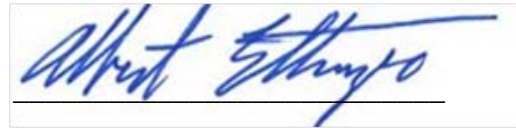
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 46 pages.

A rectangular box containing a handwritten signature in blue ink. The signature is cursive and appears to read "Albert Ettinger". Below the signature is a horizontal line.

Albert Ettinger
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CERTIFICATE OF SERVICE

I, Albert Ettinger, the undersigned attorney, hereby certify that I have served via electronic mail the attached **Brief of Petitioners** upon the persons listed in the service list below, and shipped said documents via overnight mail, postage prepaid, from 20 North Wacker Drive, Suite 1600, Chicago, IL 60606, before the hour of 5:00 p.m., on this 17th day of June, 2015.



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