BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCES DEFENSE COUNCIL **PRAIRIE RIVERS NETWORK, and** **SIERRA CLUB,** **Plaintiffs,** v. **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and DYNEGY MIDWEST GENERATION, INC.,** **Defendants**	)	**PCB 13 - 65** **(CITIZEN ENFORCEMENT -- NPDES)**

To:

John Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, IL 60601

Persons on the attached service list

Please take notice that today I filed with the office of the Clerk of the Pollution Control Board my **Memorandum in Opposition to Motion to Dismiss** on behalf of the Natural Resources Defense Council, Prairie Rivers Network, and Sierra Club, a copy of which is hereby served on you.

By: _____
Ann Alexander, Natural Resources Defense Council

Dated: July 19, 2013

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCES DEFENSE COUNCIL PRAIRIE RIVERS NETWORK, and SIERRA CLUB,	)	
Plaintiffs,	)	
v.	)	
	)	**PCB 13 - 65**
	)	**(CITIZEN ENFORCEMENT -- NPDES)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and DYNEGY MIDWEST GENERATION, INC.,	)	
Defendants	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

Introduction

Plaintiffs[1] Natural Resources Defense Council ("NRDC"), Prairie Rivers Network ("PRN"), and the Sierra Club (collectively, "Plaintiffs") hereby respond in opposition to the Motion to Dismiss ("Motion") filed by Dynegy Midwest Generation, Inc. ("Defendant").

For reasons discussed below, the motion has no merit. With respect to personal jurisdiction, regardless of the merits of the motion, any potential deficiencies in service of process have now been rectified by re-service of the Complaint on defendants. The remaining grounds proffered for dismissal are utterly unsupported. Plaintiffs have set forth facts that fall squarely within the purview of the operative regulation, 35 Ill. Admin. Code § 309.182, which authorizes the Board to suspend, modify, or revoke a permit upon a showing of cause, "including

[1] Plaintiffs were referenced as "Petitioners" in the initiating document in this action filed on May 15, 2013. To clarify that this action is an enforcement matter, the reference has been changed in this Memorandum to "Plaintiffs"; and the caption has been modified as well. For additional clarity and consistency, the Petition is referenced herein as the "Complaint."

but not limited to" a change in circumstance that mandates such action. Defendant's preference that IEPA[2] nonetheless handle the matter (Motion at 14-15) is of no consequence in view of the plain language of the regulation. Neither does entirely unrelated authority concerning multiple permit applications (Motion at 6-7) or variances (Motion at 8-9) in any way constrain the plain grant of authority to the Board in § 309.182.

Since the mercury monitoring reports filed by Defendant following issuance of its NPDES Permit – showing concentrations of mercury in the Facility's effluent consistently in excess of the human health standard in the receiving waters – could be construed by the Board as cause to modify the Permit, dismissal on the pleadings is plainly inappropriate. In any event, although the regulation does not, as Defendant contends, require that Plaintiffs demonstrate that this new evidence "mandates" modification, they have done so. Plugging the monitoring results into the relevant calculation formula clearly demonstrates a reasonable potential to exceed the applicable water quality standard, and federal and state law mandates that permit limits be set in such situation to control discharges

Point I

ANY DEFICIENCY IN PERSONAL SERVICE HAS BEEN CURED

Although Defendant acknowledges receipt of the filing commencing this action, it complains of two technical deficiencies in it: first, that it was served by regular mail rather than registered or certified mail; and second, that it did not contain language in the Notice of Filing warning of the consequences of failure to answer.

Plaintiffs note that Defendant acknowledges receipt of the document on May 17, and has alleged no prejudice resulting from these alleged deficiencies. Additionally, there was no applicable deadline for the filing; and Defendant did in fact serve a response to Plaintiffs'

[2] Abbreviations are defined in the Petition unless otherwise specified.

Motion to Consolidate that was filed in the instant case as well as in the related Permit appeal (PCB 13-017).

