

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

SIERRA CLUB, NATURAL RESOURCES	)	
DEFENSE COUNCIL, PRAIRIE RIVERS	)	
NETWORK, and ENVIRONMENTAL LAW &	)	
POLICY CENTER,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 15-189
	)	
ILLINOIS ENVIRONMENTAL PROTECTION	)	
AGENCY and MIDWEST GENERATION, LLC,	)	
	)	
Respondents.	)	

**NOTICE OF FILING**

TO: Service List

PLEASE TAKE NOTICE that on September 16, 2016, I caused to be filed with the Clerk of the Illinois Pollution Control Board via the "COOL" System the attached Respondent's Illinois Environmental Protection Agency's Pre-Hearing Brief, and hereby served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS  
*ex. rel.* LISA MADIGAN, Attorney General  
of the State of Illinois

By: /s/ Angad S. Nagra  
Angad S. Nagra  
Robert W. Petti  
Assistant Attorneys General  
Environmental Bureau  
Illinois Attorney General's Office  
69 W. Washington Street, Suite 1800  
Chicago, Illinois 60602  
(312) 814-5361  
(312) 814-2069  
anagra@atg.state.il.us  
rpetti@atg.state.il.us

**CERTIFICATE OF SERVICE**

I, Angad Nagra, sent the above Respondent's Illinois Environmental Protection Agency's Pre-Hearing Brief, on this day 16th, September, 2016, and served the following individuals via mail and electronic mail:

Brad Halloran, Hearing Officer  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601  
[Brad.Halloran@Illinois.Gov](mailto:Brad.Halloran@Illinois.Gov)

(via Email Only)

Counsel for Midwest Generation  
Susan M. Franzetti  
Vincent R. Angermeier  
Nijman Franzetti LLP  
10 South LaSalle Street, Suite 3600  
Chicago, IL 60603  
[sf@nijmanfranzetti.com](mailto:sf@nijmanfranzetti.com)  
[va@nijmanfranzetti.com](mailto:va@nijmanfranzetti.com)

(U.S. Mail and Email)

Jessica Dexter, Staff Attorney  
Environmental Law and Policy Center  
35 East Wacker Drive, Suite 1600  
Chicago, IL 60601  
[jdexter@elpc.org](mailto:jdexter@elpc.org)

(U.S. Mail and Email)

Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276  
[Sara.ternova@illiois.gov](mailto:Sara.ternova@illiois.gov)

(via Email Only)

Greg Wannier, Associate Attorney  
Sierra Club Environmental Law Program  
2101 Webster Street, Suite 1300  
Oakland, CA 94612  
[greg.wannier@sierraclub.org](mailto:greg.wannier@sierraclub.org)

( via U.S. Mail & Email Only)

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

(U.S. Mail Only)

By: /s/ Angad S. Nagra

Angad S. Nagra  
Robert W. Petti  
Assistant Attorneys General  
Environmental Bureau  
Illinois Attorney General's Office  
69 W. Washington Street, Suite 1800  
Chicago, Illinois 60602  
(312) 814-5361  
(312) 814-2069  
[anagra@atg.state.il.us](mailto:anagra@atg.state.il.us)  
[rpetti@atg.state.il.us](mailto:rpetti@atg.state.il.us)

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

SIERRA CLUB, NATURAL RESOURCES	)	
DEFENSE COUNCIL, PRAIRIE RIVERS	)	
NETWORK, and ENVIRONMENTAL LAW &	)	
POLICY CENTER,	)	
	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 15-189
	)	
ILLINOIS ENVIRONMENTAL PROTECTION	)	
AGENCY and MIDWEST GENERATION, LLC,	)	
	)	
	)	
Respondents.	)	

**ILLINOIS EPA'S PRE-HEARING BRIEF**

Respondent Illinois Environmental Protection Agency ("Illinois EPA") respectfully submits the following Pre-Hearing Brief.

This is an appeal by Petitioners Sierra Club, Natural Resources Defense Council, Prairie Rivers Network and Environmental Law & Policy Center (collectively "Petitioners") challenging Illinois EPA's re-issuance of a National Pollutant Discharge Elimination System ("NPDES") permit ("2015 NPDES Permit") to Respondent Midwest Generation, LLC ("MWG"). The 2015 NPDES Permit authorizes and regulates effluent discharges from MWG's Waukegan Generating Station ("Facility") in Lake County, Illinois. Petitioners challenge (1) the permit's alternative effluent limit for heated effluent (or "thermal") discharges under Section 316(a) of the Clean Water Act; and (2) its provisions governing discharges from a Cooling Water Intake ("CWI") structure under Section 316(b) of the Clean Water Act. The matter is set for an evidentiary hearing before the Illinois Pollution Control Board ("Board") on October 5, 2016, at which time evidence and testimony will be adduced on the following disputed material fact issues:

- (1) Whether the process of issuing the 2015 NPDES Permit complied with Subpart K of Part 106 of the Illinois Administrative Code; and
- (2) Whether the record reflects that Illinois EPA and the Facility satisfied the interim best-technology-available (“BTA”) requirements of Section 316(b) and related regulations.

