BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCES DEFENSE COUNCIL PRAIRIE RIVERS NETWORK, and SIERRA CLUB	)	
Petitioners	)	
v.	)	**PCB 13-65**
	)	**(Citizens Enforcement - NPDES)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and DYNEGY MIDWEST GENERATION, INC.	)	
Respondents.	)	

NOTICE OF FILING

TO:

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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board, the attached **Motion to Dismiss and Special Appearances of Daniel Deeb and Amy Antoniolli**, copies of which are herewith served upon you.

DYNEGY MIDWEST GENERATION,

Amy Antoniolli

By: Amy Antoniolli

Dated: June 17, 2013

Daniel Deeb
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NATURAL RESOURCES DEFENSE COUNCIL PRAIRIE RIVERS NETWORK, and SIERRA CLUB	)	
Petitioners	)	
v.	)	**PCB 13-65**
	)	**(Citizens Enforcement - NPDES)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and DYNEGY MIDWEST GENERATION, INC.	)	
Respondents.	)	

SPECIAL APPEARANCE

I, Daniel Deeb, pursuant to 35 Ill. Adm. Code 101.400(a)(5), hereby appear in a special limited capacity, on behalf of DYNEGY MIDWEST GENERATION, to contest the jurisdiction of the Illinois Pollution Control Board in this docket as set out more fully in the accompanying motion to dismiss.

Respectfully submitted,

Daniel Deeb

Dated: June 17, 2013

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCES DEFENSE COUNCIL PRAIRIE RIVERS NETWORK, and SIERRA CLUB	)	
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v.	)	**PCB 13-65**
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SPECIAL APPEARANCE

I, Amy Antoniolli, pursuant to 35 Ill. Adm. Code 101.400(a)(5), hereby appear in a special limited capacity, on behalf of DYNEGY MIDWEST GENERATION, to contest the jurisdiction of the Illinois Pollution Control Board in this docket as set out more fully in the accompanying motion to dismiss.

Respectfully submitted,

Amy Antoniolli

Amy C. Antoniolli

Dated: June 17, 2013

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCES DEFENSE COUNCIL PRAIRIE RIVERS NETWORK, and SIERRA CLUB, Petitioners, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and DYNEGY MIDWEST GENERATION, INC., Respondents.	)	PCB 13-65 (Citizens Enforcement – NPDES)

MOTION TO DISMISS

Dynegy Midwest Generation ("DMG"), by its attorneys, Schiff Hardin LLP, respectfully moves the Illinois Pollution Control Board (the "Board") to dismiss the Petition to Modify, Suspend, or Revoke a Permit Issued by the Illinois Environmental Protection Agency (the "Complaint"), filed electronically by Natural Resources Defense Council, Prairie Rivers Network, and the Sierra Club (collectively, the "Citizens Groups") on May 15, 2013 and received by DMG at its O'Fallon, Illinois office on May 17, 2013. After providing the Board with a brief background summary (Part I), this motion delineates (at Parts II and III, respectively) why the Complaint should be dismissed for lack of jurisdiction and for failing to establish a claim for which the requested relief could be granted. In support of this motion, DMG respectfully states as follows.

I. Background Summary

1. The Citizen Groups' May 15, 2013 filing of the Complaint was preceded by their October 18, 2012 filing of a third-party permit appeal contesting the Illinois Environmental Protection Agency's (the "IEPA's") issuance of NPDES Permit No. IL0001571 (the "Permit") to

DMG for its Havana Power Station located in Havana, Mason County. *Natural Resources Defense Council, et al. v. IEPA*, PCB 13-017 (filed October 18, 2012) (the "Permit Appeal").

2. At the request of DMG's counsel, counsel for the Citizen Groups provided the undersigned with a courtesy copy of the Complaint via email on May 15, 2013. However, as stated in the certificate of service found at page 245 of the Complaint, the Complaint was actually received by DMG via ordinary U.S. Mail on May 17, 2013. As will be explained at Part II below, that service was insufficient.

3. The Complaint expressly repeats and incorporates the Citizen Groups' claims of the Permit Appeal. (Complaint, par. 20). In fact, the only material aspect of the Complaint that does not duplicate the Permit Appeal is its reference to post-Permit issuance monitoring data (the "Monitoring Data") which the Citizens Groups contend somehow constitute a "change in any circumstance" under 35 Ill. Adm. Code 309.182 ("Section 309.182") that "mandates either a temporary or permanent reduction or elimination" of discharges allowed by the Permit. Complaint, par. 24.[1] In relevant part, Section 309.182 states as follows (with emphasis added):

