

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC)	
& INEOS JOLIET, LLC,)	
Petitioners,)	
v.)	PCB 16-19 (Midwest Generation)
)	PCB 16-24 (INEOS)
ILLINOIS ENVIRONMENTAL)	(Time-Limited Water Quality Standard)
PROTECTION AGENCY)	(Consolidated)
Respondent.)	

NOTICE OF FILING

To:

Don Brown, Clerk of the Board Illinois Pollution Control Board James R. Thompson Center, Suite 11-500 100 W. Randolph Street Chicago, IL 60601 don.brown@illinois.gov	Bradley P. Halloran Hearing Officer Illinois Pollution Control Board James R. Thompson Center, Suite 11-500 100 W. Randolph Street Chicago, IL 60601 Brad.Halloran@illinois.gov
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(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board a Joint Motion for Stay of Proceedings, a copy of which is herewith served upon you.

Respectfully submitted,

Dated: November 27, 2019

MIDWEST GENERATION, LLC

By: /s/ Susan M. Franzetti

Susan M. Franzetti
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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Joint Motion for Stay of Proceedings, via electronic mailing to the following:

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Dated: November 27, 2019

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JOINT MOTION TO STAY PROCEEDINGS

Pursuant to 35 Ill. Adm. Code 101.514, the Illinois Environmental Protection Agency (the Agency), by one of its attorneys, Sara G. Terranova, Midwest Generation, LLC (MWGen), by one of its attorneys, Susan M. Franzetti, and INEOS Joliet, LLC (INEOS), by one of its attorneys, Michael P. Murphy (collectively, the Movants), respectfully request that the Board enter an order staying this proceeding while MWGen pursues Alternate Thermal Effluent Limitations for Joliet Generating Station 9 and Joliet Generating Station 29 (collectively, the Joliet Stations or Stations), in order to conserve the resources of the Board and the Movants. In support of this motion, Movants state as follows:

I. Status Report Detailing the Progress of the Proceeding and Related Proceedings¹

A. Time-Limited Water Quality Standard (TLWQS) Proceedings

1. On July 1, 2015, MWGen filed a Petition for Variance for the Will County and Joliet Stations, pursuant to Section 35 of the Illinois Environmental Protection Act (the Act).

¹ “A status report detailing the progress of the proceeding must be included in the motion [to stay proceedings].” 35 Ill. Adm. Code 101.514(a).

2. On February 24, 2017, MWGen's variance petition was automatically converted to a Petition for a Time-Limited Water Quality Standard (TLWQS) by operation of 415 ILCS 5/38.5(c).

3. On April 12, 2017, the Board ruled that MWGen's "converted" variance petition did not substantially comply with Section 38.5(e) of the Act—an entirely new provision of the Act that was enacted well after MWGen filed its 2015 petition.

4. On June 27, 2018, MWGen filed an amended TLWQS petition (the "TLWQS Petition").

5. On July 25, 2019, the Board ruled that MWGen's TLWQS Petition substantially complied with the substantial or essential content requirements of 40 C.F.R. § 131.14, 415 ILCS 5/38.5, and 35 Ill. Adm. Code 104.530. Additionally, the Board's July 2019 Order consolidates the MWGen TLWQS proceeding with PCB 16-14, which concerns a TLWQS petition INEOS filed on July 21, 2015, and amended on July 26, 2018.

6. In its July 2019 Order, the Board ordered the Agency to submit a Recommendation regarding the TLWQS Petition by September 9, 2019. *See* 35 Ill. Adm. Code 104.545(b), 104.550(a).

7. On September 9, 2019, the Movants jointly moved for the Agency to receive an extension of time to file its Recommendation regarding the TLWQS Petition.

8. On September 11, 2019, the Board granted the joint motion. The Agency was ordered to file its Recommendation by December 9, 2019.

B. Alternative Thermal Limits Subpart K Demonstration Proceedings for Will County Generating Station

9. On December 3, 2015, MWGen transmitted a "Detailed Plan of Study to Support Alternative Thermal Limits" to the Agency (the "Will County DPS"). Filing a Detailed Plan of Study is one of the "Early Screening" requirements outlined in the Board's thermal-demonstration

rules (“Subpart K”). 35 Ill. Admin. Code 106.1120. At the time of the filing of its original July 2015 variance petition, MWGen planned to seek regulatory relief under Subpart K for the Will County Generating Station (“Will County Station” or “Will County”).

10. On March 3, 2016, the Agency approved the Will County DPS. The Illinois Department of Natural Resources (“IDNR”) concurred in the Agency’s approval of the Will County DPS on June 9, 2016.

11. On September 29, 2017, MWGen transmitted to the Agency and the U.S. Environmental Protection Agency (U.S. EPA) a completed draft of the Will County Thermal Demonstration Report.

