

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCES DEFENSE COUNCIL)
PRAIRIE RIVERS NETWORK, and)
SIERRA CLUB)

Complainants,)

v.)

PCB 13-65
(Citizens Enforcement - NPDES)

ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY and DYNEGY MIDWEST)
GENERATION, INC.)

Respondents.)

NOTICE OF FILING

TO:

John Therriault, Assistant Clerk
Carol Webb, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601

Ann Alexander
Meleah Geertsma
Natural Resources Defense Council, Prairie
Rivers Network, and Sierra Club
2 North Riverside Plaza, Suite 2250
Chicago, Illinois 60606

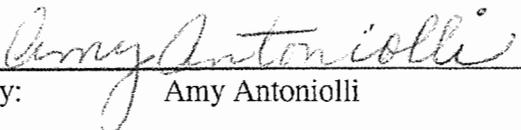
Deborah Williams
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-927

Thomas Davis
Rachel Medina
Office of the Attorney General
Environmental Bureau
500 South Second Street
Springfield, IL 62706

Albert Ettinger
Sierra Club
53 W. Jackson, #1664
Chicago, Illinois 60604

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board, the attached **Reply in Support of Motion to Dismiss**, copies of which are herewith served upon you.

DYNEGY MIDWEST GENERATION,


By: Amy Antonioli

Dated: August 5, 2013

Daniel Deeb
Amy Antonioli
SCHIFF HARDIN LLP
233 South Wacker Drive
Suite 6600
Chicago, Illinois 60606
Tel: 312-258-5500
aaantonioli@schiffhardin.com

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REPLY IN SUPPORT OF MOTION TO DISMISS

Respondent Dynegy Midwest Generation (“DMG”), by its attorneys, Schiff Hardin LLP, respectfully submits this reply in support of its Motion to Dismiss the Petition to Modify, Suspend, or Revoke a Permit Issued by the Illinois Environmental Protection Agency (the “Complaint”), electronically filed on June 17, 2013 (the “Motion to Dismiss”). The Natural Resources Defense Council, Prairie Rivers Network, and the Sierra Club (collectively, “Complainants”) filed the Complaint electronically on May 15, 2013.¹ The Complaint names the Illinois Environmental Protection Agency (“IEPA”) as a co-respondent and contends that monitoring data generated after IEPA issued NPDES Permit No. IL0001571 (the “Permit”) to DMG for its Havana Power Station located in Havana, Mason County, “constitute a change in any circumstance that mandates either a temporary or permanent reduction of the permitted discharge” under Section 309.182(b)(3). Complaint, at 9.

¹ In previous filings, the Citizen Groups have been referred to as “Petitioners” or “Plaintiffs,” but the Board’s procedural rules provides that in enforcement actions, “[t]he person initiating an enforcement proceeding must be named the complainant. Any adverse party must be named the respondent.” 35 Ill. Adm. Code 103.202(a). Therefore, in this reply, DMG refers to the Natural Resources Defense Council, Prairie Rivers Network, and the Sierra Club as “Complainants.”

The Motion to Dismiss seeks to dismiss the Complaint for: (a) lack of personal and subject matter jurisdiction; and (b) for failing to establish a claim for which the requested relief could be granted. Responses to the Motion to Dismiss were respectively filed by the Illinois Attorney General's Office ("AGO"), on behalf of IEPA, dated July 17, 2013 ("AGO Response") and Complainants on July 18, 2013 ("Complainants' Response"). Collectively, the AGO Response and Complainants' Response are sometimes referenced herein as the "Responses." This Reply in Support of Motion to Dismiss focuses on the primary mischaracterizations presented by the Responses and uses terms as defined in the Motion to Dismiss.

I. REPLY TO JURISDICTIONAL ASSERTIONS OF THE RESPONSES.

A. *The Responses Mischaracterize Board Precedent Regarding Subject Matter Jurisdiction.*

The Responses attempt to distinguish three cases cited in the Motion to Dismiss as authority for the position that the Board lacks subject matter jurisdiction with respect to the Complaint while the Permit Appeal is pending. Complainants' Response, at 4-5; AGO Response, at 2-3. In doing so, neither Complainants nor the AGO provide any contrary authority.