However, Plaintiffs will not respond directly to the deficiency allegations, as any such purported deficiency has now been cured by service of the initiating pleading upon all defendants and their counsel by both registered and certified mail.[3] The registered mail receipts, filed with the Board, are attached as Exhibit 1, and the certificate of service via certified mail is attached as Exhibit 2 (Plaintiffs will file proof of service when they receive proof of receipt). The revised Notice of Filing, attached as Exhibit 3, contains the warning language referenced in the Motion. The Board previously allowed such cure of jurisdictional deficiencies in *Strunk v. Williamson Energy LLC* , PCB 07-135 (September 20, 2007) and *Trepanier v. University of Illinois at Chicago,* PCB 97-50 (January 23, 1997) (both cited in the Motion). Particularly in view of the clear lack of prejudice to Defendant, cure should be allowed in this instance as well.

Point II

THE COMPLAINT STATES A VALID SUBSTANTIVE CLAIM FOR MODIFICATION, SUSPENSION, OR REVOCATION OF THE PERMIT

The applicable regulatory provision underlying this matter, 35 Ill. Admin. Code 309.182, is quite straightforward in defining grounds on which the Board may modify, suspend, or revoke a NPDES permit; and hence the elements of a valid claim for relief. That provision states, in relevant part, that the Board may take such action "upon proof of cause *including, but not limited to,* … (3) A change in any circumstance that mandates either a temporary or permanent reduction or elimination of the permitted discharge." *Id.* (emphasis added).

[3] Although 35 Ill. Admin. Code § 101.304(c) expressly allows service of a complaint in enforcement by "registered or certified" mail, Plaintiffs have nonetheless served the Complaint by both methods to eliminate any possible ambiguity.

The use of "including but not limited to" throws wide open the scope of the "cause" that may be pleaded in support of a complaint to the Board under this section. It is thus sufficient, in and of itself, for Plaintiffs to have pleaded that the mercury monitoring reports provide further basis to modify the permits on the grounds they initially set forth in their comments on the draft Permit. It is not necessary that Plaintiffs plead or prove that these reports constitute a change in circumstance that "mandates" action, since the listed grounds for Board action in § 309.182 are expressly non-exclusive. Nonetheless, as discussed below, Plaintiffs have sufficiently pleaded that the mercury monitoring reports do, in fact, mandate a reduction of the permitted discharge, *i.e.*, imposition of a mercury limit to ensure that the discharge does not cause or contribute to an exceedances of the mercury human health standard applicable to the Illinois River.

Defendants are thus left to challenge the sufficiency of the pleadings based on authority that has essentially nothing to do with the actual substance of § 309.182 or the issues in this case; and to argue that the Board should read pleading requirements into that regulation that are not there. For the reasons set forth below, these efforts have no merit.

A. The Pending Permit Appeal Has No Impact on the Board's Jurisdiction to Hear a Complaint in Enforcement

In support of its assertion that the Board has no subject matter jurisdiction over Plaintiffs' Complaint under § 309.182, Defendant cites to Board determinations concerning an entirely unrelated issue. *Joliet Sand & Gravel Co. v. IEPA*, PCB 87-55 (June 10, 1987), *Caterpillar Tractor Co. v. IEPA*, PCB 79-180 (July 14, 1983), and *Alburn v. IEPA*, PCB 81-23 (March 19, 1981), the cases cited in the Motion (*see* Motion at 6-7), all pertain to the circumstance of multiple permits for the same activity. The core principle underlying all three is that two permits cannot be in effect at the same time. Accordingly, the Board held in these cases that IEPA the

Board held that IEPA could not issue a new permit in an effort to correct flaws in an earlier issued permit that was pending before the Board. *See Alburn* at 1; *Joliet Sand* at 4.

These decisions do not address § 309.182 or any other type of enforcement proceedings, and there is no rational basis to extrapolate from them any limitation on such proceedings. At issue in those cases was not multiple proceedings concerning the *same* permit, as is the case here, but rather the effect of IEPA issuing *multiple permits*. The concern articulated by the Board was that if multiple permit decisions could be reviewed concurrently by the Board, applicants would have the incentive to "submit minimal information in the first application and provide more information in each subsequent permit application until the Agency granted a permit." *Joliet Sand* at 5. In this case, however, there no abuse of the permit process at issue, and Plaintiffs are appropriately employing § 309.182 to fulfill its clear purpose: to bring to the Board's attention information that was not available during the permitting process, and which supports changing the terms of the Permit.

