

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PETITION OF MIDWEST GENERATION, LLC,) AS 07-04
WILL COUNTY GENERATING STATION) (Adjusted Standard- Air)
FOR AN ADJUSTED STANDARD FROM)
35 ILL.ADM.CODE 225.230)

NOTICE OF FILING

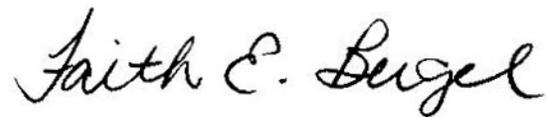
To:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, IL 60601

Persons included on the
ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board **MOTION FOR LEAVE TO FILE CONSOLIDATED REPLY and CONSOLIDATED REPLY TO RESPONSES OF ILLINOIS EPA AND MIDWEST GENERATION TO RENEWED MOTION TO INTERVENE**, copies of which are herewith served upon you.

Respectfully Submitted,



Faith E. Bugel
Environmental Law & Policy Center
35 E. Wacker Dr. Suite 1300
Chicago, IL 60601

DATED: March 18, 2008

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PETITION OF MIDWEST GENERATION, LLC,) AS 07-04
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MOTION FOR LEAVE TO FILE CONSOLIDATED REPLY

NOW COMES the Environmental Law and Policy Center (“ELPC”), by and through counsel, and, pursuant to 35 Ill. Admin. Code 101.500(e), requests leave to file a consolidated reply to the Responses of the Illinois Environmental Protection Agency (“Illinois EPA”) and Midwest Generation to ELPC’s Renewed Motion to Intervene (“Renewed Motion”). ELPC timely filed a motion for leave to reply to the Illinois EPA’s Response on March 3, 2008, requesting an extension of the time in which to reply so as to file a consolidated reply following submission of Midwest Generation’s response. Thus, ELPC now respectfully requests leave to file a consolidated reply. In support of this motion, ELPC states as follows:

1. ELPC requests that the Board consider paragraphs 1 through 9 of its Motion for Leave to File Reply to Response of Illinois EPA (filed March 3, 2008) as incorporated in this Motion by way of background.
2. Illinois EPA filed its Response to the Environmental Law & Policy Center’s Renewed Motion to Intervene on February 11, 2008 (“Illinois EPA’s Response”). As noted in the Motion for Leave to File Reply to Response of Illinois EPA, Illinois EPA and ELPC agreed subsequently to a service receipt date of February 22, 2008.
3. On March 3, 2008, within 14 days of the agreed upon service receipt date of Illinois EPA’s Response, ELPC filed a Motion for Leave to File Reply to Response of Illinois EPA, asking for an extension in which to reply so as to enable consolidation of replies to

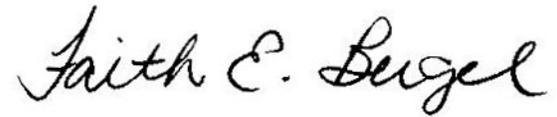
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both Illinois EPA and Midwest Generation. ELPC stated in its motion that it anticipated arguments from Midwest Generation similar to and potentially overlapping with those in Illinois EPA's Response.

4. In keeping with the Board order issued February 21, 2008, Midwest Generation filed its Response to the Environmental Law & Policy Center's Renewed Motion to Intervene on March 6, 2008 ("Midwest Generation's Response"). Midwest Generation's Response noted Petitioner's agreement with paragraphs 6 through 17 of the Illinois EPA's Response.
5. Pursuant to 35 Ill. Admin. Code 101.500(e), ELPC must file a motion for leave to reply within 14 days of service of a response. ELPC received mail service of Midwest Generation's Response on March 10, 2008. This motion thus is timely filed.
6. ELPC seeks leave to reply to address the arguments raised by Midwest Generation in its Response. Not allowing such reply would materially prejudice ELPC, as it would prevent full participation by a public interest organization representing members directly affected by the implementation of Illinois regulations controlling mercury pollution from the electric generating facility at issue in this case.
7. Efficiency would be served by consolidating ELPC's replies to the Illinois EPA and Midwest Generation.

WHEREFORE, for the reasons set forth above, ELPC seeks leave to submit a consolidated reply to the Responses of Midwest Generation and Illinois EPA to ELPC's Renewed Motion to Intervene.

