ILLINOIS POLLUTION CONTROL BOARD
September 5, 2013

NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK and SIERRA CLUB,	)	
Complainant,	)	
v.	)	PCB 13-65
	)	(Citizens Enforcement - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and DYNEGY MIDWEST GENERATION, INC,	)	
Respondents.	)	

ORDER OF THE BOARD[1] (by D. Glosser):

On May 15, 2013, the Natural Resources Defense Council, Prairie Rivers Network and Sierra Club (collectively the Environmental Groups) filed a "Petition to Modify, Suspend, or Revoke a Permit Issued by Illinois Environmental Protection Agency (IEPA)" (Petition). The Environmental Groups filed the petition against the IEPA and Dynegy Midwest Generation, Inc. (Dynegy). The Board docketed the petition as an enforcement action. Along with the petition, the Environmental Groups filed a motion to consolidate the docket with Natural Resources Defense Council *et al* v. IEPA and Dynegy Midwest Generation, PCB 13-17. Dynegy filed a response in opposition to the motion to consolidate and also a motion to dismiss the petition.

For the reasons discussed below, the Board dismisses the compliant as the complaint fails to state a cause of action upon which the Board can grant relief. Because the Board did not accept the complaint, the motion to consolidate is moot.

The Board will begin by setting forth the procedural history followed by a discussion of a motion to strike the reply. The Board then delineates the facts and legal background relevant to the motion to dismiss. The Board will then summarize the petition before summarizing the arguments relating to the motion to dismiss.

PROCEDURAL HISTORY

On May 15, 2013, the Environmental Groups filed their petition and motion to consolidate the docket with Natural Resources Defense Council, *et al.* v. IEPA and Dynegy Midwest Generation, PCB 13-17. The Board docketed the petition as an enforcement case

[1] Chad Kruse, who worked for the Illinois Environmental Protection Agency prior to joining the Board as an attorney assistant on March 19, 2013, took no part in the Board's drafting or deliberation of any order or issue in this matter.

subject to the Board's rules at 35 Ill. Adm. Code 101, 103 and pursuant to Sections 31 and 33 of the Environmental Protection Act (Act) (415 ILCS 5/31, 33 (2012)).

On May 31, 2012, Dynegy filed a response in opposition to the motion to consolidate. On June 17, 2013, Dynegy filed a motion to dismiss the petition (Mot.).

By hearing officer order additional time to respond to the motion to dismiss was granted and on July 17, 2013, IEPA filed its response to the motion to dismiss (IEPA Resp.). *See* Hearing Officer Order July 8, 2013. On July 18, 2013, the Environmental Groups filed a response to the motion to dismiss (EG Resp.).

Dynegy was granted leave to file a reply by the hearing officer and on August 5, 2013, Dynegy timely filed that reply (Reply). *See* Hearing Officer Order July 22, 2103. On August 6, 2013, the Environmental Groups filed a motion seeking to strike the reply (MS). On August 21, 2013, Dynegy responded to the motion to strike (RMS).

MOTION TO STRIKE

The Environmental Groups argue that Dynegy did not seek leave of the Board to file a reply contrary to the Board's rules at Section 101.500(e) (35 Ill. Adm. Code 101.500(e)). MS at 2. Section 101.500(e) provides:

> The moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. A motion for leave to file a reply must be filed with the Board within 14 days after service of the response. 35 Ill. Adm. Code 101.500(e).

The Environmental Groups state that the Board's hearing officer entered an order on July 22, 2103 allowing leave to file a reply. *Id*. The Environmental Groups opine that Dynegy contacted the hearing officer *ex parte* seeking leave to file. *Id*. The Environmental Groups expressed their view that the contact was inappropriate in a letter to Dynegy. *Id*. The Environmental Groups argue that neither the reply, nor the request to the hearing officer, set forth any facts claiming material prejudice would result if a reply were not allowed. MS at 2-3. The Environmental Groups argue that to allow a reply without a motion or argument about legal interpretation "would vitiate the purpose" of Section 101.500(e) (35 Ill. Adm. Code 101.500(e)). MS at 3. Therefore, the Environmental Groups argue the reply should be stricken.

Dynegy argues that there was no *ex parte* communication with the Board's hearing officer as the request was procedural in nature and not substantive. RMS at 2-3. Dynegy notes that the Board specifically found that matters of procedure and practice are exempt from the definition of *ex parte* communication. RMS at 3, citing People v. Stringini, PCB 01-43, slip op. at 1 (Aug. 5, 2004). Dynegy maintains that a request for leave to file is not substantive and does not influence the Board's decision. *Id*.

Dynegy also argues that it is well established that leave to file a reply may be granted even if the specific language of Section 101.500(e) (35 Ill. Adm. Code 101.500(e)) is not used.

RMS at 5, citing City of Quincy v. IEPA, PCB 08-86, slip op. at 2 (Jun. 17, 2010). Further the Board has allowed replies, even absent a request for leave to file. RMS at 5, citing A & H Implement Co. v. IEPA, PCB 12-53 (May 17, 2012); International Union, *et al.* v. Caterpillar, Inc., PCB 94-240 (Apr. 6, 1995). Dynegy claims that the responses included misstatements and mischaracterizations that were addressed in the reply, and the reply was necessary for that reason. RMS at 5.

