



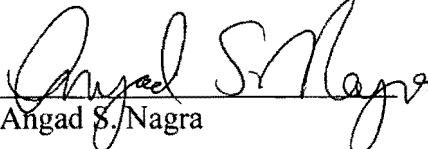
**CERTIFICATE OF SERVICE**

I, Angad S. Nagra, do hereby certify that, today, May 23, 2016, I caused to be served on the individuals listed below, by first class mail, a true and correct copy of the attached IEPA's Response to Petitioners' Motion for Clarification.

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Angad S. Nagra

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

SIERRA CLUB, NATURAL RESOURCES	)	
DEFENSE COUNCIL, PRAIRIE RIVERS	)	
NETWORK, and ENVIRONMENTAL LAW &	)	
POLICY CENTER,	)	
	)	
Petitioners,	)	
	)	
v.	)	PCB 15-189
	)	
ILLINOIS ENVIRONMENTAL PROTECTION	)	
AGENCY and MIDWEST GENERATION, LLC,	)	
	)	
Respondents.	)	

**IEPA'S RESPONSE TO PETITIONERS' MOTION FOR CLARIFICATION**

On April 7, 2016, the Illinois Pollution Control Board ("Board") issued an Opinion and Order in the above-captioned permit appeal, making the following three legal findings with respect to an April 29, 2015 petition ("Petition") filed by Sierra Club, Natural Resources Defense Council, Prairie Rivers Network and the Environmental Law & Policy Center ("Petitioners"), which challenged the Illinois Environmental Protection Agency's ("IEPA") issuance of a National Pollution Discharge Elimination System ("NPDES") to Midwest Generation:

First, the Environmental Groups have standing to bring both counts in their [P]etition. Next, the procedural rules concerning alternative thermal effluent limitations that the Board adopted in 2014 applied to IEPA's decision to issue the permit. Last, the permit must contain conditions that require the Facility's cooling water intake structure to use the interim best technology available.

(Order at 2.) The Board's Order reserved two additional legal issues for resolution pending an evidentiary hearing:

First, did the permit, as issued, comply with the applicable Board regulations on alternative thermal effluent limitations? Second, do the permit's conditions require that

the Facility's cooling water intake structure use the interim best technology available?

(Order at 2.) On May 9, 2016, the Petitioners filed a "Motion for Clarification" ("Motion") of the Board's Order. Petitioners' Motion contends that the Order fails to address "certain legal arguments that are pivotal in determining how this proceeding unfolds" and requests that they either be resolved or reserved for later ruling pending resolution of any pertinent "disputed factual questions." (Motion, p. 1.) Specifically, Petitioners assert that

in concluding that a hearing was necessary regarding IEPA's "renewal" of the variance, the Board never actually explained how the variance could still have been in existence, and thus able to be "renewed" by IEPA, given that the Board—the only entity with authority to renew the 1978 variance prior to Subpart K promulgation—had never renewed it and it had hence expired.

(Motion at 3.) Petitioners also claim that the Board failed to address their argument that "[s]ince the Board's 1978 variance was not granted pursuant to Subpart K, IEPA does not have authority under that Subpart to renew the Board's 1978 variance."

In fact, the Order expressly reflects that the Board considered both of these issues. In footnote 19 of the Order, the Board specifically addressed the former argument, holding that pre-Subpart K renewals of alternative thermal effluent limits were governed by 40 C.F.R. § 125.72. And with respect to the latter argument, in footnote 20 of its Order, the Board acknowledged the existence of a dispute between the parties but declined resolve it in the context of its summary judgment ruling.<sup>1</sup> Petitioners' Motion—which seeks a contrary ruling on the former issue and an immediate ruling on the latter issue—is thus actually a motion for reconsideration

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<sup>1</sup> In footnote 20 of the Order states that "[t]his order does not address whether IEPA had the authority to review the alternative limitation. The Environmental Groups and Respondents disagree on this point."

(rather than simply “clarification”) of the Board’s Order. And because a motion to reconsider can only be based on newly discovered evidence not available at the time of the hearing, subsequent changes in the law, or errors in the application of existing law—none of which are raised in Petitioners’ Motion—the Motion must be denied.

### **ARGUMENT**

Section 101.902 of the Board’s procedural rules provides that, “[i]n ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board’s decision was in error.” 35 Ill. Adm. Code 101.902; *see also Broderick Teaming Co. v. Illinois Env’t Protection Agency*, PCB 00-187, 2001 WL 376542 at \*2 (April 5, 2001). A motion for reconsideration may be filed “to bring to the [Board’s] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board’s] previous application of existing law.” *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 92-156 at 2 (Ill.Pol.Control.Bd. Mar. 11, 1993) (citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627). Here, Petitioners’ Motion must be denied because it sets forth no new facts or change in the law and fails to demonstrate that the Board erred in its application of existing law.

#### **I. Petitioners’ Motion adduces no newly available evidence**

Petitioners’ Motion offers no newly discovered facts or evidence. Indeed, the Motion specifically acknowledges that “all relevant facts necessary to determine the question of IEPA’s authority have already been recognized as undisputed in the Board’s . . . Order” (Motion at 3.) Accordingly, in the absence of any newly discovered factual evidence, Petitioners’ Motion for Reconsideration must be denied.

**II. Petitioners' Motion cites no change to existing law**

Next, Petitioners fail to identify any changes to existing law that would require reconsideration of the Board's Order. The relevant portions of state and federal statutory and regulatory provisions relied upon by IEPA in its arguments—and relied upon by the Board in the Order—have not changed since the record closed in this matter. Petitioners also do not cite any new case law that would necessitate reconsideration of the Order. Accordingly, their Motion must be denied.

**III. Petitioners' Motion identifies no laws that the Board misapplied**

Finally, Petitioners fail to demonstrate that the Board erred in its application of the law. Although Petitioners claim the Board neglected to address certain of their arguments, the Order expressly reflects that (1) the Board actually *did* substantively address the first of those arguments; and (2) the Board considered—but deliberately declined to resolve—the second of those arguments. Petitioners notably do not suggest that the Board Order misapplied any provision of law in making these rulings, and their Motion must therefore be denied.

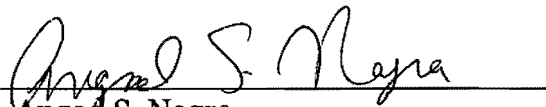
**CONCLUSION**

The Petitioners' Motion for Clarification—which actually seeks reconsideration of the Board's April 7, 2016 Order—is simply a restatement of the facts and arguments presented on summary judgment, bereft of any new evidence or law or of any colorable argument that the Board misapplied existing law. As such, it fails to offer a basis for reconsideration of the Board's Order and must be denied.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

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