Respectfully Submitted,

A handwritten signature in black ink that reads "Faith E. Bugel". The signature is written in a cursive style with a large, prominent "F" and "B".

Faith E. Bugel

Environmental Law & Policy Center
35 E. Wacker Dr. Suite 1300
Chicago, IL 60601

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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PETITION OF MIDWEST GENERATION, LLC,) AS 07-04
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**CONSOLIDATED REPLY TO RESPONSES OF ILLINOIS EPA AND MIDWEST
GENERATION TO RENEWED MOTION TO INTERVENE**

NOW COMES the Environmental Law and Policy Center (“ELPC”), by and through counsel, and, pursuant to 35 Ill. Admin. Code 101.500(e), respectfully replies to the Illinois Environmental Protection Agency’s (“Illinois EPA”) “Response to the Environmental Law & Policy Center’s Renewed Motion to Intervene” (Feb. 11, 2008) and Midwest Generation’s “Response to the Environmental Law & Policy Center’s Renewed Motion to Intervene,” (Mar. 6, 2008). ELPC requests that the Illinois Pollution Control Board (“Board”) enter an order allowing ELPC’s intervention in this matter, as failure to do so would result in material prejudice to and would adversely affect ELPC and its members. In support of this request, ELPC states as follows:

1. ELPC requests that the Board consider paragraphs 1 through 3 of its Renewed Motion for Leave to Intervene (filed Jan. 23, 2008) as incorporated in this Reply by way of background.
2. At issue in this proceeding is whether to grant an adjusted standard to Petitioner Midwest Generation for control of mercury at its Will County Generating Station (“Will County”). Petitioner in sum seeks an adjusted standard on the basis that the existence of a hot-side electrostatic precipitator (“HS ESP”) at Will County would require the facility to add or replace equipment at a cost exceeding that assumed as the economic basis for the state’s

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mercury rule, 35 Ill. Adm. Code 225.230, in order to comply with the rule as adopted. *See* Petition at E, pages 3-4 (Jan. 10, 2007). Petitioner also argues that insufficient time exists for equipment modification or addition to ensure compliance by the rule's deadlines. *Id.*

3. Intervention in Board proceedings is governed by 35 Ill. Adm. Code 101.402.

Specifically, ELPC seeks to intervene under Section 101.402(d)(2) or in the alternative Section 101.402(d)(3). Under these provisions, the Board may permit any person to intervene in any adjudicatory proceeding if the person may be materially prejudiced absent intervention, 35 Ill. Adm. Code 101.402(d)(2), or the person is so situated that the person may be adversely affected by a final Board order, 35 Ill. Adm. Code 101.402(d)(3).

4. As stated in the Renewed Motion, ELPC and its members will be directly and materially affected by the outcome of this proceeding, which will determine the mercury emissions from Will County. Renewed Motion at ¶ 3. Mercury pollution from coal combustion deposits both locally and regionally, affecting air quality, bodies of water, and fish. *In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury)*, Board Order at pp. 7¹, 60², and 63³ (Nov. 2, 2006); *In the Matter of: Petition of Midwest Generation, LLC. Will County Generating Station For an Adjusted Standard From 35 Ill. Adm. Code 225.230*, Petition for Adjusted Standard

¹ "According to the Agency, reactive and particulate forms of mercury compounds have the greatest impact on near-field deposition of mercury."

² "all three studies support the Agency's contention that reduction of mercury emissions from coal combustion plants would significantly reduce local mercury deposition"; testimony of Dr. Keeler that "recent studies pertaining to mercury chemistry suggests [sic] that in certain environments, such as downwind of urban areas, elemental mercury is rapidly transformed to reactive mercury."

³ "the Board believes that [the Steubenville] study persuasively demonstrates that local and regional coal combustion sources contribute significantly to the wet deposition of mercury"; "the Board finds [the Florida and Massachusetts] studies support the Agency's contention that a reduction of mercury deposition will result in a reduction of mercury levels in fish tissue."