The Board denies the motion to strike. The Board agrees that seeking leave to file a reply from the Board's hearing officer is not an improper *ex parte* contact and the hearing officer is authorized to grant such request. The Board will allow the reply.

FACTS

Dynegy sought to renew its National Pollutant Discharge Elimination System (NPDES) permit for its facility located in Havana, Mason County. Pet. Exh 1 at 3. That facility discharges into the Illinois River, which is listed as impaired for fish consumption due to high levels of mercury. Pet. at 5. IEPA issued a permit on September 4, 2012 that did not include a condition requiring a limit on mercury discharges. Pet. at 7. The Environmental Groups appealed that decision. *See* Natural Resources Defense Council, *et al.* v. IEPA and Dynegy Midwest Generation, PCB 13-17; Pet. at 1. The Environmental Groups based their appeal of the permit issuance on claims that numeric limits were required in the permit as the discharge had a reasonable potential to exceed the water quality standards for mercury in the Illinois River. *Id*.

As indicated above, on May 15, 2013, the Environmental Groups filed the petition seeking to have the permit revoked or modified. The proof of service attached to the petition indicates that service of the petition was sent by U.S. Mail on May 15, 2013. Dynegy states that a courtesy copy was sent by email on May 15, 2013, but that the petition was received via ordinary U.S. Mail on May 17, 2013. Mot. at 2.

On July 18, 2013, the Environmental Groups filed a second proof of service, indicating that the petition was resent via U.S. Mail, registered. On July 30, 2013, the Environmental Groups provided the return receipt showing service on the respondents.

LEGAL BACKGROUND

Section 309.182 of the Board's rules allows the Board to modify, suspend or revoke an NPDES permit under certain circumstances. Specifically, Section 309.182 provides:

> a) Any person, whether or not a party to or participant at any earlier proceeding before the Agency or the Board, may file a complaint for modification, suspension, or revocation of an NPDES Permit in accordance with this Section and Part 103.
>
> (Note: Prior to codification, Part III of Procedural Rules.)

b) The Pollution Control Board, after complaint and hearing in accordance with the Act and its Procedural Rules, may modify, suspend or revoke any NPDES permit in whole or in part in any manner consistent with the Act, applicable Board regulations and federal requirements, upon proof of cause including, but not limited to, the following:

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

2) Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; or

3) A change in any circumstance that mandates either a temporary or permanent reduction or elimination of the permitted discharge.

c) The provisions of this Section shall be included as terms and conditions of each issued NPDES Permit. 35 Ill. Adm. Code 309.182.

Section 101.304 provides the requirements for service of filings. Section 101.304(c) and (d) provide:

c) Method of Service. Service may be effectuated by U.S. Mail or other mail delivery service, in person, by messenger, or as prescribed in Section 101.302(d), except for service of enforcement complaints and administrative citations which must be made personally, by registered or certified mail, or by messenger service. Proof of service of enforcement complaints and administrative citations must be filed with the Board upon completion of service.

d) Affidavit or Certificate of Service. A proceeding is subject to dismissal, and parties are subject to sanctions in accordance with Section 101.800 of this Part, if service is not timely made. Proof of proper service is the responsibility of the party filing and serving the document. An affidavit of service or certificate of service must accompany all filings of all parties. 35 Ill. Adm. Code 101.304(c) and (d).

Section 31(d)(1) of the Act (415 ILCS 5/31(d)(1) (2006)) allows any person to file a complaint with the Board. Section 31(d)(1) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." *Id.*; *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicative or frivolous. 35 Ill. Adm. Code 103.212(b).

PETITION TO REVOKE OR MODIFY

The Environmental Groups petition the Board pursuant to Section 309.182 to modify Dynegy's NPDES permit to require conditions and limits necessary to protect the waters of the State and to assure protection of water quality standards. Pet. at 10. In the petition, the Environmental Groups explain that Dynegy submitted to IEPA after issuance of the permit multiple mercury sampling results that exceeded the water quality limit of 12 µg/L. Specifically, the Environmental Groups assert that the sample from October 24, 2012 reported a level of 69.8 µg/L. *Id*. Further, two samples from January 7, 2013 reported levels of 13.5 µg/L and 13.2 µg/L. *Id*. The Environmental Groups also claim that a discharge monitoring report for January 2013 reported a quarterly maximum mercury discharge of 24.6 µg/L and a quarterly average of 17.1 µg/L. *Id*.

The Environmental Groups maintain that these reported exceedances establish that IEPA was wrong in determining that Dynegy's discharge did not have a reasonable potential to exceed the water quality standard, and IEPA should have performed further analysis requested by the Environmental Groups. Pet. at 9. The Environmental Groups claim that the monitoring reports constitute a change in circumstance that mandates either a temporary or permanent reduction of the permitted discharge pursuant to Section 309.182 of the Board's rules. *Id*.

MOTION TO DISMISS PETITION

The Board will begin by summarizing the arguments for dismissal made by Dynegy. The Board will then proceed to the response by IEPA and the Environmental Groups. The Board then summarizes Dynegy's reply and will conclude this segment of the order by discussing the Board's decision.

Dynegy's Arguments

Dynegy claims that the petition is identical to the third-party appeal of the NPDES permit appeal with the only material difference being the references to post-permit issuance monitoring data. Dynegy seeks dismissal of the petition on two grounds. First that the Board lacks jurisdiction to hear the case due to the improper service of the petition. Second, Dynegy argues that the petition fails to state a claim for which the Board can grant relief. Those arguments will be summarized in turn below.