> (a) Any person, whether or not a party to or participant at any earlier proceeding before the Agency or the Board, may file a complaint for modification, suspension, or revocation of an NPDES Permit in accordance with this Section and Part 103.
>
> (b) The Pollution Control Board, after complaint and hearing in accordance with the Act and its Procedural Rules, <u>may modify, suspend or revoke any NPDES permit in whole or in part in any manner consistent with the Act, applicable Board regulations and federal requirements</u>, upon proof of cause including, but not limited to, the following:
>
> (1) Violation of any terms or conditions of the permit (including, but not limited to, schedules of compliance and conditions concerning monitoring, entry and inspection);
>
> (2) Obtaining a permit by misrepresentation or failure to disclose fully all

[1] The paragraph numbers of the Complaint mistakenly begin to repeat starting at its page 9. For ease of reference, this motion assumes that the paragraph numbers at page 9 of the Complaint were intended to be, respectively, 21, 22, 23 and 24. The references stated herein use said revised numbering.

relevant facts; or

(3) A change in any circumstance that mandates either a temporary or permanent reduction or elimination of the permitted discharge.

4. Specifically, the Complaint contends that the Monitoring Data somehow "constitute a change in any circumstance that mandates either a temporary or permanent reduction of the permitted discharge." Complaint, par. 24. The Complaint goes on to assert (without explanation) that the Monitoring Data somehow "mandate that the IEPA modify the Permit to establish a discharge limit for mercury that will comply with Clean Water Act requirements concerning WQBELs, technology-based limits, and antidegradation." *Id.* As will be explained at Part III below, the Complaint does not demonstrate that the Monitoring Data mandate a modification under Section 309.182, nor do the Monitoring Data mandate such action.

5. Also on May 15, 2013, the Citizen Groups filed a motion seeking to consolidate the Permit Action and Complaint pursuant to 35 Ill. Adm. Code 101.406. DMG timely filed a Response in Opposition to Motion to Consolidate (the "Response") opposing that motion to consolidate on May 31, 2013. In the Response, DMG advised the Board that the Complaint should be dismissed, among other reasons, for want of jurisdiction and that such position would be detailed in this motion. Response, fn 1. To date, the Board has not ruled upon said motion to consolidate.

II. The Complaint Should Be Dismissed for Lack of Jurisdiction

The Complaint should be dismissed for lack of jurisdiction for each of the following two independent grounds: (A) failure of the Citizen Groups to establish personal jurisdiction and (B) the Board's lack of jurisdiction to hear the Complaint while the Permit Appeal is pending.

A. *The Citizens Groups Failed to Establish Personal Jurisdiction Via Proper Service*

6. The Citizen Groups filed the Complaint pursuant to Section 309.182. The Board adopted Section 309.182 (then, Rule 912) on September 5, 1974. *In the Matter of: National Pollutant Discharge Elimination System Regulations*, R73-11, 12 (Sept. 5, 1974) ("*NPDES Regulations*"). The language of Rule 912 was identical in all relevant ways to the current language of Section 309.182:

> 912 Authority to Modify, Suspend or Revoke Permits
>
> (a) Any person, whether or not a party to or participant at any earlier proceeding before the Agency or the Board, may file a complaint for modification, suspension, or revocation of an NPDES Permit in accordance with this Rule 912 and Part III of Chapter I.
>
> (b) The Pollution Control Board, after complaint and hearing in accordance with the Act and its Procedural Rules, may modify, suspend or revoke any NPDES Permit in whole or in part in any manner consistent with the Act, applicable Board regulations and federal requirements, upon proof of cause including, but not limited to, the following:
>
> (1) Violation of any terms or conditions of the permit (including, but not limited to, schedules of compliance and conditions concerning monitoring, entry, and inspection);
>
> (2) Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; or
>
> (3) A change in any circumstance that mandates either a temporary or permanent reduction or elimination of the permitted discharge.
>
> (c) The provisions of this Rule shall be included as terms and conditions of each issued NPDES Permit.

In adopting the above, the Board made it clear that Rule 912 (now, Section 309.182) "was enacted to be consistent with Section 33(b) of the [Environmental Protection] Act, which allows the Board to revoke an Agency-issued permit in an enforcement action." *NPDES Regulations*, R73-11, 12, slip op. at 17 (Dec. 5, 1974) (emphasis added). Section 33(b) of the Environmental Protection Act (the "Act") remains substantively the same today as it appeared in 1974 – the only even somewhat material difference being that the current version of Section 33(b) expressly

allows actions enforcing "any Board order."

1974	2013
"Such order may include a direction to cease and desist from violations of the Act or of the Board's rules or regulations or of any permit or term or condition thereof, and/or the imposition by the Board of civil penalties in accord with Section 42 of this Act. The Board may also revoke the permit as a penalty for violation. . . ." 415 ILCS 5/33(b) (111 ½ Ill. Rev. Stat. § 1033 (1973)).	"Such order may include a direction to cease and desist from violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, and/or the imposition by the Board of civil penalties in accord with Section 42 of this Act. The Board may also revoke the permit as a penalty for violation. . . ." 415 ILCS 5/33(b) (2013).