The Motion to Dismiss quotes *Joliet Sand & Gravel v. IEPA*, PCB 87-55 (Jun. 10, 1987) as follows:

In both [*Auburn* and *Caterpillar*], the Board was considering the validity of a subsequent permit decision regarding the same facility for the same operations, under the same regulatory framework. In both proceedings, the Board held that the second permit decision was of no force and effect while the first permit decision was still under appeal to this [B]oard.

Motion to Dismiss, at 7. DMG continues to believe *Joliet*, and the cases it cites (*Auburn* and *Caterpillar*) well-stand for the proposition that an appealed NPDES permit cannot be modified.

Complainants and the AGO misconstrue *Joliet*, *Auburn*, and *Caterpillar* to narrowly apply only to circumstances involving multiple permits. Complainants' Response, at 4-5; AGO Response, at 2-3. In doing so, they ignore the fact that those cases and the situation at hand involve the same jurisdictional issue – *i.e.* whether jurisdiction can be established for a second permit decision while the validity of an initial permit decision is being adjudicated. In the present scenario, the Complainants contend via the Permit Appeal that the Permit is invalid and should be “set aside”.² Permit Appeal, at 9. Subsequently, via the Complaint, the Complainants contend that the very Permit they believe to be a legal nullity in the first place, should be modified, suspended or revoked. Complaint, at 10. Logically, a permit that is set aside is without legal effect and inherently cannot be modified, suspended or revoked; it can only be re-issued. Before one can properly consider whether the Permit should be modified, suspended or revoke, the Complainant's first claim, the validity of the Permit must first be fully determined though completion of the pending Permit appeal.

Complainants' Response suggests that, if the Board does not have jurisdiction under Section 309.182 to modify an NPDES permit, there would an “enormous loophole.” Complainants' Response at 5. Complainants describe the purported loophole as follows: “[a] permittee[] who appealed conditions or its permit to the Board would be immune from modifications to the permit no matter how dire the need for changes to the permit, no matter how blatant the misrepresentations made to obtain the permit.” *Id.* Said loophole is illusory. Among other defects, Complainants' argument ignores the fact a permittee challenging its own NPDES permit is not expected to ask the Board to set aside a newly issued NPDES permit (as the Complainants have done in the Permit Appeal). A permittee simply has no incentive to do so.

² Black's Law Dictionary defines the verb “set aside” to mean “to annul or vacate.” Black's Law Dictionary, 9th ed., p. 1495 (2009).

Instead, a permittee is likely to simply seek modification of certain conditions of a newly issued (or reissued) NPDES permit in accordance with their view of applicable law. Consequently, the same jurisdictional problem presented by the Permit Appeal and Complaint will generally not exist in the context of a permittee appealing its own NPDES permit.

B. The Responses Mischaracterize the Law Regarding Personal Jurisdiction.

The AGO Response argues that compliance with the service requirements of 35 Ill. Adm. Code 103.204(a) is situational, notwithstanding the lack of any stated exception at 35 Ill. Adm. Code 103.204(a). AGO Response, at 2. That is, the AGO Response implicitly advocates (without providing any supporting authority) for an unstated exception to 35 Ill. Adm. Code 103.204(a) – compliance with service requirements are somehow not necessary if a complainant has previously-filed litigation concerning the same facility. There is no basis in Illinois law for said AGO position. DMG finds no Board procedural rule indicating that strict compliance with the procedural rules is optional with regard to some enforcement complaints and not others. Rather, the rules state all complaints must be properly served (35 Ill. Adm. Code 103.204(a)), and properly notify the respondents of the consequences of failing to answer the complaint (35 Ill. Adm. Code 103.204(f)). As of the date of filing the Motion to Dismiss, jurisdiction had not yet been established with respect to the Complaint; precedent dictates that a failure to execute proper service is jurisdictional and that knowledge of the Complaint does not legitimize improper service. *Trepanier v. Board of Trustees of the University of Illinois at Chicago*, PCB 97-50, slip op. at 4 (Nov. 21, 1996). DMG also disagrees with the AGO Response's mischaracterization of this action as "collateral" to the pending Permit Appeal. AGO Response, at 2. The Permit Appeal and Complaint represent entirely separate independent actions – the

former is to be determined based solely upon an administrative record and the latter entirely concerns information outside of that administrative record.