Indeed, Defendants' strained application of these unrelated cases proves too much. Divesting the Board of jurisdiction to hear a claim under § 309.182 while a permit appeal was pending would create an enormous loophole. A permitees who appealed conditions of 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, and no matter the extent of the permitee's violation of the permit. Had the Board intended to create such a loophole, or otherwise restrict its jurisdiction under § 309.182, Plaintiffs expect it would have done so explicitly.

Here, moreover, unlike the cases cited by Defendant, there no potential problem in this instance of disparate decisions made by the Board and the Agency concerning the same activity.

Both the Permit Appeal and the instant matter are now pending before the Board, which may choose the appropriate course of action to ensure that the necessary limit on mercury discharge is put in place.

B. No Proof of a Violation is Required for a Claim under § 309.182

As discussed *supra,* it is quite clear from the plain language of § 309.182 that the only requirement for a finding by the Board that a permit should be modified, suspended, or revoked – and hence for any pleading requesting such action – is "cause." Moreover, of the three non-exclusive ("including but not limited to") possible causes for such action, only the first references a finding of a violation.

Defendants' contention that a violation is a prerequisite to a cause of action under § 309.182 therefore has no merit. The Board decision cited by Defendant , *City of Monticello v. IEPA*, PCB 77-305 (February 16, 1978), does not change that fact (Motion at 8-9). *City of Monticello,* once again, addressed entirely different subject matter: the City's request for a variance. The Board mentioned in passing dicta the violation element of the predecessor to § 309.182, but did not purport to analyze and apply that provision. *Id.* at 3.

As § 309.182 allows, and Plaintiffs have made clear in their pleading, there is "cause" to modify, suspend, or revoke Defendant's Permit separate and apart from any possible violation of that Permit. As discussed in Subsection C, *infra,* IEPA was required under applicable regulations to determine whether the Facility's discharge had a reasonable potential to cause or contribute to an exceedance of the applicable mercury human health standard in the Illinois River. Such a finding is critical to ensuring that any necessary water quality-based effluent limitations ("WQBELs") are put in place to ensure compliance with Clean Water Act § 302, 33 U.S.C. § 1312, implemented at § 309.141(a) and (d) . Hence, new evidence – like the mercury

monitoring results at issue here – of reasonable potential to exceed is clearly good cause for the Board to re-evaluate a permit. But a finding of reasonable potential does not necessarily entail a finding that any violation or exceedance has already occurred, only – by definition – that there is a "reasonable potential" that it will.

C. The Mercury Monitoring Reports Mandate Modification of the Permit to Include a Limit on Mercury Discharge

Although it is not necessary for Plaintiffs to plead or prove that changed circumstances "mandate" modification, the mercury monitoring reports do, in fact, mandate a permit revision to include a limit. Those reports demonstrate reasonable potential for the Facility's discharge to cause or contribute to an exceedance of the human health standard for mercury in the Illinois River, and applicable law thus requires that a discharge limit be imposed to prevent such an exceedance.

Illinois regulations provide at 35 Ill. Admin. Code § 309.141 that "[i]n establishing the terms and conditions of each issued NPDES Permit, the Agency *shall* apply and ensure compliance with…[a]ny more stringent limitation. . .necessary to meet water quality standards." § 309.141(d)(1) (emphasis added). Ensuring that permitted discharges do not cause or contribute to exceedances of applicable water quality standards is thus mandatory in the NPDES permitting process, beyond the general requirement that IEPA issue water quality-based effluent limitations whenever it finds reasonable potential to exceed.[4] 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*, 880 F.Supp.2d 119 (D.D.C. 2012) (Motion at 13), that the Clean Water Act does not specify the time at which

[4] 35 Ill. Adm. Code 304.105 (no effluent shall alone or in combination cause a violation of water quality standards and "when" Agency finds a discharge would cause violation it "shall take" appropriate action to ensure compliance with water quality standards).

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.

