

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF: )  
 ) AS 2021-003  
Petition of Midwest Generation LLC for an )  
Adjusted Standard From 35 Ill. Adm. Code ) (Adjusted Standard)  
845.740(a) and Finding of Inapplicability of )  
35 Ill. Adm. Code 845 )  
(Waukegan Station) )

To: See attached service list.

**NOTICE OF ELECTRONIC FILING**

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the Illinois Environmental Protection Agency’s Response to Midwest Generation’s Motion in Limine to Exclude and Strike from the Record Agency Exhibits 1-5, 13-26, and 50, a copy of which is herewith served upon you.

Dated: November 30, 2023

Respectfully submitted,  
ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
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BY: /s/Sara Terranova  
Sara Terranova

**THIS FILING IS SUBMITTED ELECTRONICALLY**

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ILLINOIS POLLUTION CONTROL BOARD

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**ILLINOIS EPA’S RESPONSE TO MIDWEST GENERATIONS’S MOTION IN LIMINE  
TO EXCLUDE AND STRIKE FROM THE RECORD AGENCY EXHIBITS 1-5, 13-26,  
AND 50**

The Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by and through its attorney, hereby submits its Response to Midwest Generation’s (“MWG” or “Petitioner”) Motion in Limine. The Agency states as follows:

- 1) On May 11, 2021, MWG filed a “Petition for an Adjusted Standard and a Finding of Inapplicability for Waukegan Station” regarding the East Pond and the Grassy Field.
- 2) On September 17, 2021, MWG filed an “Amended Petition for an Adjusted Standard and a Finding of Inapplicability for Waukegan Station” regarding the West Pond (instead of the East Pond) and the Grassy Field.
- 3) On October 31, 2022, Illinois EPA filed with the Board a Recommendation (“Agency Recommendation”) to deny Petitioner’s request.
- 4) On July 28, 2023, Petitioner filed a Motion to Stay Proceedings, a Response to the Agency’s Recommendation, and Second Amended Petition for an Adjusted Standard from 35 Ill. Adm. Code 845.740(a) and Finding of Inapplicability of Part 845 withdrawing its request for an adjusted standard allowing the reuse of the West Pond’s existing lagoon but leaving its request to the Grassy Field.

5) On November 16, 2023, MWG filed its Motion in Limine (“Motion”) to exclude and strike Agency Exhibit’s 1-5, 13-26, and 50. In support, MWG stated Agency Exhibits 1-5, 13-26, and 50 lack any evidentiary foundation and constitute inadmissible heresy. *See* Motion at 1.

6) MWG’s Motion in Limine should be denied.

7) MWG seems to have forgotten who bears the burden of proof in this proceeding and should be reminded that the burden of proof in an adjusted standard proceeding is on the petitioner. 415 ILCS 5/28.1(c) and 35 Ill. Adm Code 104.426. In fact, the Illinois EPA does not have to provide a single piece of evidence or testimony and the Board could still deny Petitioner’s request for an adjusted standard. Pursuant to 35 Ill. Adm. Code 104.416(b), the Agency must “address and respond to the petition with respect to each issue raised by the requirements of Section 104.406(a) through (j).” The Agency fulfilled this requirement in the Agency’s Recommendation filed on October 31, 2022. Furthermore, pursuant to Section 104.416(a), the recommendation must set forth the rationale for the Agency's position and **may present any information which the Agency believes is relevant** to the Board's consideration of the proposed adjusted standard (**emphasis added**). 35 Ill. Adm Code 416(a). The recommendation must cite to supporting documents or legal authorities whenever they are used as a basis for the Agency's conclusion. 35 Ill. Adm. Code 104.416(c). The Agency has met the requirements of Section 104.416 and the exhibits relied upon by the Agency should therefore not be excluded or stricken.

8) As the Agency stated in discovery, it does not plan to call any witnesses at hearing. This is because it is MWG (and not the Agency) seeking the relief. Therefore, it is MWG (and not the Agency) that must demonstrate their qualification for an adjusted standard to the Board. 35 Ill. Adm. Code 104.426.

9) However, like all hearings before the Illinois Pollution Control Board, Agency staff will attend the hearing and will be available to answer any question from the Board or others who may have questions for the Agency. As such, there will be no hearsay issues as the Petitioner alleges in their Motion.

10) Therefore, there will be no prejudice against MWG and the request to strike or exclude Agency Exhibits should be denied.

WHEREFORE, Illinois EPA requests that the Illinois Pollution Control Board DENY Midwest Generation's Motion in Limine to Exclude and Strike from the Record Agency Exhibits 1-5, 13-26, and 50.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Dated: November 30, 2023

Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
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(217) 782-5544  
Sara.Terranova@Illinois.Gov

BY: /s/Sara Terranova  
Sara Terranova

**CERTIFICATE OF SERVICE**

I, the undersigned, on affirmation certify the following:

That I have electronically served the attached **ELECTRONIC NOTICE AND FILING** and **ILLINOIS EPA'S RESPONSE TO MIDWEST GENERATIONS MOTION IN LIMINE TO EXCLUDE FROM THE RECORD AGENCY EXHIBITS 1-5, 13-26, AND 50** upon those listed on the Service List before 4:30 p.m. on November 30, 2023.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By:           /s/ Sara Terranova            
Sara Terranova  
Assistant Counsel  
Division of Legal Counsel

DATED: November 30, 2023

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