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pp. 3⁴ (Jan. 10, 2007) (Will County's emissions will have significance as a regional concern). ELPC represents members who live both in the local vicinity of the plant and the region impacted by the plant's emissions. *See* Attachment A. These members include mothers of childbearing age, parents of young children and/or anglers who are concerned with the impact of mercury emissions from Waukegan on the quality of the air, nearby waters, and fish within those waters, and thus their health and their enjoyment of the impacted waters. ELPC's members therefore are so situated that they may be adversely affected by the Board's final order.

5. The Board has regularly permitted intervention by individuals and/or citizen groups where, as here, the proposed intervenors would be impacted by the pollution from the activity at issue and were interested in participating regarding the primary issue in the proceeding.
 - a. Admittance has been granted where, as is highly possible here, the proposed intervenor and Illinois EPA take different positions on the substantive result to advocate before the Board. *See Commonwealth Edison Co. v. Illinois EPA*, PCB-91-29 (Nov. 21, 1991) (Sierra Club admitted as intervenor where it opposed a variance and Illinois EPA's position was that a variance was not necessary due to inapplicability of the provision in question); *Village of Round Lake Beach v. Illinois EPA*, PCB-86-59 (Sept. 11, 1986) (concerned citizens admitted as intervenors where citizens opposed variance and Illinois EPA recommended that variance be granted); *In the Matter of: Proposed Determination of No Significant Ecological Damage for the Joliet Generating Station*, PCB-87-93 (Nov. 15, 1989)

⁴ "Will County's emissions have more significance as a regional concern than as a local concern."

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(Sierra Club admitted as intervenor where Sierra Club opposed company's petition and Illinois EPA supported the petition).

- b. The Board has also granted intervenor status under other circumstances relevant to this case. *See Citizens Utilities Co. of Illinois v. Illinois EPA*, PCB-85-95 (Apr. 10, 1986) (Village permitted to intervene where it alleged that a Board order regarding exemption from water quality standards could affect the rates and services provided to its citizens); *Gallatin Nat'l Co. v. Illinois EPA*, PCB-90-184 (Jan. 18, 1991) (citizen group permitted to intervene where it and Illinois EPA opposed grant of variance); *We Shred It v. Illinois EPA*, PCB-92-180 (Mar. 25, 1993) (county permitted to intervene because it could be adversely affected by order granting variance to tire shredding company). *See also Caterpillar, Inc. v. Illinois Environmental Protection Agency*, PCB-94-198 (Sept. 1, 1994) (unions admitted as intervenors).
6. Illinois EPA and Midwest Generation put forth essentially two arguments regarding why ELPC and its members should not be granted intervenor status: the opportunities for participation short of intervention are sufficient to avoid material prejudice, and Illinois EPA will adequately ensure that their interests are not adversely affected. *See* Illinois EPA's Response at ¶¶ 9 and 11; Midwest Generation's Response at ¶¶ 10, 16, and 17. The Board should reject both of these arguments.
7. ELPC and its members may be materially prejudice absent intervention. The rights of a party are significant in general and with respect to this case. With an adjusted standard proceeding, only a party to the proceeding may appeal a final order in state court. 415 ILCS 5/41(a). Similarly, only parties may file briefs and take part in telephonic status

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conferences on important issues before the Board. 35 Ill. Adm. Code 101.500; *see e.g.*, Order of February 22, 2007 (parties or legal representatives to participate on telephonic status conference). Thus, failing to admit ELPC would prevent access to judicial review, while admittance would permit ELPC to establish a complete record for review and file an appeal to protect its members. These rights are especially important in an adjusted standard proceeding where, as here, a range of outcomes based on different technologies is possible.

8. ELPC and its members also may be adversely affected without status as intervenors.

While the Illinois EPA is responsible for protecting all the state's citizens from harmful air pollution, Illinois EPA's Response at ¶11, this duty does not necessarily mean that the agency represents the best interests of a select group of citizens living within the area that will be impacted by mercury pollution from the plant.

- a. In formulating its recommendation for the Will County Station for the Board, the agency has to take into account the precedent of the recommendation over the range of facilities for which it has regulatory responsibility. This position may cause the agency to advocate for a lesser degree of clean-up at this particular facility than would be advanced by ELPC and its members, who will be impacted primarily by mercury pollution from the Will County plant.
- b. The Illinois EPA has yet to file its recommendation with the Board. Without a recommendation, it is presumptuous to assume that the agency will advocate for the same position as ELPC. Illinois EPA may recommend that an adjusted standard is appropriate, while ELPC may advocate for application of the rule. Both the agency and ELPC may agree that an adjusted standard is appropriate.