Complainants' Response states that DMG did not allege any prejudice due their failure to satisfy the Board's procedural rules, but fail to mention that a showing of prejudice is not required (*see Trepanier*, slip op. at 4). Rather, lack of strict adherence to the Board's procedural rules requiring proper service deprives the Board of jurisdiction. *Strunk v. Williamson Energy, LLC (Pond Creek Mine #1)*, PCB 07-135 (Dec. 20, 2007).

II. REPLY TO THE CONTENTION THAT THE COMPLAINT SOMEHOW STATES A VALID SUBSTANTIVE CLAIM UNDER SECTION 309.182.

The Motion to Dismiss demonstrated that the Complaint must be dismissed for failing to establish that the Monitoring Data meet the only Section 309.182(b) criteria plead by the Complaint – *i.e.*, the Motion to Dismiss demonstrated that the Complaint failed to establish that the Monitoring Data “mandates either a temporary or permanent reduction or elimination of the permitted discharge.” Motion to Dismiss, at 12 -13. The Complainants contest this point in two ways. First, they contend that the plain language (“mandates”) of Section 309.182(b)(3) should be ignored. That is, the Complainants contend that, because Section 309.182(b) may allow permit modifications for causes other than those specified by Section 309.182(b)(1), (2) and (3), it is somehow not necessary for them to demonstrate that the Monitoring Data “mandates” anything. Complainants' Response, at 4. Second, they contend that the Monitoring Data does somehow mandate a reduction in the permitted discharge. Complainants' Response, at 7-10. As will be explained below in inverse order, both arguments are without merit. Also explained below, Complainants' Response mischaracterizes the prior Board holding cited by the Motion to Dismiss and, in doing so, fails to demonstrate that the Board did not intend an action pursuant to Section 309.182 to require proof of a violation.

A. *The Monitoring Data Does Not Mandate A Reasonable Potential Analysis During the Permit Term or A Reduction In the Permitted Discharge.*

The Complaint argues that the Monitoring Data somehow demonstrate a “reasonable potential” (it does not) and that the IEPA or Board is somehow mandated to modify an NPDES permit when a reasonable potential is demonstrated.³ Complainants’ Response, at 7. The Motion to Dismiss explained that neither federal nor Illinois law mandate the IEPA or Board to conduct (or re-conduct) a reasonable potential analysis during the term of an issued NPDES permit based upon monthly discharge monitoring report data. Motion to Dismiss, at 12-13. In response, the Complainants assert that:

While it may or may not be the case, per the D.C. District Court’s holding in *National Mining Association et al. v. Jackson*, 8800 F.Supp.2d 119(D.D.C 2012)(Motion at 13), that the Clean Water Act does not specify the time at which agencies are required to ascertain reasonable potential to exceed, Illinois regulations do specify such a time, mandating that this determination be made in the course of issuing NPDES permits.

Complainants’ Response, at 7-8 (Emphasis in original). Obviously, the IEPA is not now “in the course” of issuing the Permit. Accordingly, by the terms of Complainants’ own argument, there is plainly no mandate to now conduct a post-Permit issuance reasonable potential analysis, regardless as to how one interprets the Monitoring Data. Because there is no mandate under federal or Illinois law to conduct a reasonable potential analysis during the term of an NPDES permit, Complainants cannot (and have not) met their burden to satisfy the express criteria of Section 309.182(b)(3). The Complaint must therefore be dismissed.

