

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

In the Matter of: )

SIERRA CLUB, NATURAL )  
RESOURCES DEFENSE COUNCIL, )  
PRAIRIE RIVERS NETWORK, and )  
ENVIRONMENTAL LAW & )  
POLICY CENTER )

Petitioners, )

v. )

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY and )  
MIDWEST GENERATION, LLC )

Respondents.

PCB 15-189  
(Third Party NPDES Appeal)

**NOTICE OF ELECTRONIC FILING**

To: Attached Service List

PLEASE TAKE NOTICE that on September 16, 2016, I electronically filed with the Clerk of the Illinois Pollution Control Board: **PETITIONERS' PREHEARING BRIEF**, a copy of which is served on you along with this notice.

Respectfully submitted,



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Matthew Glover  
Legal Assistant  
Environmental Law & Policy Center  
35 E. Wacker Dr., Suite 1600  
Chicago, IL 60601  
mglover@elpc.org  
ph (312) 795-3719

Dated: September 16, 2016

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v.	)	(Third Party NPDES Appeal)
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY and	)	
MIDWEST GENERATION, LLC	)	
	)	
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**PETITIONERS' PRE-HEARING BRIEF**

On March 25, 2015, Illinois Environmental Protection Agency (IEPA) issued a renewed National Pollutant Discharge Elimination System (NPDES) permit (“the Permit”) to Midwest Generation, LLC (“Midwest Generation”) to continue to discharge pollutants from its Waukegan Generating Station (“the Facility”). On April 29, 2015 the Sierra Club, Natural Resources Defense Council, Prairie Rivers Network, and Environmental Law & Policy Center (collectively, “Environmental Groups” or “Petitioners”) petitioned the Board to review the conditions in the Permit related to thermal pollution discharges to Lake Michigan and the cooling water intake structures, on the basis that those conditions do not comply with applicable state and federal law.

After briefing by the parties, an Opinion and Order of the Board was entered on April 7, 2016, (“Opinion and Order”) granting summary judgment for Petitioners on most of the key legal issues, but reserving decision on two issues until after facts can be presented at hearing:

1. “[D]id the permit, as issued, comply with the applicable Board regulations on alternative thermal effluent limitations?”
2. “[D]o the permit’s conditions require that the Facility’s cooling water intake structure use the interim best technology available?” (*Id.*)

The Environmental Groups will demonstrate at the hearing that IEPA did not comply with either of these regulatory requirements when it issued the Permit. In each case, the regulations at issue require that certain specific types of information be present in the record and considered by IEPA. Petitioners will demonstrate that the record is devoid of any evidence that such information was submitted or considered, thereby satisfying their burden of proof described below.

### ***Petitioners' Burden of Proof***

Petitioners, as third-party permit appellants, bear the burden of proof that the Permit as issued will violate the Environmental Protection Act or Board regulations. 415 ILCS 5/40(a)(1). *See also Des Plaines River Watershed Alliance v. IEPA*, PCB 04-88 at 12 (April 19, 2007) (aff'd sub nom. *IEPA v. IPCB*, 896 N.E.2d 479). Review of the agency's action must be "exclusively on the basis of the record before the Agency," 415 ILCS § 5/40(e)(3). Accordingly, petitioners will carry their burden of proof by demonstrating that there is no evidence in the administrative record supporting the agency's action.

This principle is well demonstrated in *Ill. Env'tl. Protection Agency v. Ill. Pollution Control Bd.*, 896 N.E.2d 479 (Ill. App. Ct. 3d 2008). In that case, the petitioners argued that effluent limitations for phosphorus were necessary to address the impairment of the receiving streams. *Id.* at 483. Therefore, the Board's antidegradation requirements required IEPA to include such limits in the permit. *Id.* IEPA's antidegradation assessment concluded that expanded phosphorus discharges would not exacerbate the impairments. *Id.* at 489. Based on this finding, IEPA did not include phosphorus effluent limits in the permit. *Id.* In reviewing the Board's decision, the appellate court concluded "that the third parties in this case met their burden of proof before the Board by demonstrating that IEPA failed to require sufficient evidence to assure the water quality of Hickory Creek would not deteriorate further by exceeding the regulatory narrative and numeric standards as a result of the plant expansion." *Id.* at 487. Similarly, Petitioners' burden here is to demonstrate that substantial evidence does not exist in the record to support IEPA's actions regarding the thermal discharges and cooling water intake structures. *See Des Plaines River Watershed Alliance v. IEPA*, PCB 04-88 at 12 ("The Board does not affirm the IEPA's decision on the permit unless the record supports the decision.").

### ***Alternative Thermal Effluent Limitations***

The April 7, 2016 Opinion and Order of the Board found that the Board's 2014 "Subpart K" procedural rules concerning alternative thermal effluent limitations applied to the issuance of this permit. (Opinion and Order at 10-12.) Subpart K is the first and only source of IEPA's authority to establish alternative thermal effluent limitations in NPDES permits—*i.e.*, any permit limits that differ from the thermal limits otherwise required to meet water quality standards.