Jurisdiction

Dynegy sets forth two arguments claiming that the Board lacks jurisdiction. First, Dynegy claims the Board lacks personal jurisdiction. Next Dynegy claims that the Board does not have jurisdiction to hear the case while the permit appeal is pending.

Personal Jurisdiction. Dynegy claims that a petition filed pursuant to Section 309.182 is an enforcement action. Mot. at 4. In support of this claim, Dynegy points to the Board's opinion adopting the rule later codified at Section 309.182. *Id*., citing NPDES Regulations, R73-

11, 12 slip op. at 17 (Dec. 5, 1974)[2]. In that opinion the Board expressly stated that the rule was enacted "to be consistent with Section 33(b) of the Act, which allows the Board to revoke an [IEPA]-issued permit in an enforcement action." *Id*. Dynegy argues that Section 33(b) of the Act (415 ILCS 5/33(b) (2012)) remains "substantively the same" as the provision appeared in 1974 when the Board adopted the regulation. Dynegy opines that the Board's opinion from 1974 makes clear that the Board intended that actions brought pursuant to Section 309.182 would be enforcement actions. Mot. at 5.

Dynegy argues that because the petition was brought as an enforcement action the petition must be served by registered mail, messenger service or personal service with a notice, which includes the specific consequences if an answer is not filed. Mot. at 5, citing 35 Ill. Adm. Code 101.304. Dynegy maintains that the Board consistently finds that a failure to afford proper service in accordance with Board rules deprives the Board of jurisdiction and warrants dismissal of the underlying action. Mot. at 5-6, citing Strunk v. Williamson Energy, LLC (Pond Creek Mine #1), PCB 07-135 (Dec. 20, 2007); Dorothy v. Flex-N-Gate Corp., PCB 05-49 (Nov. 2, 2006); Trepanier v. Board of Trustees of the University of Illinois at Chicago, PCB 97-50 (Nov. 21, 1996). Dynegy further maintains that the Board has found that the degree of prejudice suffered by a respondent due to improper service is immaterial to the Board's personal jurisdiction analysis. Mot. at 6, citing Trepanier, PCB 97-50, slip op. at 4 (finding that proper service is a jurisdictional requirement and knowledge of the complaint does not legitimize improper service).

Dynegy argues that because the Environmental Groups served the petition on Dynegy by U.S. Mail rather than registered mail, messenger mail, or personal service, the complaint must be dismissed for lack of personal jurisdiction. Mot. at 6. Dynegy also opines that dismissal is appropriate because the petition failed to include notice of the consequences of failing to answer the complaint. *Id*.

Lack of Jurisdiction While Permit Appeal is Pending. Dynegy argues that the Board has also found that the Board lacks jurisdiction to hear a second permitting decision regarding the same facility and regulatory framework while a permit appeal is pending. Mot. at 6, citing Joliet Sand & Gravel Co. v. IEPA, PCB 87-55 (Jun. 10, 1987); Caterpillar Tractor Co. v. IEPA, PCB 79-180 (Jul. 14, 1983); Auburn v. IEPA, PCB 81-23 (Mar. 19, 1981). Dynegy asserts that the Board's decisions find that the Board has no jurisdiction with respect to a second permitting decision, while a permit for the same facility and operations is under appeal. Mot. at 7. Dynegy opines that the Environmental Groups are seeking just such a review in this proceeding. *Id*. Dynegy maintains that because the permit appeal and this petition clearly entail the same operations, facility and regulatory framework, the Board lacks jurisdiction to hear the petition and the case should be dismissed. *Id*.

Failure to State a Claim

Dynegy maintains that the petition fails to present a violation under Section 309.182 and fails to establish that the monitoring data requires a reduction or elimination of the discharge.

[2] In 1974, the Board adopted Rule 912, which was later codified as Section 309.182. *See* 35 Ill. Adm. Code 309.Appendix "Referenced to Previous Rules".

For these reasons, Dynegy argues that the petition fails to set forth a cause of action for which the Board can grant a relief and the petition should be dismissed as frivolous. Mot. at 7-8.

Failure to Allege a Violation Pursuant to Section 309.182. Dynegy asserts that the Board has interpreted Section 309.182 (35 Ill. Adm. Code 308.182) to require a finding of violation before a permit can be modified, suspended or revoked. Mot. at 8, citing City of Monticello v. IEPA, PCB 77-305 (Feb. 16, 1978). Dynegy opines that based on Monticello, a violation must be asserted and established in an action under Section 309.182 and the violation must be predicated on "changed circumstances". Mot. at 8-9. Dynegy "does not believe" the petition can be read to allege a violation of any kind attributable to the monitoring data. Mot. at 9. Rather Dynegy opines that the petition can only be read as asserting that IEPA acted improperly in issuing the permit, and the monitoring data proves that IEPA acted improperly. *Id*. Dynegy asserts that whether IEPA acted improperly is an issue only in the context of the permit appeal, not in an enforcement action. *Id*. Dynegy argues that the Environmental Groups should not be allowed to "litigate issues of the Permit Appeal in an action requesting permit modification." *Id*. Therefore, Dynegy urges the Board to dismiss the petition.

