BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, and ENVIRONMENTAL LAW & POLICY CENTER	)	
	)	PCB 15-189
Petitioners,	)	(Third Party NPDES Appeal)
	)	
v.	)	
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and MIDWEST GENERATION, LLC	)	
Respondents.		

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on November 28, 2016, I electronically filed with the Clerk of the Illinois Pollution Control Board: **PETITIONERS' RESPONSE TO MIDWEST GENERATION'S MOTION FOR LEAVE *INSTANTER* TO SUPPLEMENT THE RECORD**, a copy of which is served on you along with this notice.

Respectfully submitted,

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: November 28, 2016

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, and ENVIRONMENTAL LAW & POLICY CENTER	)	
Petitioners,	)	
v.	)	PCB 2015-189 (Third Party NPDES Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and MIDWEST GENERATION, LLC	)	
Respondents.	)	

PETITIONERS' RESPONSE TO MIDWEST GENERATION'S MOTION FOR LEAVE *INSTANTER* TO SUPPLEMENT THE RECORD

Sierra Club, Natural Resources Defense Council, Prairie Rivers Network, and Environmental Law & Policy Center (collectively, "Petitioners") urge the Illinois Pollution Control Board ("Board") to deny Midwest Generation, LLC's November 14, 2016 Motion for Leave *Instanter* to Supplement the Record because the information offered is irrelevant, untimely, misleading, and confusing.

In issuing the National Pollution Discharge Elimination System ("NPDES") permit ("Permit") that is the subject of this appeal, the Illinois Environmental Protection Agency ("Agency") claimed to rely on studies from the 1970s that supported permitting and variance decisions that occurred nearly forty years ago. Throughout this proceeding, Petitioners have emphasized that those studies are not in the record and thus cannot be used to uphold the Permit consistent with the statutory directive that review of the Agency's action must be "exclusively on the basis of the record before the Agency," 415 ILCS § 5/40(e)(3).

Here, the documents presented at the eleventh hour by Midwest Generation are not relevant because there is no indication that the Agency considered them as part of permit issuance and because they do not help resolve any actual legal issue in this proceeding. In any case, they should not be considered because their inclusion in the record would unduly prejudice Petitioners.

I. The Offered Documents are Irrelevant to This Challenge Because the Agency Did Not Consider Them in Deciding to Renew the Thermal Variance

The documents offered by Midwest Generation are irrelevant to the matters before the Board and are thus inadmissible. Under Illinois Rules, "[e]vidence which is not relevant is not admissible." Ill. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401. In the context of permit challenges, the only relevant evidence that may be considered is the record that the Agency relied on in making its decision. In reviewing a permit issued by the Agency, the Board "shall hear the petition…exclusively on the record before the Agency." 415 ILCS § 5/40(e)(3). Board rules require the Agency to compile its administrative record, which must include specifically identified documents as well as "[a]ny other information the Agency relied upon in making its final decision." 35 Ill. Adm. Code 105.212.

Only the Agency is in a position to identify the information it relied upon in making its final decision. Sensibly, the rules do not empower Midwest Generation to add information to what the Agency has stated it relied upon. To the contrary, the rules state that "[t]he hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act."

35 Ill. Adm. Code 105.214(a).[1] No such agreement of the parties was sought to admit the documents at issue here, and for the reasons explained below, no such agreement would be obtained from Petitioners.

Thus, neither of Midwest Generation's alternative requests to belatedly insert references to decades-old studies[2] into the record will cure the glaring deficiency on which Petitioners' case rests: that the Agency does not have substantial evidence in the record to support the findings that must be made prior to issuing this permit.

The motion does not anywhere allege that the Agency relied upon the documents Midwest Generation seeks to enter in making its final decision. It does not cite to statements in the administrative record or those made by Agency witnesses at the October 5, 2016 hearing that make any link whatsoever between the Agency and the now-offered documents. Nor does it cite to testimony or record evidence that establish an evidentiary foundation linking Waukegan Station to the "supplemental" documents, which relate to an entirely different facility (Zion Station).[3]

Indeed, Midwest Generation plainly admits in the motion, "These documents do not contain information that would have factored into the Agency's fact-based evaluation (more than twenty years later) of whether the Thermal AEL causes appreciable harm to the local aquatic community or whether the Station's effluent will violate the applicable Water Quality Standard."

[1] The reference to Section 40 of the Act appears to still operate to limit the supplementary information to that which the Agency considered in making its decision. However it appears that the reference to Subsection (d) may be in error, as that section deals with the specific procedures for a "NA NSR permit."

[2] Again, like the missing thermal studies and impingement and entrainment studies, the Zion studies that are the subject of Midwest Generation's motion have not been presented here, only out-of-context references to those studies.