Subpart K provides, at 35 Ill. Adm. Code 106.1180, that IEPA may renew a previously-granted<sup>1</sup> alternative thermal effluent limitation, but *only if* IEPA makes two key factual findings on the record: 1) that the nature of the thermal discharge has not changed; and 2) that the alternative thermal effluent limit has not caused appreciable harm to a balanced, indigenous population of fish, shellfish and wildlife. 35 Ill. Adm. Code §§ 106.1180(c)-(d). If IEPA finds the nature of the thermal discharge has changed materially, or that appreciable harm has resulted from the discharges, it is prohibited from renewing the alternative thermal effluent limit. 35 Ill. Adm. Code § 106.1180(d).

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<sup>1</sup> To avoid waiving the argument, we note here that the plain language of 35 Ill. Adm. Code 106.1180 only allows IEPA to renew variances that were granted by the Board under the 2014 Subpart K rules, and that IEPA does not have any authority to renew the Board's 1978 variance. The Board has thus far declined to decide this legal claim, as well as the claim that there was no valid alternative effluent limitation in effect for IEPA to renew because the 1978 variance had long since expired.

Thus, two factual issues must be resolved at this hearing in order to determine whether IEPA properly granted alternative thermal limits in the Permit. First, did IEPA consider whether the nature of the discharge has changed materially, and if so, is IEPA's finding supported by substantial evidence in the administrative record? Second, did IEPA consider whether appreciable harm to a balanced, indigenous population of fish, shellfish, and wildlife had occurred as a result of the alternative thermal effluent limit, and if so, is IEPA's finding supported by substantial evidence in the administrative record? If IEPA did not do each of these things, IEPA was prohibited from renewing the alternative thermal effluent limit, and the Board must invalidate the Permit.

At hearing, Petitioners will demonstrate that the administrative record is wholly devoid of evidence that IEPA considered either of these questions in issuing the Permit. Undisputed record evidence shows that the nature of the discharge has indeed changed since the alternative thermal effluent limitation was granted in 1978, and the record contains no evidence supporting a conclusion that the thermal discharges from the Facility do not cause substantial harm to aquatic life. The agency did not require the permit applicant to provide information addressing these issues prior to issuing the Permit. Accordingly, IEPA failed to comply with Subpart K by authorizing alternative thermal limits without first addressing whether the thermal discharges from the Facility have materially changed in nature or caused appreciable harm.

### *Cooling Water Intake Structures*

Regarding the permit conditions related to cooling water intake structures, the April 7, 2016 Opinion and Order of the Board found that, under 40 C.F.R. § 125.98(b)(6), “the [permitting authority] must establish interim BTA requirements in the permit based on the [permitting authority's] best professional judgment on a site-specific basis in accordance with § 125.90(b) and 40 CFR 401.14.” 40 C.F.R. § 125.90 (b) states, “Cooling water intake structures ... must meet requirements under section 316(b) of the CWA established by the Director on a case-by-case, best professional judgment (BPJ) basis.” 40 C.F.R. § 401.14 states “The location, design, construction and capacity of cooling water intake structures ... shall reflect the best technology available for minimizing adverse environmental impact ....”

Therefore, the factual issue to be determined at hearing regarding cooling water intake structures is whether IEPA used its best professional judgement to establish interim Best Technology Available (BTA) requirements to minimize adverse environmental impact from the Facility's cooling water intake structures, and if so, whether IEPA's action is supported by substantial evidence in the administrative record.

Once again, the record is simply devoid of any evidence – much less substantial evidence—that IEPA exercised best professional judgment to establish BTA requirements. Nothing in the record shows IEPA based its supposed BPJ opinion on any relevant information regarding the impact the Facility's cooling water intake structures have on aquatic life. There is no study regarding the impingement and entrainment impacts of the cooling water intake structures, no information regarding whether the facility has minimized environmental impact, and no indication that IEPA considered any technologies available to reduce impingement and entrainment impacts. Furthermore, the Permit Special Condition fails to even define what IEPA deems to constitute the interim BTA for the Facility.

*Conclusion*

As Petitioners previously have demonstrated, and will become even clearer at the hearing, IEPA acted on the belief that it was not required to do more than simply cite to a nearly 40-year-old thermal variance in order to continue that variance in the Permit and leave the status quo for the cooling water intake structures undisturbed. As the Board has recognized, the law requires more. IEPA had to make specific factual findings to support any continuance of the 1978 variance and its BPJ determination regarding cooling water intake structures, and petitioners will demonstrate that IEPA did not fulfill these obligations.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **PETITIONERS' PREHEARING BRIEF** was served to all parties of record listed below via mail and electronic mail, on September 16, 2016.



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Matthew Glover  
Legal Assistant  
Environmental Law and Policy Center  
35 E Wacker Drive, Suite 1600  
Chicago, Illinois 60601  
312-795-3719

**PCB 15-189 SERVICE LIST:**

Bradley P. Halloran, Hearing Officer  
Illinois Pollution Control Board  
100 West Randolph Street, Suite 11-500  
Chicago, IL 60601

Greg Wannier  
Sierra Club  
2101 Webster Street, Suite 1300  
Oakland, CA, 94612

Susan M. Franzetti  
Vincent R. Angermeier  
Nijman Franzaetti LLP  
10 South LaSalle Street, Suite 3600  
Chicago, IL 60603

Midwest Generation, LLC  
401 East Greenwood Avenue  
Waukegan, IL 60087

Frederick Veenbaas  
Frederick.veenbaas@nrg.org

Angad Nagra  
Robert W. Petti  
Office of the Attorney General  
69 West Washington Street, Suite 1800  
Chicago, IL 60602

Sharene Shealey  
Sharene.shealey@nrg.org