Moreover, even if the Complaint were to establish a reasonable potential, neither it nor Complainants’ Response come close to demonstrating that such reasonable potential would mandate “a temporary or permanent reduction in the permitted discharge.” That is,

³ As demonstrated by the Motion to Dismiss, the Monitoring Data does not, as a matter of law or fact, demonstrate a reasonable potential. That issue, however, need not be determined in order to fully consider the Motion to Dismiss.

Complainants have completely failed to recognize a reasonable potential, even if somehow established, and even if such required the imposition of a new water-quality based effluent limitation, it does not necessarily also follow that the facility would need to reduce its discharge in order to comply with the same. Indeed, given that, as AGO has conceded, the Monitoring Data have not demonstrated a violation of any water-quality criterion, it is entirely possible that no reduction of the facility's discharge would be necessary at all. AGO Response, at 3. Because the plain language of Section 309.182(b)(3) requires Complainants to demonstrate a mandated discharge reduction, something the Complainants have not (and cannot) demonstrate, the Complaint should be dismissed.

B. The Interpretation of Section 309.182(b) Advocated by Complainants' Response is Contrary to Illinois Law and Public Policy.

Perhaps understanding that they cannot demonstrate the requisite mandate of Section 309.182(b)(3), Complainants' Response seems to attempt to both (i) assert new grounds which it believes warrants Permit modification and (ii) argue that the only criterion of Section 309.182(b) referenced by the Complaint should be interpreted to disregard the plain meaning of the term "mandate". Complainants' Response, at 4. Neither position is persuasive.

The Complaint asserts as follows, with emphasis added:

10. 35 Ill.Admin.Code § 309.182 provides that "Any person, whether or not a party or participate at any earlier proceeding before the Agency or Board, may file a complaint for modification, suspension, or revocation of an NPDES Permit in accordance with this Section and Part 103." It further provides that the Board may "modify, suspend or revoke any NPDES permit in whole or in part in any manner consistent with the Act," upon proof that "[a] change in any circumstance . . . mandate either a temporary or permanent reduction or elimination of the permitted discharge."

[24].⁴ The [Monitoring Data] therefore constitute "A change in any circumstance that mandates either a temporary or permanent reduction of the permitted

⁴ As explained in the Motion to Dismiss, the Complaint was improperly numbered with redundant paragraph references. The references provided herein assume corrected paragraph numbering.

discharge” pursuant to 35 Ill.Admin.Code § 309.182. Specifically, the [Monitoring Data] mandate that IEPA modify the Permit to establish a discharge limit for mercury that will comply with Clean Water Act requirements concerning WQBELs, technology-based limits, and anti-degradation.

Clearly, the Complaint contends only that a modification is warranted under Section 309.182(b)(3) – it makes no mention of any other cause or criteria which purportedly warrant a modification. Nonetheless, the Complainants’ Response appears to attempt to pivot to a new assertion - that the Monitoring Data somehow constitutes sufficient proof of cause for a criteria other than that that of Section 309.182(b)(3). Complainants’ Response, at 7. It is improper for the Complainants to do so – the Motion to Dismiss must be decided based on the claims expressly plead by the Complaint, not those added by subsequent pleadings.⁵

Moreover, Complainants’ Response (at its page 4) contends that “It is not necessary that Plaintiffs plead or prove that [the Monitoring Data] constitute a change in circumstances that ‘mandates’ action, since the grounds for Board action in [Section] 309.182 are expressly non-exclusive.” In other words, Complainants contend that the Board did not intend for “mandate” to have its plain and ordinary meaning in Section 309.182(b)(3). Instead, they implicitly take the position that in pleading a claim under Section 309.182(b)(3), one need only establish a change in circumstance; the Complainants render the entire phrase “that mandates either a temporary or permanent reduction of the permitted discharge” meaningless and without legal import.⁶ DMG strongly disagrees – the fact that the Board may elect to allow other causes to warrant a permit

⁵ New or modified claims must be alleged in an amended complaint and filed with the Board in accordance with Section 103.206(d) of the Board’s rules, which Complainants have not done. Section 103.206(d) states in part: “If a party wishes to file an amendment to a complaint ... that sets forth a new or modified claim, against another person, the party who wishes to file the pleading must move the Board for leave to file the pleading.” 35 Ill. Adm. Code 103.206(d).