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Under this scenario, it is entirely possible that the agency and ELPC will disagree about which technology to present to the Board to achieve what numeric standard over what time period. A motion to intervene is not an appropriate forum to argue the merits of a case. Thus, based on the range of possible disparate positions between the agency and ELPC, ELPC has adequately demonstrated for the purposes of intervention that Illinois EPA will not sufficiently represent the interests of ELPC and its members.

9. In addition, cases cited by Illinois EPA and Petitioner are distinguishable from the bases on which ELPC seeks intervention. Unlike the City in *2222 Elston LLC v. Purex Industries et al.*, PCB 03-55 (Jan. 23, 2003), which relied on tenuous financial impacts to show adverse affects, ELPC alleges harms to the health and well-being of its members and cannot file a complaint of its own with regards to this adjusted standards proceeding. Also unlike the Sierra Club in the *Midwest Generation* proceeding, ELPC has a direct interest in the core issue at stake in this proceeding, i.e., the standard that the Will County unit must meet. Contrast *Midwest Generation v. Illinois EPA*, PCB-04-185 (Nov. 4, 2004) (denying intervention where Illinois EPA would seek the same outcome as Sierra Club on the trade secret issue at stake and Sierra Club's "rationales for seeking intervention [did] not concern the sole issue in [the] appeal.") Finally, as stated above, the present adjusted standards proceeding could result in any number of substantive standards for Will County, with ELPC and Illinois EPA potentially advancing different technologies, standards, and timelines. The enforcement proceeding at issue in *Illinois v. Alloy Engineering and Casting Company*, PCB-01-155 (Sept. 6, 2001), in contrast, involved the single issue of liability. In that case, unlike here, the Illinois Attorney

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General (who would be calling the proposed intervenors as witnesses in the case, in contrast to Illinois EPA in this case) could clearly be viewed as representing the interests of the proposed intervenors on the sole up-or-down issue at stake.

10. Nor will admittance of ELPC as an intervenor result in the slippery slope to undue delay and inefficiency posited in the Responses. See Agency Response at ¶ 12; Petitioner Response at ¶ 21.

- a. The Board at all times retains the discretion to permit or deny intervention based on the strength of the interests asserted by the proposed intervenor. See 35 Ill. Adm. Code 101.402d (Board “may” permit intervention). With respect to prior participation in a rulemaking, the Board may consider the intensity of participation as an indicator of the interests to be affected in later adjudications. The Board can readily draw a distinction between an intervenor who, like ELPC, actively participated in all aspects of the rulemaking process by attending public hearings, meeting with the agency, submitting comments on draft rules, introducing oral and written expert testimony at the hearing and actively cross-examining the agency’s own witnesses, and one who participated by, e.g., merely attending a single hearing.
- b. Regardless of the level of participation in the rulemaking, nowhere in the intervention provision is there the authority to deny intervention solely on the basis that a large number of persons would qualify, where those seeking intervention would otherwise qualify to intervene based on their interest and status. As with standing in the federal courts, the mere fact that injury may occur to many persons does not erase the injury and the status it confers. *See, e.g.,*

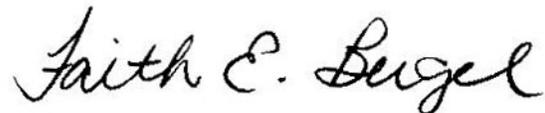
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Massachusetts v. EPA, 127 S. Ct. 1438, 1453 (2007) (rejecting EPA's argument that the widespread nature of harm from global warming creates an insurmountable standing bar, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (Kennedy concurrence that "it does not matter how many persons have been injured by the challenged action")). The Board instead has the authority to limit the participation of intervenors once admitted "as justice may require." 35 Ill. Adm. Code 101.402e. The Board's rules thus anticipate that some degree of inconvenience may occur from intervention and contain a means for the Board to prevent or minimize disruption while recognizing the rights of intervenors.