12. On January 26, 2018, pursuant to Subpart K, MWGen filed a petition for alternative effluent limitations for the Will County Station (the “Will County Subpart K Petition”).

13. On March 12, 2018, the Agency recommended that the Board approve the Will County Subpart K Petition.

14. On May 14, 2018, the IDNR informed the Board that it concurred with the Agency’s recommendation.

15. On November 7, 2019, the Board approved, in substance, the relief requested in the Will County Subpart K Petition.

16. On November 12, 2019, MWGen filed a “Motion for Modification,” proposing that the Board make non-substantive alterations to its Order granting the Will County Opinion for purposes of clarity.

17. The Board granted the Motion for Modification on November 21, 2019. This eliminates MWGen’s need to pursue the Will County portion of the pending TLWQS

Petition, and MWGen intends to move to voluntarily dismiss that portion of the TLWQS Petition once the Station's NPDES permit is modified to reflect the new thermal limits.²

C. Status of Discussions with U.S. EPA Regarding the MWGen Time-Limited Water Quality Standard Petition

18. The Movants' Joint Motion for Extension of Time to File a Recommendation noted that the Agency required "more time to have further discussions with U.S. EPA and MWGen concerning issues related to the interpretation and application" of various legal standards governing TLWQS petitions filed under Illinois law and the federal water-quality-standards variance regulations that the U.S. EPA would apply in determining whether to approve a Board-issued TLWQS.

19. On October 1, 2019, representatives from U.S. EPA Region 5, the Agency, and MWGen met to discuss MWGen's TLWQS Petition. The meeting discussion identified a number of relevant issues that apply to both the Joliet Stations portions and the Will County portion of the TLWQS Petition, for which there are not yet any Board decisions under the TLWQS regulations (Subpart E of Part 104) or federal court decisions under the federal regulations, or to Movants' knowledge, under other similar state laws. These issues include:

- Whether, in satisfying the requirement to show that one or more of the Use Attainability Analysis factors listed in 40 C.F.R. § 131.10(g) ("UAA Factors") are applicable to the waters covered by the TLWQS petition, a petitioner is limited to relying on facts that relate only to the pollutant(s) that would be covered by the requested TLWQS, or may also rely on other facts establishing that the covered waters meet one or more of the UAA factors.
- How to sufficiently demonstrate the existence of a "substantial and widespread negative economic and social impact on the public" under 35 Ill. Adm. Code 104.560(a)(6), in the case of a privately-owned electrical generating station that participates in a multi-state transmission network that is, in turn, closely regulated by the Federal Energy Regulatory Commission, like the MWGen stations at issue here.

² Alternatively, if the Board prefers, it could grant MWGen leave to file an amended petition that limits the scope of the petition to the Joliet Generating Stations.

- Whether the granting of an Alternative Thermal Effluent Limit represents a “Highest Attainable Condition” for purposes of the Illinois TLWQS and federal regulations allowing for water-quality-standard variances.
- Whether the requirement for a Pollutant Minimization Program (35 Ill. Adm. Code 104.530(a)(13)) can be satisfied, in whole or in part, by reductions in pollutant discharges that have been made since the filing of: (i) the original Section 35 variance petition, (ii) the converted TLWQS petition and/or the amended TLWS petition but before the final issuance of the requested TLWQS by the Board.
- Whether a Pollutant Minimization Program can consist solely of a commitment to not increase pollutant levels, even if the petitioner establishes that no feasible changes in operating practices can be implemented to further reduce pollutant levels during the term of the TLWQS.
- Whether the U.S. EPA, the Board and/or the Agency can condition the granting of a TLWQS based on the performance of habitat restoration work that will not ameliorate the ecological effects of thermal discharges (if any) in the waterway.

20. Because there is little or no precedent to guide Movants on the above issues, both MWGen and the Agency would be compelled to devote significant effort and resources to determining their respective positions and presenting some or all of these issues in pre-hearing and post-hearing briefs, as well as hearing testimony (including expert testimony), before the Board. The Board in turn would need to expend its resources in evaluating and deciding these issues. In sum, Movants have concluded that it will take a significant amount of time and effort to proceed with the MWGen TLWQS Petition.