⁶ Ironically, elsewhere in Complainants’ Response, Complainants argue that the Board should look to the “plain language of §309.182.” Complainants’ Response, at 6.

modification does not negate the meaning of the causes specifically listed by the Board in Section 309.182(b). To paraphrase another statement of Complainants' Response, had the Board intended the phrase "that mandates either a temporary or permanent reduction of the permitted discharge" to have no meaning, we expect it would have omitted said text from 309.182(b)(3).⁷

In addition to being contrary to Illinois law, the interpretation of Section 309.182(b) advocated by Complainants would establish a dangerous precedent. That is, the practical effect of Complainants' argument (if somehow successful) would be to impose upon the IEPA an actual or *de facto* continual obligation to, each month following receipt of monthly discharge monitoring data from permittees, re-evaluate a reasonable potential analyses and modify previously issued NPDES permits to include new or modified water-quality based-effluent limits. Such would represent an extraordinary burden upon the IEPA. Moreover, such an obligation would be in direct contrast to 35 Ill. Adm. Code 309.141 which requires reasonable potential analysis only at the time of permit issuance. In addition, Complainants' position would result in perpetual uncertainty for permittees.

C. The Board Intended An Action Under Section 309.182 to Entail a Violation.

The Motion to Dismiss cited to prior Board writings to illustrate that Board intended Section 309.182 to entail a violation. Motion to Dismiss, at 8-9. In response, Complainants and the AGO assert that Section 309.182 does not require any proof of violation. Complainants' Response, at 6; AGO Response, at 3. Neither Response, however, addressed the Board's language adopting Rule 912 (now, Section 309.182). Moreover, Complainants' Response mischaracterized the Board's discussion in *City of Monticello v. IEPA*, PCB 77-305 (Feb. 16,

⁷ At page 5 of the Complainants' Response, Complainants assert that, had the Board wished to preclude an action under Section 309.182(b) while an appeal was pending, it would have expressly stated such a prohibition with Section 309.182.

1978). Both said authorities support the conclusion that a successful claim pursuant to Section 309.182 must allege a violation. In the rulemaking adopting Rule 912 (now, Section 309.182), the Board made it clear that the Section “was enacted to be consistent with Section 33(b) of the [Environmental Protection] Act, which allows the Board to revoke an Agency-issued permit in an enforcement action.” *NPDES Regulations*, R73-11, 12, slip op. at 17 (Dec. 5, 1974). Section 33(b) of the Environmental Protection Act (the “Act”) remains substantively the same today as it appeared in 1974. Section 33(b), addressing Board orders, specifically states “[t]he Board may also revoke the permit as a penalty for violation.” 415 ILCS 5/33(b) (2010).

Moreover, the Board has subsequently stated: “Rule 912(a) . . . requires the finding of a violation before the Board may modify, suspend, or revoke an NPDES permit.” *City of Monticello v. IEPA*, PCB 77-305, slip op. at 2 (Feb. 16, 1978). DMG disagrees with Complainants’ mischaracterization of the above statement in *City of Monticello* as passing dictum.⁸ The Board plainly then stated that Rule 912 requires a finding of violation and relied on that reasoning in making the procedural decision to grant a variance instead. *Id.*

Reading *City of Monticello* and the Board’s adopting opinion together with the language of the Act, it appears that the Board’s intent in promulgating Section 309.182 was to be consistent with Section 33(b) and allow modification, suspension, or revocation only as a penalty for a violation of the Act or a Board regulation.