- c. Finally, intervention by a single non-profit group representing multiple members potentially adversely affected by a rule may be viewed as an efficiency measure, against the alternative scenario of each member or adversely affected person seeking to intervene on his or her own behalf.

WHEREFORE, for the reasons set forth above, the Environmental Law and Policy Center requests that the Board admit ELPC as an intervenor in this proceeding.

Respectfully Submitted,



Faith E. Bugel
Environmental Law & Policy Center
35 E. Wacker Dr. Suite 1300
Chicago, IL 60601

ELPC ATTACHMENT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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)
PETITION OF MIDWEST GENERATION, LLC,) AS 07-04
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35 ILL.ADM.CODE 225.230)

DECLARATION OF STACY MARIA JAMES

STACY MARIA JAMES, residing at 509 S. Draper, Champaign, Illinois, 61821,

declares under penalty of perjury as follows:

1. I am a member of the Environmental Law and Policy Center.
2. ELPC is actively involved in efforts to protect air and water quality in Will County by researching, attending public hearings, providing comments/testifying, interacting with government agencies, creating public awareness and educating the public on environmental issues that are detrimental to our health and safety.
3. I am aware that the State of Illinois has issued a statewide fish consumption advisory because of mercury pollution and that most of the mercury air emissions in Illinois come from coal-fired power plants.
4. I am aware that the Will County coal fired power plant is a major source of air pollution, including mercury pollution. Additionally, I am aware that the mercury pollution from Will County not only exists in the surrounding air, but also deposits locally and regionally in relation to the plant. This local and regional deposition of mercury pollutes the nearby waters, including the Des Plaines River and other downwind waterways, and contaminates the fish living in those waters.
5. I am aware that the mercury in the air and water is associated with numerous health problems, including fetal and infant developmental delays from the mother's and child's

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consumption of contaminated fish. I am also aware that mercury has been linked to increased risk of heart attack in adults from their consumption of contaminated fish, and mercury pollution in the air to increased prevalence of autism among children.

6. I am aware that mercury can impair the reproductive system of birds feeding on mercury contaminated fish. I understand that Lake Renwick is a heron breeding sanctuary described by the Illinois Audubon Society as "By far the most valuable rookery in all of Illinois...a site of outstanding statewide significance," is located approximately six miles from the Will County plant, and has among the highest levels of mercury contamination of any lake in the state, as well as the highest levels of mercury-contaminated fish.

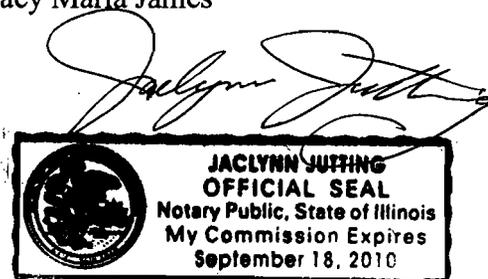
7. I am concerned about air pollution from these coal-fired power plants and the effect that such pollution has on my health and my community. I am especially concerned about the impacts of mercury pollution on the health of Illinois' waterways and the aquatic life in them. As a scientist who has devoted her career to protecting aquatic resources in Illinois, I am affected by the negative impacts that mercury pollution has on aquatic systems and the people and wildlife who consume mercury-contaminated organisms.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 17, 2008



Stacy Maria James

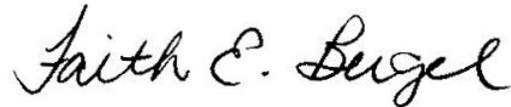


CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 18th day of March, 2008, I have served electronically the attached **MOTION FOR LEAVE TO FILE CONSOLIDATED REPLY** and **CONSOLIDATED REPLY TO RESPONSES OF ILLINOIS EPA AND MIDWEST GENERATION TO RENEWED MOTION TO INTERVENE** upon the following persons:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

and electronically and by first class-mail with postage thereon fully prepaid and affixed to the persons listed on the **ATTACHED SERVICE LIST**.



Faith E. Bugel
Environmental Law & Policy Center
35 E. Wacker Dr. Suite 1300
Chicago, IL 60601

DATED: March 18, 2008

SERVICE LIST

(AS 07-04)

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