

ILLINOIS POLLUTION CONTROL BOARD

December 8, 2016

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

**HEARING OFFICER ORDER**

A hearing was held on October 5, 2016, in the above-captioned appeal. On November 14, 2016, respondent Midwest Generation, LLC. (Midwest) filed a Motion for leave *instanter* to supplement record with the proposed supplemental documents attached. (Mot.). On November 28, 2016, petitioners filed their response. (Resp.). No response was filed by respondent Illinois Environmental Protection Agency. (Agency).

**Midwest’s Motion To Supplement**

Midwest requests that the Board permit Midwest to include references to the Waukegan Generating Station permitting documents attached to its motion in its post-hearing briefs or, in the alternative, as part of the permit record on appeal because they relate to a legal issue arising out of a statement the Board included in the 1978 Board Opinion and Order in PCB 77-82 (Aug. 3, 1978)(the 1978 Order). Mot. at 1. The 1978 Board Order is part of the permit record in this appeal. Midwest additionally argues that during the October 5, 2016, hearing, petitioners questioning of the witnesses “revealed an apparent attempt to use the absence from the permit record in this appeal of any documents indicating such additional studies were performed [by ComEd] as legal grounds for invalidating” the Agency’s renewal of Midwest’s thermal alternative effluent limitation permit in 2015. *Id.*

In a nutshell, Midwest is seeking to introduce documents relating to the Board’s 1978 order concerning the ‘promised studies’ to clarify and accurately inform the historical record relating to the Board’s 1978 Order. *Id.* at 4. Midwest argues that these historical documents are related to the 1978 Board Order and should be allowed to be referenced in its post-hearing brief

to counter petitioners apparently new argument and “establish that there is no fatal defect affecting the continued legal validity” of the 2015 thermal alternative effluent limitation permit. *Id.* at 7.

### **Petitioners Response**

Petitioners state that the Board should deny Midwest’s motion to supplement the record because “the information offered is irrelevant, untimely, misleading, and confusing”. Resp. at 1. Petitioners state that the documents are not part of this record on appeal and should not be included in this appeal record, nor is there any evidence that the Agency relied on these documents in granting the permit at issue. *Id.* at 1-2. Petitioners additionally argue that they are not raising a new argument “as they have been consistent 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 Sec. 106.1180”. *Id.* at 5.

Finally, petitioners argue that to allow this new information in the record, petitioners would be prejudiced “by limiting their ability to properly address Midwest Generation’s last-minute arguments”. *Id.* at 6-7.

### **Discussion And Ruling**

Section 101.630 of the Board’s procedural rules (35 Ill. Adm. Code 101.630), allows the Board to take official notice “of all facts of which judicial notice may be taken and of other facts within the specialized knowledge and experience of the Board”. Even though these documents, re-issued NPDES permits to ComEd in 1979 and 1985, are not in the record, “it should not necessarily be a roadblock to the Board’s consideration of particularly relevant public facts”. Texaco, Inc. v. Environmental Protection Agency, PCB 70-29, concurring, Samuel Aldrich (Feb. 17, 1971) slip op. 2.

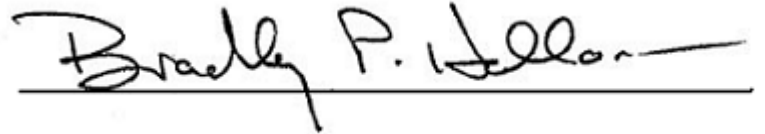
Here, the petitioners do not challenge Midwest’s request that the documents be allowed to be referenced in their post-hearing briefs in an effort to bring them to the Board’s attention, only that they would be prejudiced if Midwest was allowed to supplement the record with these documents.

The documents here are of public record and are within the Board’s specialized knowledge and experience.

Midwest’s motion is granted to the extent that references to the documents included in their post-hearing briefs are allowed. This decision makes no ruling on whether the documents are relevant.

The parties or their legal representatives are directed to participate in a telephonic status conference with the hearing officer on December 12, 2016, at 9:30 a.m.

IT IS SO ORDERED.

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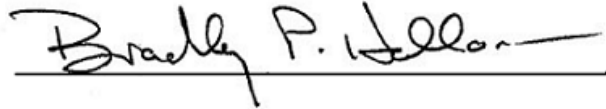
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on December 8, 2016, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on December 8, 2016:

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A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath it.

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