Petition is Duplicative or Frivolous. Dynegy states that assuming *arguendo* that the petition does state a cause of action, the petition must be dismissed as either duplicative or frivolous. Dynegy recites the Board's standard of review on a motion to dismiss and notes that the Board looks to Illinois civil practice for guidance. Mot. at 10, citing Elmhurst Memorial Healthcare *et al*. v. Chevron U.S.A. Inc. and Texaco Inc., PCB 09-66 (Dec. 16, 2010). Further Dynegy notes that the Board recognizes that "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." *Id*., citing Rolf Schilling, *et al*. v. Gary Hill, *et al*., PCB 10-100, slip op. at 7 (Aug. 4, 2011); citing Loschen v. Grist Mill Confections, Inc., PCB 97-174, slip op. at 4 (Jun. 5, 1997). Dynegy notes that legal conclusions must be supported by facts, or such conclusions are insufficient. Mot. at 10-11, citing LaSalle National Trust N.A. v. Village of Mettawa, 249 Ill. App. 3d 550, 557, 606 N.E.2d 1297, 1303 (2nd Dist. 1993). Dynegy further notes that "it is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Mot. at 11, citing Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003).

Dynegy argues that the petition provides no set of facts on which the Environmental Groups can receive a permit modification and therefore the complaint is frivolous. Mot. at 11. Dynegy concedes that the monitoring data arguably could be viewed as a "change in circumstance". *Id*. However, Dynegy opines that under no set of alleged facts does the monitoring data mandate either a temporary or permanent reduction or elimination of the permitted discharge as required by Section 309.182. *Id*.

Dynegy asserts that in no event can the petition be viewed to allege a violation as the petition stops short of alleging a violation as the water quality standard of 12 µ/L is an annual average to be based on eight representative samples. Mot. at 12. Dynegy offers that the monitoring data present less than eight samples. Further, instead of alleging a violation of water quality standards, the petition alleges that the monitoring data somehow establish a reasonable

potential to exceed the water quality standard and even if true does not mandate that the permit be modified. *Id*.

Dynegy argues that the federal regulations regarding NPDES permits do not include a mandate for when Illinois must perform a reasonable potential analysis. Mot.at 12, Dynegy notes that the United States District Court for the District of Columbia stated:

> It is clear that the permitting authority is afforded the authority to determine whether a discharge "causes, has the reasonable potential to cause, or contributes to" an excursion of water quality standards. [citation omitted]. As written, the regulation does not mandate when the state permitting authority must conduct its analysis of the discharge's impact on the water quality standard. . . . [T]here can be no question that a plain reading of the regulation leaves that determination, and the decision as to when it must be made. solely to state permitting authorities. National Mining Association, *et al*., v Jackson, 880 F.Supp.2d 119, 141 (D.D.C. 2012). Mot. at 12-13.

Dynegy opines that because the timing of a reasonable potential analysis is discretionary for IEPA, the monitoring data cannot be said to require a permit modification. *Id*.

Dynegy asserts that Illinois law also does not mandate a post-permit issuance analysis for a reasonable potential to emit, but rather allows IEPA to perform such an analysis when issuing an NPDES permit. Mot. at 13. Further, Dynegy asserts that it has not been established that a reduction or elimination of the permitted discharge would be necessary to achieve compliance with any mercury effluent limitation. *Id*.

With respect to antidegradation analysis and best professional judgment/best available technology (BPJ/BAT), Dynegy opines that the Environmental Groups have not cited any applicable law that requires the NPDES permit to be modified post-issuance to incorporate such an analyses. Mot. at 14. Furthermore, even if antidegradation and BPJ/BAT analyses were required post-issuance, Dynegy maintains that nothing demonstrates that the analyses would result in a need to eliminate, reduce or modify the effluent limit in the NPDES permit. *Id*.

Dynegy opines that while Section 309.182 states that the Board may modify a permit, a permit modification should only be done in the context of the NPDES permitting regulations by IEPA. Mot. at 14-15. Dynegy maintains that USEPA delegated to IEPA the authority to issue NPDES permits and thus the request for the Board to modify the permit should be stricken as frivolous. Mot. at 15. Dynegy states: "To the extent the Board interprets Section 309.182 to allow only the Board itself to modify an NPDES permit, [Dynegy] submits that such may be inconsistent with the aforementioned delegation of NPDES permitting authority from US EPA and with 415 ILCS 5/33(b)." *Id*.

IEPA Response

IEPA argues that Dynegy's request to dismiss based on a lack of jurisdiction is a valid concern, but the improper service does not require dismissal. IEPA Resp. at 1-2. IEPA argues

that Dynegy is already subject to jurisdiction of the Board by virtue of the pending permit appeal (PCB 13-17), and the petition to modify or revoke "is a collateral pleading that was docketed as a separate action." IEPA Resp. at 2. IEPA argues that the Board can cure any defect in service by consolidating the two matters or directing the Environmental Groups to perfect service. *Id*. IEPA opines that dismissal is not required in this context; however if the matter was a totally new action, strict compliance with service would be required. *Id*.

IEPA takes issue with Dynegy's claim that the Board lacks subject matter jurisdiction. IEPA Resp. at 2. IEPA opines that the cases relied upon by Dynegy involved "a subsequent permit decision regarding the same facility, same operations, same regulatory scheme and same parties." *Id*. IEPA further opines that this case is different as the petition filed in this proceeding involves the same permit decision. *Id*. IEPA states:

> The jurisdictional problem, of course, is that a permitting agency simply does not have authority to modify or reissue a permit regarding the same facility, same operations, and same regulatory scheme, while a previous permit regarding the same facility, same operations, and same regulatory scheme, is on appeal. There is no such problem in the instant situation. *Id*.