Reading the text of Rule 912 (now Section 309.182) together with the Board's opinion and order in the *NPDES Regulations* rulemaking makes it clear that the Board intended complaints filed pursuant to what is now Section 309.182 to constitute enforcement actions. Consistent with that intent, the Board has docketed this matter (PCB 13-65) as an NPDES enforcement matter subject to the procedural rules of 35 Ill. Adm. Code Part 103.

7. Because the action initiated by the Complaint is an enforcement action under the Act, it is well established that the Complaint needed to be served (a) by "registered mail, messenger service, or personal service" with (b) an accompanying notice. 35 Ill. Adm. Code 101.304(c) (specifying the special requirements for a complaint), and 35 Ill. Adm. Code 103.204(a) & (b). The notice must specify the consequences of not filing an answer to the complaint. 35 Ill. Adm. Code 103.204(f).

8. The Board has consistently found that a failure to afford proper service in accordance with Board rules deprives the Board of jurisdiction and warrants dismissal of the underlying action. *Strunk v. Williamson Energy, LLC (Pond Creek Mine #1)*, PCB 07-135 (Dec. 20, 2007); *Dorothy v. Flex-N-Gate Corp.*, PCB 05-49 (Nov. 2, 2006); *Trepanier v. Board of*

Trustees of the University of Illinois at Chicago, PCB 97-50 (Nov. 21, 1996). The Board has further found that the degree of prejudice suffered by a respondent due to improper service is immaterial to the Board's personal jurisdiction analysis. *Trepanier*, PCB 97-50, slip op. at 4 (finding that proper service is a jurisdictional requirement and knowledge of the complaint does not legitimize improper service).

9. As confirmed by the certificate of service that accompanied the Complaint, the Citizen Groups sent the Complaint to DMG and the IEPA via ordinary U.S. Mail rather than registered mail, messenger service, or personal service contrary to the Board's rules. Complaint, p. 245. Because the Citizen Groups failed to accomplish service as required by the Board's rules, the Complaint must be dismissed for lack of jurisdiction.[2] Moreover, dismissal is also warranted due to the Citizens Groups' failure to provide the accompanying notice specifying the consequences of not filing an answer to the Complaint as required by 35 Ill. Adm. Code 103.204(f).

B. *The Board Does Not Have Jurisdiction to Hear the Complaint While the Permit Appeal Is Pending.*

10. The Board has repeatedly found that it is without jurisdiction to hear a second permitting decision regarding the same facility and regulatory framework while a permit appeal is pending. See *Joliet Sand & Gravel Co. v. IEPA*, PCB 87-55 (Jun. 10, 1987); *Caterpillar Tractor Co. v. IEPA*, PCB 79-180 (Jul. 14, 1983); and *Alburn v. IEPA*, PCB 81-23 (Mar. 19, 1981).

[2] DMG counsel have entered a special appearance in this matter in light of the jurisdictional defects of the Complaint.

11. In determining that it lacked jurisdiction to review a second permit decision while an appeal of an initial permit decision was pending, the Board in *Joliet* summarized its holdings in *Alburn* and *Caterpillar* as follows:

> In both [*Alburn* and *Caterpillar*], the Board was considering the validity of a subsequent permit decision regarding the same facility for the same operations, under the same regulatory framework. In both proceedings, the Board held that the second permit decision was of no force and effect while the first permit decision was still under appeal to this [B]oard.

Joliet, slip op. at 3. In other words, there can be no Board jurisdiction with respect to a second permitting decision (such as that sought by the Complaint) while a permit for the same facility and operations under the same regulatory framework is the subject of an appeal.[3] Because both the Permit Appeal and Complaint clearly entail the same operations of DMG's Havana Power Station and the same regulatory framework (and even the same parties), there can be no jurisdiction with respect to the Complaint until the Permit Appeal is dismissed or otherwise finally decided.

III. The Complaint Must Be Dismissed For Failing Establish the Violation Required to Bring An Action Under Section 309.182 and for Otherwise Failing to State a Claim for Which the Board Can Provide the Requested Relief.