**I. Clean Water Act Section 316(a) & Subpart K**

Clean Water Act Section 316(a) authorizes the United States Environmental Protection Agency (“USEPA”) or states administering its NPDES program to establish alternative thermal effluent limitations governing thermal discharges from regulated point sources. To qualify for an alternative thermal effluent limitation, the owner or operator of the source in question must

demonstrate . . . that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made[.]

Once such a demonstration is made, Section 316(a) authorizes USEPA or the administering state to establish an alternative thermal effluent limitation

that will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on that body of water.

In 2014, the Board promulgated new regulations implementing Section 316(a). Those regulations, which now govern the issuance and renewal of alternative thermal effluent limitations in Illinois, are codified at Subpart K of Part 106 of the Illinois Administrative Code (“Subpart K”). Among other things, Subpart K authorizes Illinois EPA to renew alternative thermal effluent limitations, sets forth the specific grounds on

which the agency may do so, requires certain demonstrations by the permittee in order to support renewal, and obligates the permittee to “be prepared” to offer supporting documentation based on “actual operation experience during the previous permit term.” 35 Ill. Adm. Code 106.1180(b).

In an April 7, 2016 order adjudicating Petitioners’ and Respondents’ respective motions and cross motions for summary judgment (“April 7, 2016 Summary Judgment Order”), the Board reserved for evidentiary hearing the disputed material fact issue of whether, in re-issuing the 2015 NPDES Permit, Illinois EPA complied with Subpart K and, more specifically, whether, the agency considered (1) whether the nature of the thermal discharge had changed materially; and (2) whether the alternative thermal effluent limitation caused appreciable harm to a balanced, indigenous population of shellfish, fish, and wildlife. Accordingly, at the upcoming evidentiary hearing scheduled for October 5, 2016, Respondent Illinois EPA will present testimony from the following witnesses establishing that the agency did, in fact, make these considerations when it re-issued the 2015 NPDES Permit: (1) Darin E. LeCrone, P.E.; Manager, Industrial Unit, Division of Water Pollution Control, Illinois EPA; and (2) Jaime Rabins, P.E.; Environmental Protection Engineer, Industrial Unit Permit Section, Division of Water Pollution Control, Illinois EPA. The testimony of these witnesses will be buttressed by documentation from the record of decision—which has been filed with the Board—demonstrating that Illinois EPA, in issuing the 2015 NPDES Permit, specifically considered (1) decreases in the amount of the Facility’s thermal discharge resulting from the retirement of two electricity generating units (in 1978 and 2007, respectively); and (2) various data and findings from studies of Lake Michigan water quality and organism populations spanning more than 30 years.

## **II. Section 316(b)**

Section 316(b) of the Clean Water Act requires that the location, design, construction, and capacity of cooling water intake (“CWI”) structures at certain facilities “reflect the best technology available for minimizing adverse environmental impact.” 33 U.S.C. § 1326(b). USEPA recently issued a regulation implementing these requirements—the 2014 Phase II Rule—which requires CWI structures at existing facilities to (1) submit certain items of information in their applications for NPDES permit renewals; and (2) implement BTA standards set forth in Section 316(b)’s implementing regulations.

In its April 7, 2016 Summary Judgment Order, the Board held that the interim BTA standard set forth in 40 C.F.R. § 125.98(b)(6) is the applicable standard governing the Facility’s CWI structure. In so holding, the Board reserved for evidentiary hearing the issue of whether the Facility’s CWI structure actually met that standard. Accordingly, at the upcoming evidentiary hearing scheduled for October 5, 2016, Respondent Illinois EPA will present testimony from the following witnesses establishing that the Facility’s CWI structure did, in fact, comply with the interim BTA standard set forth in 40 C.F.R. § 125.98(b)(6): (1) Darin E. LeCrone, P.E.; Manager, Industrial Unit, Division of Water Pollution Control, Illinois EPA; and (2) Jaime Rabins, P.E.; Environmental Protection Engineer, Industrial Unit Permit Section, Division of Water Pollution Control, Illinois EPA. The testimony of these witnesses will be buttressed by documentation from the record of decision—which has been filed with the Board—demonstrating that Illinois EPA (1) exercised its best professional judgment in making the requisite interim BTA determination; (2) properly considered the results of studies concerning the CWI structure’s environmental impact; and (3) appropriately

found, on an interim basis, that that impact had been minimized and that additional pollution control technology therefore was not required.

Dated: September 16, 2016

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: /s/ Angad S. Nagra

Angad S. Nagra  
Robert W. Petti  
Assistant Attorneys General  
Environmental Bureau  
Illinois Attorney General's Office  
69 W. Washington Street, Suite 1800  
Chicago, Illinois 60602  
(312) 814-5361  
anagra@atg.state.il.us  
rpetti@atg.state.il.us