IEPA agrees that the grounds for relief under Section 309.182 should be pled with specificity and that the petition "improperly seeks to incorporate by reference factual and legal contentions" from the permit appeal. However, IEPA argues that consolidation of this matter with PCB 13-17 will address problems in the pleadings raised by Dynegy. IEPA Resp. at 3. IEPA also argues that the Environmental Groups should be allowed to replead the petition to included factual sufficiency. *Id*.

IEPA maintains that Section 309.182 does not require proof of any water quality standards violation, but rather that any violation of a permit term or condition is grounds for relief. IEPA Resp. at 3. IEPA claims that the monitoring data "appears" to show a potential to exceed and this is a different ground for relief than the "changed circumstance" and both can be argued under Section 309.182. *Id*.

Environmental Groups' Response

The Environmental Groups argue that the motion to dismiss is without merit. EG Resp. at 1. Specifically the Environmental Groups argue that any potential deficiencies in service have been rectified and the remaining grounds for Dynegy asserts for dismissal are without merit. *Id*. The Environmental Group assert that they have "set forth facts that fall squarely within the purview" of Section 309.182. *Id*.

Service Has Been Cured

The Environmental Groups note that Dynegy acknowledges that it received the complaint on May 17, 2013, and Dynegy has not argued prejudice resulting from the alleged deficiencies in service. EG Resp. at 2. Furthermore, the Environmental Groups note that there was no deadline for the filing of the complaint, and Dynegy did respond to the motion filed in this case. EG

Resp. at 2-3. The Environmental Groups state that they "will not respond directly to the deficiency allegations, as any such purported deficiency has now been cured by service" of the complaint on Dynegy. EG Resp. at 3. The Environmental Groups argue that the Board has previously allowed such a correction of "jurisdictional deficiencies". *Id*., citing Strunk, PCB 07-135 and Trepanier, PCB 97-150. The Environmental Groups argue that because Dynegy was not prejudiced, the Board should allow the Environmental Groups to cure any deficiency in this proceeding.

Pending Permit Appeal Does Not Impact Jurisdiction

The Environmental Groups assert that the cases relied upon by Dynegy for its claim that the pending permit appeal divests the Board of jurisdiction is not supportive of Dynegy's position. EG Resp. at 4. The Environmental Groups argue that the core principle of Joliet Sand & Gravel, PCB 87-55, Caterpillar, PCB 79-180, and Auburn PCB 81-23 is that two permits cannot be in effect at the same time. *Id*. The Environmental Groups argue that these decisions do not address an enforcement action pursuant to Section 309.182 (35 Ill. Adm. Code 309.182) or any other type of enforcement proceedings. EG Resp. at 5. The Environmental Groups argue that in the cited cases the issue was IEPA's issuance of multiple permits that resulted in proceedings before the Board; not the situation here where only one permit is at issue. *Id*. Furthermore, the Environmental Groups argue that in the instant case there is no potential problem that the Board and the IEPA would make disparate decisions concerning the same activity. *Id*.

The Environmental Groups argue that the strained reading of Joliet Sand & Gravel, PCB 87-55, Caterpillar, PCB 79-180, and Auburn PCB 81-23, that Dynegy seeks, is too extreme and would result in a loophole. EG Resp. at 5. The Environmental Groups argue that if a pending permit appeal were to divest the Board of jurisdiction under Section 309.182 (35 Ill. Adm. Code 309.182), as Dynegy urges, then a permit holder who appealed conditions would be "immune from modifications to the permit no matter how dire the need for changes to the permit." *Id*. The Environmental Groups argue that had the Board intended such loophole, the Board would have explicitly placed it in the rule. *Id*.

Complaint States a Valid Claim

The Environmental Groups argue that Section 309.182 (35 Ill. Adm. Code 309.182) is straightforward in specifying the grounds that allow the Board to modify, suspend, or revoke an NPDES permit. EG Resp. at 3. The Environmental Groups opine that the language allows the Board to modify, suspend, or revoke upon cause "including but not limited too", and that last phrase "throws wide open the scope of 'cause'". EG Resp. at 3-4. The Environmental Groups argue it is sufficient to plead that the mercury monitoring reports provide a basis for modification of the permit and it is not necessary for the Environmental Groups to plead or prove that the reports mandate action. EG Resp. at 4. Furthermore, the Environmental Groups assert they have sufficiently pled that the monitoring reports do mandate a reduction in the permitted discharge and thus a modification of the permit. *Id*.

No Proof of Violation is Required. The Environmental Groups reiterate that the plain language of Section 309.182 (35 Ill. Adm. Code 309.182) requires only that the Board find that a permit should be modified, suspended or revoked for cause and no violation need be found. EG Resp. at 6. Of three, non-exclusive, listed causes in Section 309.182 (b)(1) - (3) (35 Ill. Adm. Code 309.182(b)(1) - (3)), only one, subsection (b)(1), references a violation. *Id*. Thus, the Environmental Groups claim Dynegy's assertion that a violation must be found is without merit. *Id*. The Environmental Groups assert that Dynegy's reliance on Monticello, PCB 77-305 is misplaced as that case "addressed entirely different subject matter". *Id*. The Environmental Groups note that Monticello, PCB 77-305 addressed a request for variance. *Id*.