[3] Indeed, several paragraphs of the Motion are in the nature of testimony, but this information is not in a form (e.g. affidavit or sworn testimony) acceptable to be entered as evidence in a legal proceeding. (See e.g. MWG Mot. to Supplement R. at 4 ("MWGen's investigation of the referenced additional studies has revealed…").)

(MWG Mot. to Supplement R. at 7.) This statement alone is enough to preclude the documents from being admitted as not relevant to this proceeding under Illinois Rule of Evidence 402.

II. The Offered Documents Are Inadmissible Because They Do Not Properly Address Any of Petitioners' Actual Legal Arguments

Even if the "historical Waukegan Generating Station permitting documents from the 1970's and 1980's" were belatedly added to the record (which they should not be), they would not cure any of the deficiencies identified by Petitioners. The record would still lack any scientific support whatsoever for the thermal variance that was granted in 1978, despite the fact that the Agency relies on the associated findings as practically the entire basis for renewing the variance under Subpart K in 2015. The record would still fail to contain the historical impingement and entrainment studies from 1975 and 1976 that the Agency has claimed to rely upon as the principal basis for its Best Professional Judgment determination regarding the cooling water intake structure.

In lieu of arguing that the supplementary documents are relevant to the issues that are actually before the Board in this proceeding, Midwest Generation argues instead that they are relevant to an imagined legal claim Petitioners have not made to the Board. The Motion hinges on "Petitioners' apparent purpose . . . to advance, for the first time, the legal contention that if the 'promised' studies were not performed, the failure to do so would provide the Board with a lawful basis on which to grant Petitioners' appeal." (MWG Mot. to Supplement R. at 4.) Midwest Generation does not cite to any source of law that would provide such a "broken promises" cause of action.

In reality, Petitioners' post-hearing brief contains no such legal claim. Petitioners argue, as they have continually throughout this proceeding, that the Agency lacks substantial evidence in the record to support a renewal of the thermal variance under 35 Ill. Adm. Code § 106.1180.

No studies that supported the 1978 proceeding are included in the administrative record. The Agency testimony Midwest Generation has seized upon merely confirmed that, although the variance notes that ComEd "promised to continue studying possible damaging effects on the Lake in the future," (R. 0002), the record contains no such studies and the Agency did not rely upon any such information in making a final decision.[4]

III. Considering the Offered Documents at This Stage of the Litigation Would Unduly Prejudice Petitioners

In addition to being patently irrelevant to the legal claims being adjudicated by the Board in violation of Illinois Rule of Evidence 402, the documents offered as "supplemental" to the record create unnecessary confusion of the issues and cause undue prejudice to the Petitioners in violation of Illinois Rule of Evidence 403. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.") Therefore, the Board must deny the pending Motion.

Midwest Generation's true purpose in submitting these documents at this stage in the proceeding is unclear. If it wanted this information to be considered, Midwest Generation could have presented it to the Agency with its permit renewal application in 2005, or at any time during the ten years the Agency considered the permit before issuing it in 2015. It could have sought agreement to supplement the administrative record after it was filed by the Agency on June 26, 2015 or when the Agency itself supplemented the record on August 7, 2015. It could even have sought to enter these documents into the record during the October 5, 2016 hearing. Midwest Generation's failure to take advantage of those earlier opportunities, and instead to wait until the

[4] Indeed, the only reference to this topic in Petitioners' Post-Hearing Brief is the following sentence: "The record contains no studies of thermal impacts since the variance was first issued in 1978, (Tr. 29:11-30:11), despite the fact that part of the Board's reasoning behind issuing the original variance was that 'Edison has promised to continue studying possible damaging effects on the Lake in the future.' (R. 0002.)" (Pet'r Post-Hr'g Br. at 13.)

post-hearing briefs were filed to dump this information, leaves Petitioners with just one more chance to address the proffered new information in the record. This failure has unduly prejudiced Petitioners by limiting their ability to properly address Midwest Generation's last-minute arguments.

This prejudice is particularly acute here, because Midwest Generation relies on a convoluted series of logical steps to infer the existence of scientific studies from oblique references in NPDES permits issued to the Zion facility over 30 years ago. Petitioners cannot adequately evaluate this completely novel and highly factual argument at this late stage of the case, especially since any chance to explore this argument at hearing is passed. And of course, even after this novel filing, the purported studies are *still* nowhere to be found in the record, including in the newly offered documents. Thus, it would be highly improper to require Petitioners to respond to Midwest Generation's argument here.

IV. Conclusion

For the foregoing reasons, Midwest generation's Motion for Leave *Instanter* to Supplement the Record should be denied.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITIONERS' RESPONSE TO MIDWEST GENERATION'S MOTION FOR LEAVE *INSTANTER* TO SUPPLEMENT THE RECORD** was served to all parties of record listed below via electronic mail, on November 28, 2016.

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

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

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

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

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