21. As explained further below, and as supported by the Board’s prior decision to delay for three years the applicability of the new thermal standards for these receiving waters,³ MWGen originally pursued the instant thermal variance relief to cover the period of time necessary to obtain a Subpart K thermal variance, which necessitated extensive field work in the receiving waters and analysis of the relevant data to support a Subpart K petition for each of the stations. However, due

³ See in the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304, PCB R08-9(D), slip op. at 77 (Mar. 19, 2015).

to the passage of time, the Board already has granted that relief for the Will County Station and MWGen is about to file a Subpart K petition for the two Joliet Stations.⁴ Thus, what was originally thought to be a multi-year period for which a TLWQS would be needed, is now virtually over for the Will County Station and much closer to being unnecessary for the two Joliet Stations. Therefore, for the reasons discussed in the following Section, pursuing this TLWQS proceeding further would not result in any foreseeable ecological benefits to the receiving waters, but would cause both Movants and the Board to expend a considerable amount of time and effort that is likely to become moot in a relatively short period of time.

D. MWGen's Filing of a Subpart K Petition for the Joliet Stations is Imminent

22. On March 3, 2016, the Agency approved MWGen's Detailed Study Plan for the Joliet Generating Stations pursuant to 35 Ill. Adm. Code 106.1120(f).⁵

23. The Detailed Study Plan called for sampling to be conducted in the UDIP and Five-Mile Stretch during the calendar years of 2016, 2017, and 2018. The plan cautioned that the sampling period might need to be extended if unusual meteorological conditions and/or atypical station operations interfered with the collection of useful data. It further cautioned that the 2016 data, some of it collected prior to the start of the Joliet Stations' new mode of "peaker" operations, would not be representative of the UDIP's thermal regime once the Joliet Stations were operating.

24. For reasons described in MWGen's TLWQS Petition, completion of the Joliet Stations Thermal Demonstration Report was delayed, primarily due to the conversion of those Stations

⁴ For simplicity, this Motion refers to the filing of a single Subpart K petition for the two Joliet Stations. In fact, based on its understanding of the Subpart K regulatory requirements, MWGen is likely to file two Subpart K petitions, one for each of the Stations. Both petitions would rely on the same Demonstration Report and would seek the same regulatory relief for the same waterbodies.

⁵ MWGen prepared two, substantively identical and overlapping, study plans, one for each of the Joliet Stations. For simplicity, this Motion refers to them as a single Plan.

from coal-fired base-load plants, to “peaker stations” fueled by natural gas. (See PCB 16-19, *Amended Petition for Time-Limited Water Quality Variance with Exhibits*, at pp. 11-13 (filed June 27, 2018)). This conversion prevented MWGen from conducting meaningful winter surveys in December 2016-January 2017, because the Will County and Joliet Stations were not in operation during that time.

25. Additionally, excessive icing prevented MWGen from accessing the UDIP to conduct studies planned for January 2018. The Agency was given timely notice of these delays and agreed that the additional time requested by MWGen was reasonable and necessary for the final study to give a proper assessment of the Stations’ future effects or non-effects on aquatic life in the receiving waters. The additional study work was completed earlier this year.

26. On October 3, 2019, MWGen submitted a draft copy of the Joliet Stations Thermal Demonstration Report to the Agency for review and comment.

27. In a cooperative effort to move the Joliet Stations’ Subpart K process along expeditiously, the Agency conducted a preliminary review of the main body of the Joliet Stations Thermal Demonstration Report (*i.e.*, not the appendices to the Report) to identify any significant issues or concerns. On November 13, 2019, the Agency advised MWGen that it had not identified any significant issues or concerns with the Report’s findings or the proposed Subpart K relief and provided limited comments requesting further clarity in the text of the final report.

28. MWGen’s consultant, EA Science & Technology, is in the process of preparing the final Joliet Stations Thermal Demonstration Report and its counsel is preparing the Subpart K Petition to accompany that Report.

E. INEOS's Amended Petition for Time-Limited Water Quality Standard for Temperature

29. INEOS's Amended Petition for Time-Limited Water Quality Standard for Temperature, filed on July 26, 2018, was supplemented by certain information in MWGen's Amended Petition. INEOS's Amended Petition provided INEOS's discharger-specific information required for coverage under the temperature multi-discharger TLWQS and, where appropriate, referenced and incorporated required information provided in the MWGen TLWQS Petition that is commonly applicable to dischargers that may be covered by this temperature multi-discharger TLWQS. INEOS incorporated by reference the discussion of the Use Attainability Analysis (UAA Factors) in the MWGen TLWQS Petition (See INEOS's Amended Petition, p. 4).

30. The relief requested by INEOS is dependent upon the information contained in MWGen's TLWQS Petition and the interpretation and application of the UAA Factors discussed in the Amended Petition. Accordingly, resolution of the INEOS TLWQS petition (including the Agency's development of a recommendation) would pose many of the same challenges that resolution of the MWGen TLWQS Petition does. Moreover, INEOS is assessing whether it will continue to pursue its thermal TLWQS petition or whether it is feasible for it to seek regulatory relief under Subpart K, and review and assessment of the upcoming filings in the Joliet Subpart K Petition will be an important part of this analysis.