The Environmental Groups argue that Section 309.182 (35 Ill. Adm. Code 309.182) and their pleadings have established that there is "cause" to modify, revoke or suspend the permit, separate and apart from any potential violation. EG Resp. at 6. The Environmental Groups maintain that IEPA was required to determine if Dynegy's discharge had a reasonable potential to cause or contribute to an exceedance of the water quality standard, an essential finding to ensure that water quality based effluent limits are included in permits. *Id*. The Environmental Groups argue that new evidence, such as mercury exceedances of reasonable potential to emit, is good cause for the Board to reevaluate the permit. EG Resp. at 6-7.

Mercury Monitoring Reports Mandate Modification of the Permit. The Environmental Groups argue that the mercury monitoring reports demonstrate a reasonable potential for the facility's discharge to exceed the human health standard for mercury in the Illinois River. EG Resp. at 7. The Environmental Groups argue that ensuring that a discharge does not cause or contribute to an exceedance is mandatory in the NPDES permit process. *Id*. The Environmental Groups claim that four mercury sampling results provided to IEPA by Dynegy reflect mercury concentrations over the human health standard for mercury and settle that question as to whether or not there is a reasonable potential to exceed the mercury standard. EG Resp. at 8.

Board Has Authority to Modify the Permit. The Environmental Groups argue that Dynegy's claim that the Board has no authority to modify the permit, is directly contradicted by the language of Section 309.182 (35 Ill. Adm. Code 309.182) and Dynegy concedes that point. EG Resp. at 10. The Environmental Groups assert that absent a showing that Section 309.182 is in conflict with a USEPA directive, the Board should disregard Dynegy's argument. *Id*.

Dynegy's Reply

In its reply, Dynegy argues that both the Environmental Groups and IEPA mischaracterize Board precedent on subject matter jurisdiction and the law on personal jurisdiction. Reply at 2-4. Furthermore, Dynegy reiterates that the complaint does not state a valid substantive claim pursuant to Section 309.182 (35 Ill. Adm. Code 309.182)). Those arguments are summarized below. Reply at 5.

Jurisdiction

Dynegy argues that the attempts to distinguish Joliet Sand & Gravel, PCB 87-55, Caterpillar, PCB 79-180, and Auburn PCB 81-23, fall short, and neither IEPA nor the Environmental Groups cite contrary authority. Reply at 2. Dynegy maintains that these cases "well-stand for the proposition that an appealed NPDES permit cannot be modified." *Id*. Dynegy notes that IEPA and the Environmental Groups "misconstrue" Joliet Sand & Gravel, PCB 87-55, Caterpillar, PCB 79-180, and Auburn PCB 81-23, "to narrowly apply only to circumstances involving multiple permits." Reply at 3. However, Dynegy asserts this assumption ignores the fact that those cases involve the same jurisdictional issue as this proceeding and that is "whether jurisdiction can be established for a second permit decision while the validity of an initial permit is being adjudicated." *Id*. Dynegy claims that the Environmental Groups are challenging the validity of the permit in PCB 13-17, while at the same time in this proceeding arguing that same permit should be modified. *Id*. Dynegy states:

> Logically, a permit that is set aside is without legal effect and inherently cannot be modified, suspended or revoked; it can only be reissued. Before one can properly consider whether the permit should be modified, suspended or revoke[d], the complainant's first claim, the validity of the permit must first be fully determined through completion of the pending permit appeal. *Id*.

As to the issue of personal jurisdiction, Dynegy claims that IEPA argues that the service requirements of Section 103.204(a) (35 Ill. Adm. Code 103.204(a)) are situational; however, there is no basis in Illinois law for this position. Reply at 4. Dynegy maintains that as of the time of the filing of the motion to dismiss, jurisdiction had not yet been established as to Dynegy. *Id*. Dynegy asserts that precedent dictates that improper service is jurisdictional and knowledge of the complaint does not correct improper service. *Id*.

Dynegy also disagrees with IEPA's argument that the filing of the complaint is collateral to the permit appeal. Reply at 4. Dynegy maintains that the two proceedings are separate and distinct. Reply at 4-5. Likewise, Dynegy takes issue with the Environmental Groups claim that Dynegy failed to show prejudice, arguing that there is no requirement that Dynegy do so. Reply at 5.

Complaint Does Not State a Valid Claim

Dynegy argues that the Environmental Groups would have the Board ignore the plain language of Section 309.182, and that the monitoring data somehow mandate a reduction in effluent limits in the permit. However, Dynegy claims these arguments are without merit. Reply at 5.

Dynegy reiterates that neither State nor federal law mandate that the IEPA or the Board conduct a reasonable potential to emit analysis during the term of an issued NPDES permit. Reply at 6. Such analysis occurs only when issuing the permit and there is no post-issuance requirement. *Id*. Because there is no requirement to perform a reasonable potential to emit analysis during the term of an NPDES permit, Dynegy opines that the Environmental Groups

have not met their burden to satisfy the criteria of Section 309.182 (35 Ill. Adm. Code 309.182). *Id*. Therefore, Dynegy argues the complaint must be dismissed. *Id*.