The Complainants have neither alleged nor proved a violation. Notably, the AGO agrees that Complainants have not established a violation of water quality standards. AGO Response, at 3 (“Dyneyg’s assertion that the monitoring data do not currently establish a water quality

⁸ “Judicial dictum” means “[a]n opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision.” Black’s Law Dictionary, 9th Ed., p. 519 (2009).

violation is accurate”). The Complaint does not allege a violation of water quality standards, the permit or any condition, thereof, and for this reason the Complainants’ claim of “changed circumstances” must fail.

Both Responses also fail to acknowledge that the three listed criteria of Section 309.182(b)(3) can each be viewed to, directly or indirectly, entail a violation. Such a view would be consistent with the above-referenced authority. The first criterion of Section 309.182(b) overtly does so but only with respect to permit terms:

Violation of any terms or conditions of the permit (including, but not limited to, schedules of compliance and conditions concerning monitoring, entry and inspection).

Section 309.182(b)(1). The second criterion, Section 309.182(b)(2) (“Obtaining a permit by misrepresentation of failure to disclose fully all relevant facts”) also necessarily entails a violation. That is, an NPDES application failing to meet the standard of 309.182(b)(2) would inherently represent a violation of, at a minimum, the NPDES application and certification requirements of 35 Ill. Adm. Code 309.103.⁹ Finally, the last listed criterion of Section 309.182(b), “a change in any circumstances that mandates either a temporary or permanent reduction or elimination of the permitted discharge” also seems to implicitly require a violation – DMG is unaware of any scenario under which a reduction of a permitted discharge could be mandated in the absence of some type of regulatory violation requiring immediate action.

⁹ In part, 35 Ill. Adm. Code 309.103 requires NPDES applicants to use an application form which includes the following certification statement: “I certify under penalty of law that I have personally examined and am familiar with the information submitted in this application and all attachments and that, based on my inquiry of those persons immediately responsible for obtaining the information contained in the application, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.”

IV. CONCLUSION¹⁰

WHEREFORE, for the reasons stated above, Dynegy Midwest Generation respectfully requests that the Board dismiss the Complaint for want of jurisdiction and/or as for failing to sufficient state a claim for which the Board can provide the requested relief. With respect to the latter, the dismissal is requested with prejudice because Complainants can prove no set of facts that that, if proven, would afford the relief (Permit modification) requested by Complainants.

Respectfully submitted,

DYNEGY MIDWEST GENERATION.

By: 
Daniel Deeb

Dated: August 5, 2013

Daniel Deeb
Amy Antonioli
Stephen Bonebrake
SCHIFF HARDIN LLP
233 S. Wacker Drive, Suite 6600
Chicago, Illinois, 60606
Phone: (312) 258-5500

¹⁰ Complainants failed to respond to DMG's motion to dismiss the claims that the Monitoring Data mandated post-Permit issuance antidegradation and BPJ BAT analyses under federal or Illinois law. Accordingly, Complainants have waived any objection to the Board granting DMG's motion to dismiss such claims. 35 Ill. Adm. Code 101.500(d).

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 5th day of August, 2013, I have served electronically the attached **Reply in Support of Motion to Dismiss**, upon the following persons:

John Therriault, Assistant Clerk
Carol Webb, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601

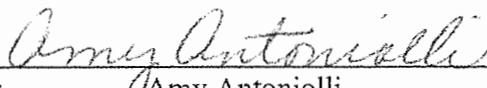
and electronically and by first class mail, postage affixed, upon:

Ann Alexander
Meleah Geertsma
Natural Resources Defense Council,
Prairie Rivers Network, and Sierra Club
2 North Riverside Plaza, Suite 2250
Chicago, Illinois 60606

Thomas Davis
Rachel Medina
Office of the Attorney General
Environmental Bureau
500 South Second Street
Springfield, IL 62706

Deborah Williams
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-927

Albert Ettinger
Sierra Club
53 W. Jackson, #1664
Chicago, Illinois 60604


By: Amy Antonioli

Dated: August 5, 2013

Daniel Deeb
Amy Antonioli
SCHIFF HARDIN LLP
233 South Wacker Drive
Suite 6600
Chicago, Illinois 60606
312-258-5500
aantonioli@schiffhardin.com