Defendant provided four mercury sampling results to IEPA, reflecting concentrations of 69.8 ng/L, 13.5 ng/L, 13.2 ng/L, and 24.6 ng/L. *See* Complaint Exhibit 3. Obviously, the average of these numbers is over 12 ng/L. Thus, any question whether there is a reasonable potential that the average will be over 12 n/L is plainly settled in the affirmative.

This result can be more formally confirmed by plugging the four mercury data points in to the formula set forth in the federal guidance used by IEPA to determine reasonable potential to exceed water quality standards. That guidance is set forth in the United States Environmental Protection Agency's ("USEPA") *Technical Support Document for Water Quality-Based Toxics Control* ("TSD") (March 1991).[5] *See Des Plaines River Watershed Alliance v. IEPA,* PCB 04-88 (April 19, 2007) ("New Lenox") at 47 (IEPA states that it uses the TSD to assess impacts on water quality). The method for calculation of reasonable potential to exceed water quality standards is described at TSD 53-55. That method specifically addresses situations where, as here, there exist a limited number of data points, such that a multiplier must be used on those data points to compensate for the resulting uncertainty.

Employing the TSD formula here unequivocally demonstrates a reasonable potential to exceed the mercury human health standard of 12 ng/L, by a large margin.[6] As the Board made

[5] *Available at* http://www.epa.gov/npdes/pubs/owm0264.pdf.

[6] The calculation steps are set forth at TSD 53. Step 1 is to select the highest value, which is 69.8 ng/L. Step 2 is to determine the coefficient of variation for the dataset, which is .06 where, as here, there are fewer than 10 samples. Step 3 is to determine the appropriate multiplier ratio from the tables at TSD 54. Here, the ratio for the 99% confidence level is 4.7, and the ratio for the 95% confidence level is 2.6. Step 4 is to multiply the highest value by the ratio selected in Step 3: 69.8 X 4.7 = 328.06 ng/L (99% confidence level), and 69.8 X 2.6 = 181.48 (95% confidence level). Step 5 is to compare the values arrived at in Step 4 – which is the projected maximum receiving water concentration ("RWC") with the applicable water quality standard, which is 12 ng/L. The TSD states, "EPA recommends that permitting authorities find reasonable potential when the projected RWC is greater than an ambient criterion," as is the case here. Plaintiffs also note that throwing out the highest value as an outlier and using

clear in *New Lenox*, IEPA did not have the option of simply disregarding the results of the TSD calculation without sound basis. *Id.* at 50 (rejecting IEPA's argument that a TSD calculation showing reasonably potential to exceed the applicable copper standard could be disregarded without sound basis). Indeed, the Board made that finding in *New Lenox* where there were only two data points available, and only one of them was equal to the applicable standard. Here, there are twice that many data points available, and all of them *exceed* the applicable standard.

Nor is it of any consequence here that IEPA employs an annual averaging method to determine whether a water body is meeting the human health standard. Motion at 12; *see* 35 Ill. Admin. Code 302.208(f). The method used to determine whether the *waterbody* exceeds the applicable standard does not necessarily govern the determination of whether a *discharge* to that waterbody has a reasonable potential to cause or contribute to an exceedance of that standard. The TSD calculation makes no reference to the method used to determine whether a waterbody is in compliance, because that is not consistently a relevant factor. Here, it is clearly not relevant, because, as noted above, the average of the four data points for the Facility's discharge exceeds the 12 ng/L human health standard. On the face of it, there is reasonable potential to cause or contribute not only to a one-time exceedance of that level, but to an exceedance of the standard calculated on an annual average basis.

In any event, the reasonable potential calculation described in the TSD is a determination, by definition, of *potential* to exceed, not a certainty that an exceedance would occur. The calculation is designed to be conservative, as indicated by the application of a multiplier when fewer samples are available. Accordingly, even if the TSD calculation were interpreted to show only a reasonable potential for a discharge to cause or contribute to a one-time excursion over the

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the next highest value would result in an even greater RWC number, since the multiplier would increase in association with the decreased number of samples.

applicable standard, an inference can be drawn from the pleaded facts that such potential in turn represents reasonable potential that the discharge could cause or contribute over time to an exceedance of the annual average.