Furthermore, Dynegy maintains that even if the complaint established a reasonable potential to emit, the complaint does not demonstrate that such a potential would mandate a reduction in the permitted discharge. Reply at 6. Dynegy notes that IEPA concedes that the monitoring data have not demonstrated a violation of any water quality criteria and as such it is "entirely possible" that no reduction would be required based on the complaint. Reply at 7.

Dynegy argues that "mandate" should be given its plain meaning and the mere fact that the Board allows other causes to warrant a permit modification, does not mean that "mandate" is meaningless in Section 309.182 (35 Ill. Adm. Code 309.182). Reply at 8. Dynegy maintains that to adopt the interpretation of Section 309.182 (35 Ill. Adm. Code 309.182) urged by the Environmental Groups would be contrary to Illinois Law and establishes a dangerous precedent. Reply at 9. Dynegy opines that the Environmental Groups' interpretation would impose on IEPA a responsibility to continually re-evaluate a reasonable potential to emit analysis modify permits based on monthly monitoring discharge reports. *Id*. Dynegy claims that such a requirement would unnecessarily burden the IEPA and result in perpetual uncertainty for permittees. *Id*.

Dynegy maintains that the Board intended that a permit would be modified pursuant to Section 309.182 (35 Ill. Adm. Code 309.182) only if a violation was found. Reply at 9. Dynegy notes that neither response to the motion to dismiss addresses the language in the Board's opinion upon adoption of the predecessor rule and the Environmental Group mischaracterize the Board's discussion in Monticello, PCB 77-305. *Id*. Dynegy reiterates that both Board opinions support the conclusion that a successful claim pursuant to Section 309.182 (35 Ill. Adm. Code 309.182) must include an allegation of a violation. Reply at 10. As the complaint does not allege a violation, Dynegy argues that the complaint must be dismissed.

Discussion on Motion to Dismiss

Standard of Review

The Board's standard for determining motions to dismiss has been well established in case law. *See* People v. Sheridan Sand & Gravel Co., PCB 06-177 (Sept. 7, 2006); People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001); Shelton v. Crown, PCB 96-53 (May 2, 1996); Krautsak v. Patel, PCB 95-143 (June 15, 1995); Miehle v. Chicago Bridge and Iron Co., PCB 93-150 (Nov. 4, 1993). The Board takes all well-pleaded allegations as true in determining a motion to dismiss. Import Sales Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991); s*ee also* Stein Steel, PCB 02-1; Shelton, PCB 96-53; Krautsack, PCB 95-143; Miehle, PCB 93-150. In addition, dismissal of the complaint is proper only if it is clear that no set of facts could be proven that that would entitle complainant to relief. *See* Stein Steel, PCB 02-1; Shelton, PCB 96-53; Krautsack, PCB 95-143; Miehle, PCB 93-150

Personal Jurisdiction

Dynegy argues that this proceeding must be dismissed as proper service of the complaint did not occur prior to Dynegy's motion to dismiss and relies on several cases for its argument. The Environmental Groups assert that any service issue has been resolved by the later service of the complaint, properly served pursuant to the Board's rules. Also, the Environmental Groups note that there was no deadline for the filing of the complaint. The IEPA argues that the improper service does not require dismissal of the action as the problem can be cured by perfecting proper service.

The Board agrees that proper service of a complaint is a prerequisite for jurisdiction and that failure to properly serve the complaint can be grounds for dismissal. However, the Board has in the past allowed for and even directed that proof of proper service be filed with the Board before accepting cases. *See e.g.* Rolf Schilling *et. al.* v. Gary D. Hill *et. at.*, PCB 10-100 (Nov. 3, 2011); Elmhurst Memorial Healthcare *et. al.* v. Chevron U.S.A., Inc., PCB 9-66 (June 3, 2010). Where that proof of service was not filed, the Board has dismissed cases. *See e.g.* People v. J.D. Plating Works, Inc., PCB 90-103 (Oct. 25, 1990 and Nov. 8, 1990). In one case cited by Dynegy, the Strunk case, the Board directed that the complainant provide proof of proper service in the form and manner articulated in the Board's procedural rules. *See* Strunk v. Williamson Energy, LLC, PCB 7-135 (Aug. 9, 2007). The Board ultimately dismissed the Strunk case, when complainant filed an amended complaint and did not provide proof that the amended complaint was properly served. Strunk, PCB 07-135 (Dec. 20, 2007).

In Dorothy, the Board sanctioned the complainant for failure to respond to discovery requests, failure to meet deadlines, and repeated failure to comply with Board procedural rules and hearing officer orders. Dorothy, PCB 05-49 slip op. at 8. The Board also dismissed an amended complaint due to several failures, including improper service. *Id*., slip op. at 11-12. However, the case did continue on the original complaint. *Id*.

The Board did dismiss the respondent in the Trepanier proceeding due to improper service. Trepanier, PCB 97-50 slip op. at 5 (Nov. 21, 1996). However the Board stated: "this ruling does not preclude the complainants from properly serving the [respondent], . . . in accordance with the Board's rules." *Id*.

A review of the Board's past cases and the arguments of the parties convinces the Board that dismissal for want of personal jurisdiction is not warranted here. While proper service is required for jurisdiction, the Environmental Groups did complete proper service of the complaint, while the motion to dismiss was briefed. Specifically, on July 18, 2013, the Environmental Groups provided proof that the complaint was mailed by certified mail and on July 30, 3013, proof that service occurred was filed. Thus, service has been perfected pursuant to the Board's procedural rules and proof of that service has been filed. Therefore, the Board finds that dismissal for lack of personal jurisdiction is not required.

