

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Petitioner, Midwest Generation, LLC's Will County Generating Station Alternative Thermal Effluent Limitation Demonstration Response to Illinois Pollution Control Board Question for Petitioner (April 2019) which was electronically filed on April 15, 2019 with the following:

Don Brown, Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
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and that a true copy was mailed via email on April 15, 2019 to the parties listed on the foregoing Service List.

Dated: April 15, 2019

/s/ Susan M. Franzetti _____

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC)	
Petitioner,)	
)	PCB 18-58 (Thermal Demonstration)
v.)	
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

Midwest Generation, LLC
Will County Generating Station Alternative Thermal Effluent Limitation Demonstration
Response to Illinois Pollution Control Board Question for Petitioner (April 2019)

Petitioner Midwest Generation, LLC (MWGen), by its undersigned counsel, hereby responds to the supplemental question it received from the Illinois Pollution Control Board (the “Board”). The Board proposes making a one-word change to the draft language of the alternative thermal effluent limitation for the Will County Generating Station (“WCGS”):

Under 35 Ill. Adm. Code 106.Subpart K and 35 Ill. Adm. Code 304.141(c), the Board determines that the following alternative thermal effluent limitations apply to the WCGS:

....

- b. In lieu of the water temperature requirements of 35 Ill. Adm. Code 302.408(c), (d), (e), and (f), water temperature must not exceed the daily maximum temperature limits in paragraph (1)(a):
 - i. By more than 5% of the hours (438 hours) in the 12-month period ending with any month; ~~or~~ and
 - ii. By more than 1.7°C (3°F) at any time

....

The Board’s stated purpose in proposing this change is to make this language more consistent with 35 Ill. Adm. Code 302.408(f), which reads:

Water temperature at representative locations in the main river shall not exceed the maximum limits in the applicable table in subsections (g), (h) and (i), during more than one percent of the hours in the 12-month period ending with any month. Moreover,

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at no time shall the water temperature exceed the maximum limits
in the applicable table that follows by more than 1.7°C (3°F).

MWGen agrees with the Board that the alternative thermal effluent limit should follow the structure of 35 Ill. Adm. Code 302.408(f), while changing numerical values so that the regulation is not more stringent than necessary to assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the Chicago Sanitary and Ship Canal (CSSC), which is the standard set forth in the Subpart K regulations and Section 316(a) of the Clean Water Act. Under the structure of Subsection 302.408(f), a discharger violates the thermal standard if they exceed the permitted excursion-hour limit, even if its effluent never exceeds the daily maximum by more than 3°F. And the standard is also violated if the discharger exceeds the applicable daily maximum by more than 3°F, even if the discharger has complied with the excursion-hours requirement. Finally, the standard is violated if both limits are exceeded.

MWGen further agrees that the word “or” is facially ambiguous. The word can be applied as an “inclusive disjunctive” or as an “exclusive disjunctive.”¹ In the context of the alternative thermal effluent limit, the key difference between these two meanings is how they govern the situation where a thermal discharge both (1) exceeds the permitted total excursion-hours limit and (2) exceeds the applicable daily maximum by more than 3°F. Under the “inclusive disjunctive” sense of “or”, the thermal discharge that exceeds both limits violates the thermal standard. This is clearly the outcome intended by the Board.

But under the “exclusive disjunctive,” the discharge would not violate the thermal standard when the discharger violated both limits, not just one “or” the other. Thus, this both-limits situation is “excluded” from the meaning of the word “or.”

The Illinois Legislative Reference Bureau’s *Bill Drafting Manual* advises that the “inclusive disjunctive” is “the sense in which ‘or’ is usually intended and understood.” *Manual*, at p. 219.² But if the Board believes that the level of ambiguity in the original version is unacceptable, the Bureau advises that the best way to address it is to add clarifying language:

¹ The “inclusive” sense can be expressed as “A, but not B; B, but not A; or both A and B.” The “exclusive” sense is expressed as “A, but not B; B, but not A; but not A and B.”

² Available at <http://www.ilga.gov/commission/lrb/manual.pdf>.

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b. In lieu of the water temperature requirements of 35 Ill. Adm. Code 302.408(c), (d), (e), and (f), water temperature must not exceed the daily maximum temperature limits in paragraph (1)(a):

- i. By more than 5% of the hours (438 hours) in the 12-month period ending with any month; ~~or~~
- ii. By more than 1.7°C (3°F) at any time; or
- iii. Both (b)(i) and (b)(ii).

MWGen believes that this change would be the simplest way to eliminate ambiguity in the alternative thermal effluent limit.³ Alternatively, the Board could revise Subsection (b) to more directly track the language of 35 Ill. Admin. Code 302.408(f):

b. In lieu of the water temperature requirements of 35 Ill. Adm. Code 302.408(c), (d), (e), and (f), water temperature must not exceed the daily maximum temperature limits in paragraph (1)(a), during more than five percent of the hours (438 hours) in the 12-month period ending with any month. Moreover, at no time shall the water temperature exceed the maximum limits in the applicable table by more than 1.7°C (3.0°F).~~;~~

- ~~i. By more than 5% of the hours (438 hours) in the 12-month period ending with any month; or~~
- ~~ii. By more than 1.7°C (3°F) at any time.~~

35 Ill. Admin. Code 302.211(e), which Subsection 302.408(f) mirrors, has been in place for decades, and MWGen is unaware of any difficulties in application caused by drafting ambiguity during that time. So it would be a robust precedent to use in drafting the alternative thermal effluent limit for the Will County Generating Station.

MWGen does not think that replacing “or” with “and” is the correct way to resolve the ambiguity in the original version of the alternative thermal effluent limit.⁴ There is a concern that substituting the word “and” for “or” will relax the compliance monitoring requirements contemplated by Subsection 302.408(f). With the insertion of the word “and” in the Board’s

³ This approach is preferable to resorting to using the phrase “and/or” in the regulation. The Illinois Legislative Reference Bureau criticizes “and/or” as an “abominable monstrosity.” *Manual*, at p. 219.

⁴ The Reference Bureau notes that, depending on context, the word “and” is capable of having four distinct meanings. *Manual*, at p. 218.

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proposed language, noncompliance would occur only if the discharge exceeded both the excursion-hour limit “and” the daily maximum temperature limit. This result would be a significant departure from Subsection 302.408(f) and might not assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the CSSC.

In conclusion, the Board’s proposed change threatens to relax the compliance obligations imposed by the AEL in a way that the Board does not intend and that is not consistent with the requested alternative thermal effluent relief supported by MWGen’s Thermal Demonstration Report. MWGen agrees that any reduction in the ambiguity of the proposed thermal limit is an improvement. But the addition of clarifying language, as discussed above, is the most reliable way to accomplish that goal.

MWGen has spoken with the Agency and they agree the regulatory language should use “or” instead of “and”.

Respectfully submitted,

Midwest Generation, LLC

By: /s/ Susan M. Franzetti
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Dated: April 15, 2019

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