Thus, although it was not necessary under §309.182 for Plaintiffs to plead that the mercury sampling results makes modification of the Permit mandatory, inferences drawn from plaintiffs' claims clearly support such a conclusion. Drawing all inferences from pleaded facts in Plaintiff's favor, it is clear that there is a set of facts that Plaintiffs could prove that would demonstrate that the mercury monitoring data mandated a finding of reasonable potential to exceed the applicable water quality standard. Dismissal is therefore not appropriate. *Smith v. Central Illinois Regional Airport*, 207 Ill.2d 578, 302 N.E.2d 250 (2003).

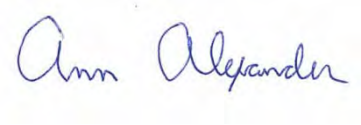
D. The Board has Authority to Modify the Permit

Defendant's claim that the Board is without authority under §309.182 is, by Defendant's own admission, directly contrary to the language of that provision. Defendant states that while it "recognizes that Section 309.182 states that 'The Pollution Control Board. . .may modify, suspend or revoke' a NPDES permit, DMG submits that NPDES permit modification should be done by IEPA…." Motion at 14-15. Absent a clear showing that §309.182 is in conflict with a USEPA directive, Defendant's argument that the language of the regulation should be disregarded, and the Board divested of its enforcement authority, is frivolous. Defendant has made no such showing, nor could it. When Illinois applied to USEPA for delegated authority to issue NPDES permits, it was required to submit "[a] description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures." 40 C.F.R. § 123.22(c). Accordingly, at the time USEPA granted delegated authority to IEPA in 1977, it presumptively had before it a description the 1974 predecessor to §309.182, Rule 912.

Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss the Complaint should be denied.

Respectfully submitted this 19th day of July, 2013 by:



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Attorney for the Sierra Club

EXHIBIT 1

Registered No. RE733088747US

Date Stamp 0063 09 07/18/13

To Be Completed By Post Office

Reg. Fee	$11.20		
Handling Charge	$0.00	Return Receipt	$0.00
Postage	$6.15	Restricted Delivery	$0.00
Received by			

Customer Must Declare Full Value $0.00

Domestic insurance up to $25,000 is included based upon the declared value. International indemnity is limited. (See Reverse).

OFFICIAL USE

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FROM	TO
ANN ALEXANDER NATURAL RESOURCES DEFENSE COUNCIL 20 N. WACKER DRIVE, SUITE 1600 CHICAGO, IL 60606	ILLINOIS ENVIRONMENTAL PROTECTION AGCY 1021 N. GRAND AVE. E., P.O. BOX 19276 SPRINGFIELD, IL 62794-9276

PS Form 3806, Receipt for Registered Mail Copy 1 - Customer
Rev 2007 (7530-02-000-9051) (See Information on Reverse)

Registered No. RE732087160US

Date Stamp

Reg. Fee	$11.20		0063
Handling Charge	$0.00	Return Receipt	$0.00	09
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OFFICIAL USE

60606

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FROM	ANN ALEXANDER NATURAL RESOURCES DEFENSE COUNCIL 20 N. WACKER DRIVE, SUITE 1600 CHICAGO, IL 60606
TO	[redacted] AND RACHEL R. MEDINA ENVIRONMENTAL BUREAU, IL ATTORNEY GENERAL'S OFFICE 500 S. SECOND STREET SPRINGFIELD, IL 62706

USPS Form **3806,** **Receipt for Registered Mail** *Copy 1 - Customer*
May 2007 (7530-02-000-9051) *(See Information on Reverse)*

Registered No.