Lack of Jurisdiction While Permit Appeal is Pending.

The Board has reviewed its decisions in Joliet Sand & Gravel, Caterpillar, and Auburn, and is unconvinced by Dynegy's arguments. The Board disagrees that those cases support a finding that the Board lacks jurisdiction to hear this petition. While the Board does agree that multiple appeals of permits, for the same facility, same situation and same operation, may result in a lack of jurisdiction to hear the those appeals, the Board is convinced that it is only in the context of a permit appeal that Joliet Sand & Gravel, Caterpillar, and Auburn would require dismissal for lack of jurisdiction. This proceeding is an enforcement action and as such, the Board finds it has the jurisdiction to hear the complaint. However, the Board is concerned that the pending permit appeal does impact its ability to grant the relief requested by the Environmental Groups, which the Board will discuss below.

Failure to State a Claim

Dynegy puts forth two main arguments in support of its position that the complaint fails to state a claim on which the Board can grant relief. First, Dynegy argues that because no violation has been alleged, the petition to modify, revoke or suspend a permit pursuant to Section 309.182 (35 Ill. Adm. Code 309.182) cannot proceed. Second Dynegy claims that the petition is frivolous. The Environmental Groups argue that no proof of a violation is required and that the Board has the authority to order the permit to be modified. The Environmental Groups further opine that the monitoring reports establish that modification of the permit is necessary.

The Board disagrees with the Environmental Groups' interpretation of Section 309.182 (35 Ill. Adm. Code 309.182). The plain language of Section 309.182 clearly indicates that a violation is contemplated before revocation, modification or suspension of a permit. Section 309.182(a) and (b) both refer to complaints; and, while the word violation does not appear in each of subsections (b)(1), (2) and (3), a violation is clearly contemplated. This interpretation is supported by the Board's specific discussion of the provision in NPDES Permit Regulations, R73-11. The provision was later codified as Section 309.182. In that opinion, the Board specifically states that the provision was enacted to allow the Board to revoke an IEPA issued permit in an enforcement action. NPDES Permit Regulations, R73-11, slip op. at 17. Therefore, the Board finds that a violation must be alleged prior to the Board revoking, modifying or suspending a permit pursuant to Section 309.182 (35 Ill Adm. Code 309.182).

In this complaint, the Environmental Groups have alleged that exceedances of the human health water quality criteria for mercury reported in the daily monitoring reports support a modification of the permit; a permit currently being challenged before the Board in PCB 13-17. However, exceedances reported in a daily monitoring report alone are not sufficient to establish a violation of the human health water quality criteria for mercury. *See* 35 Ill. Adm. Code 302.208. Rather, an annual average, using at least eight samples, is used to demonstrate compliance or non-compliance. *Id.* Thus, a violation of the human health mercury water quality criteria has not been properly pled.

The Environmental Groups also argue that these daily monitoring reports establish that Dynegy's effluent has a reasonable potential to exceed the human health water quality standard

for mercury. However, the Board agrees with Dynegy that performance by IEPA of a reasonable potential to emit analysis occurs prior to the issuance of a permit. Thus, establishing a reasonable potential to exceed the water quality standard is not, in and of itself, a violation of the Act and Board regulations. If the Environmental Groups were to plead and prove that a violation of the human health water quality standard was occurring as a result of Dynegy's effluent, that would be a violation of the Act, which might necessitate a permit modification.

In this complaint, the Environmental Groups are seeking a modification of a permit, which has not yet been affirmed. Although, the permit was issued by IEPA, the Board has not yet acted on the permit appeal. As the Board stated above, the fact that a permit appeal is pending does not divest the Board of jurisdiction; however, the existence of the permit appeal is problematic when examining the relief requested in this proceeding. The Board has not yet decided if the permit was properly issued, and one specific challenge to the permit is the mercury effluent limits. In effect, the Environmental Groups are asking the Board to modify a permit that the Board has not even determined is valid. The Board finds that it cannot do so.

Section 31(d)(1) of the Act provides that "[u]nless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing." 415 ILCS 5/31(d)(1) (2010); *see also* 35 Ill. Adm. Code 103.212(a). A complaint is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests "relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* In considering the facts, most favorably for the Environmental Groups, the Board cannot find a set of facts that would allow the Board to grant the relief requested by the Environmental Groups at this time. Because the permit that the Environmental Groups seek to modify is not yet final, the Board cannot modify that permit. Furthermore, the Environmental Groups failed to allege facts that would establish a violation of the Act or Board regulations that would provide cause for revocation, modification, or suspension of a permit pursuant to Section 309.182 (35 Ill. Adm. Code 309.182). Therefore, the Board finds that the complaint must be dismissed at this time; however, the Environmental Group may refile, if they deem it necessary, when the permit appeal is complete.

MOTION TO CONSOLIDATE

The motion to consolidate is moot as the Board has dismissed the complaint.

CONCLUSION

The Board dismisses the complaint as the complaint fails to state a cause of action upon which the Board can grant relief. The motion to consolidate is moot.

IT IS SO ORDERED.

Board Member J. A. Burke abstains.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, hereby certify that the Board adopted the above opinion and order on September 5, 2013, by a vote of 3-0.

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John T. Therriault, Clerk
Illinois Pollution Control Board