II. The Board Should Stay this TLWQS Proceeding and Allow MWGen to Voluntarily Dismiss Portions of its TLWQS Petition Related to the Will County Generating Station

31. Now that the Board has approved Alternative Thermal Effluent Limits for the Will County Station, the portions of the TLWQS Petition related to that Station have been rendered moot; the temporary thermal standards for the Station requested in the TLWQS Petition are identical to the thermal limits approved by the Board in the Will County Petition. Once the Will

County Station's NPDES permit is modified to include the new thermal limits, MWGen will request a voluntary dismissal of the portions of the pending TLWQS Petition relating to the Will County Station.

32. As noted above, when the TLWQS petition was filed, Movants expected that it would be a period of years before MWGen would be able to collect all of the necessary data to support a request for Subpart K relief and to pursue a Subpart K petition to a decision by the Board. While the collection of the necessary data did cover a period of three years, that work is now completed and MWGen has prepared a draft Joliet Thermal Demonstration Report explaining how the data show that thermal effluent from the Joliet Stations is not adversely affecting aquatic life in the UDIP or Five-Mile Stretch. And the Agency has now conducted a preliminary review of the draft Report which indicates that the requested Subpart K relief described therein is reasonable and supported by the data.

33. Accordingly, MWGen is working expeditiously to finalize the Report, prepare a Subpart K petition, and file that petition with the Board before the end of 2019. Thus, instead of the previously expected duration of approximately 2.5 years for the Joliet portion of the proposed TLWQS, the TLWQS would only be needed for the limited amount of time that the Board would need to decide the soon-to-be filed Joliet Subpart K Petition.

34. The Agency would prefer to devote its resources to continuing its review of the Joliet Thermal Demonstration Report rather than preparing its recommendation on the TLWQS Petition, which is currently due on December 9, 2019.

35. By staying the TLWQS Petition, the Board can conserve resources by simply resolving the Joliet Subpart K Petition. If the Joliet Subpart K Petition is granted, this would moot MWGen's TLWQS Petition in its entirety, and MWGen would move to voluntarily dismiss the TLWQS

petition once the Joliet Stations' NPDES permits are modified to reflect the Subpart K relief. *See State v. Bd. of Trustees of U. of Ill.*, PCB Nos. 13-35; 13-36, slip op. at 13 (PCB 2013) (granting stay where doing so would “help to avoid the potentially unnecessary expenditure of resources by the parties and the Board”).

36. Subject to the Agency's completion of its detailed review of the Joliet Demonstration Report, the Movants agree that MWGen's draft Joliet Stations Thermal Demonstration Report appears to show that the Joliet Generating Stations—particularly under current “peaker” mode operations—do not adversely influence aquatic life in the UDIP or Five-Mile Stretch. Accordingly, granting this stay is not likely to produce any ecological harm in the foreseeable future.

37. Although the Joliet Stations Thermal Demonstration Report's retrospective assessment concludes that the currently applicable Secondary Contact and Indigenous Aquatic Life Water Quality Standards have not caused appreciable harm, in further support of this request for a stay of the TLWQS proceeding, MWGen is willing to commit (effective January 1, 2020), to following the stricter thermal limits proposed in the Report while the stay of proceedings requested in this Motion is in effect. MWGen will document and certify compliance (or any noncompliance) with these stricter thermal limits in its monthly Discharge Monitoring Reports (DMRs) for the Joliet Stations, which are submitted to the Agency. The following chart shows the significant tightening in thermal standards that MWGen is committing itself to if this Motion is granted:

Month	Currently Applicable Secondary Contact Standards (°F)	Proposed Near-Field AELs for Joliet Stations 9 and 29 (°F)
January	93	65
February	93	65
March	93	70
April 1-15	93	80
April 16-30	93	80
May 1-15	93	85
May 16-31	93	85
June 1-15	93	93
June 16-30	93	93
July	93	93
August	93	93
September	93	93
October	93	90
November	93	85
December	93	70
Excursion Hours	Shall not exceed 93°F more than 5% of the time, or 100°F at any time	Daily maximum not to be exceeded by more than 5% of the time in a calendar year; at no time shall water temperature exceed the maximum limits by more than 3°F

WHEREFORE, the Movants—the Illinois Environmental Protection Agency, Midwest Generation, LLC, and INEOS Joliet, LLC—respectfully request the Illinois Pollution Control Board stay proceedings in this matter until a decision is rendered by the Board in the Joliet Stations Subpart K proceedings, which will be filed with the Board not later than December 31, 2019.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

Dated November 27, 2019

By: /s/Sara G. Terranova
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Dated: November 27, 2019

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Midwest Generation, LLC

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