Date Stamp

Reg. Fee	$11.20		0063
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Postage	$6.15	Restricted Delivery	$0.00	07/18/13
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FROM	TO
60606 ANN ALEXANDER NATURAL RESOURCES DEFENSE COUNCIL 20 N. WACKER DRIVE, SUITE 1600 CHICAGO, IL 60606	DYNEGY MIDWEST GENERATION, INC. 604 PIERCE BLVD. O'FALLON, IL 62269

PS Form 3806, Receipt for Registered Mail *Copy 1 - Customer*
July 2007 (7530-02-000-9051) *(See Information on Reverse)*

RE732007230US

To Be Completed By Post Office			
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Handling Charge	$0.00	Return Receipt $0.00	09
Postage	$5.80	Restricted Delivery $0.00	07/18/13
Received by			

Customer Must Declare Full Value $ $0.00

Domestic insurance up to $25,000 is included based upon the **declared value.** International indemnity is limited. (See Reverse).

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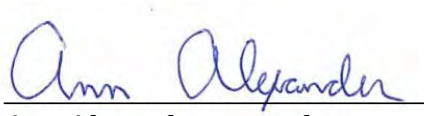
To Be Completed By Customer (Please Print) All Entries Must Be in Ballpoint or Typed	
FROM	60606 ANN ALEXANDER NATURAL RESOURCES DEFENSE COUNCIL 20 N. WACKER DRIVE, SUITE 1600 CHICAGO, IL 60606
TO	ANN CAMPION/NRDC/DANIEL DEEB/STEPHEN BONEBRAKE SCHIFF HARDIN, LLP 6600 WILLIS TOWER, 233 S. WACKER DR. CHICAGO, IL 60606

PS Form **3806, Receipt for Registered Mail** *Copy 1 - Customer*
May 2007 (7530-02-000-9051) *(See Information on Reverse)*
For domestic delivery information, visit our website at *www.usps.com*®

EXHIBIT 2

CERTIFICATE OF SERVICE

I, Ann Alexander, the undersigned attorney, hereby certify that I have served the attached **Petition to Modify, Suspend, or Revoke a Permit Issued by the Illinois Environmental Protection Agency** upon the persons listed in the foregoing Notice of Filing, by Certified Mail, from 20 N. Wacker Drive, Suite 1600, Chicago, IL 60606, before the hour of 5:00 p.m., on this 18th day of July, 2013.



Ann Alexander, Natural Resources Defense Council

EXHIBIT 3

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCES DEFENSE COUNCIL **PRAIRIE RIVERS NETWORK, and** **SIERRA CLUB,**	)	
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and DYNEGY MIDWEST GENERATION, INC.,	)	
Defendants	)	

To:

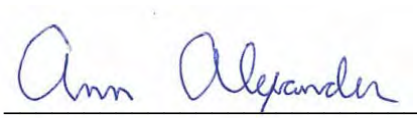
John Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, IL 60601

Persons on the attached service list

Please take notice that on May 15, 2013, I filed with the office of the Clerk of the Pollution Control Board a **Petition to Modify, Suspend, or Revoke a Permit Issued by the Illinois Environmental Protection Agency** on behalf of the Natural Resources Defense Council, Prairie Rivers Network, and Sierra Club, a copy of which is hereby served on you.

Please take further notice that you may be required to attend a hearing at a date set by the Board.

Please take further notice that failure to file an answer to this complaint within 60 days may have severe consequences. Failure to answer will mean that all allegations in the complaint will be taken as if admitted for purposes of this proceeding. If you have any questions about this procedure, you should contact the hearing officer assigned to this proceeding, the Clerk's Office or an attorney.

By: 

Ann Alexander, Natural Resources Defense Council

Dated: July 18, 2013

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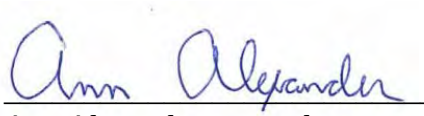
Chicago, Illinois 60604
Tel: (773) 818 4825

Attorney for the Sierra Club

CERTIFICATE OF SERVICE

I, Ann Alexander, the undersigned attorney, hereby certify that I have served the attached **Memorandum of Law in Opposition to Motion to Dismiss** upon the persons listed in the foregoing Notice of Filing, by depositing said documents in the United States Mail, postage prepaid, from 20 North Wacker Drive, Suite 1600, Chicago, IL 60606, before the hour of 5:00 p.m., on this 19th day of July, 2013.



Ann Alexander, Natural Resources Defense Council