If the Complaint is not dismissed for lack jurisdiction as set out in Part II above, it should be dismissed with prejudice as it fails to present any set of facts that, if proven, would afford the relief (Permit modification) requested by the Citizen Groups. Specifically, as demonstrated respectively at Subparts III.A and III.B below, (A) the Complaint fails to present the requisite violation required for an action under Section 309.182, and (B) regardless of any purported violation, the Complaint fails to establish that the Monitoring Data *mandate either a temporary*

[3] Like the case at hand, the first and second permit decisions in *Joliet*, *Caterpillar* and *Alburn* each involved the same parties. Although the second permitting decision in each of said cases involved the issuance of a new permit, the underlying rationale is the same with respect to second actions seeking to modify, suspend or revoke an appealed permit.

or permanent reduction or elimination of the permitted discharge as required under Section 309.182. With respect to (B), the Complaint is frivolous in that it: (1) fails to establish that the Monitoring Data mandate either a post-Permit issuance reasonable potential analysis or a change in the permitted discharge, (2) fails to establish that the Monitoring Data mandate post-Permit issuance antidegradation or best professional judgment ("BPJ") analyses or a change in the permitted discharge, and (3) requests a Permit modification that, at least in part, is beyond the Board's authority. Items (1), (2) and (3) are respectively detailed at Subparts III.B1, III.B.2 and III.B.3 below.

A. *The Complaint Must Be Dismissed for Failing to Sufficiently Allege a Violation Attributable to the Monitoring Data.*

12. In *City of Monticello v. IEPA*, PCB 77-305 (Feb. 16, 1978), the Board interpreted what is now Section 309.182 (former Rule 912) to require a finding of a violation before a permit could be modified, suspended, or revoked. Specifically, the Board stated: "Rule 912(a) . . . requires the finding of a violation before the Board may modify, suspend, or revoke an NPDES permit." *Id.* at 2. That decision is consistent with the Board's stated original intent of the text of Section 309.182 (then Rule 912) as stated at Part II.A above – in originally adopting said text, the Board stated that such was intended "to be consistent with Section 33(b) of the Act, which allows the Board to revoke an Agency-issued permit in an enforcement action." *NPDES Regulations*, R73-11, 12, at 17 (Dec. 5, 1974).

13. Pursuant to *City of Monticello* and the afore-referenced Rule 912 rulemaking, a violation must be asserted and established in order to maintain an action under Section 309.182. Inherently, with respect to a Section 309.182 action predicated upon "changed circumstances,"

the violation must be attributable to said changed circumstances.[4] DMG does not believe that the Complaint can be fairly read to even allege a violation of any kind attributable to the Monitoring Data (*i.e.*, the purported "changed circumstances"). Instead, the Complaint can be fairly read only to assert that the IEPA acted improperly when issuing the Permit and that Monitoring Data somehow prove that point.[5] Whether the IEPA acted improperly in issuing the Permit is, of course, an issue appropriate only for the Permit Appeal. The Citizen Groups should not be permitted to litigate issues of the Permit Appeal in an action requesting permit modification.[6] Consequently, the Complaint should be dismissed for failing to present sufficient allegations to warrant the Citizen Groups' requested relief. For the remainder of this motion, DMG will assume, arguendo, and without conceding that such is in fact true, that the Complaint somehow sufficiently alleges that the Monitoring Data demonstrate a violation.

B. *Even if the Complaint Somehow Sufficiently Alleges a Violation, It Must Be Dismissed for Failing to State a Cause of Action that the Board Does Has the Authority to Grant and for Requesting Relief that the Board Does Not Have the Authority to Grant.*

14. In referencing Section 31(d)(1) of the Act, 35 Ill. Adm. Code 103.212 provides that:

---

[4] If a "changed circumstances" claim under Section 309.182 could instead be based on something other than "changed circumstances," *e.g.*, issues of the Permit Appeal, the Section 309.182 claim would necessarily represent an improper re-litigation of issues that would otherwise be time barred in a modification proceeding. *Tex Mun. Power Agency v. USEPA*, 836 F.2d 1482 (5th Cir. 1988)("Congress did not intend petitions for modification to provide a second chance for full review of an NPDES permit after the statute of limitation has run from the issue or renewal of the permit.").

[5] As stated at Part III.B.1, the mercury water quality standard referenced by the Complaint is, in most cases, expressed as an "annual average, based on at least eight samples, collected in a manner representative of the sampling period". 35 Ill. Adm. Code 302.208(c). The Complaint does not establish that at least samples have been collected, that the collected samples were representative of the sampling period, nor that the annual average has been exceeded. Moreover, the Complaint does not assert that flow conditions of the Illinois River on the sampling dates reflected by the Monitoring Data were "at or above the harmonic mean flow" so as to warrant application of the referenced water quality standard as an instantaneous standard. *Id.*

[6] *See Tex. Mun. Power Agency v. USEPA*, 836 F.2d 1482 (5th Cir. 1988).

> Any person may file with the Board a complaint against any person allegedly violating the Act, any rule or regulation adopted under the Act, any permit or term or condition of a permit, or any Board order. When the Board receives a citizen's complaint, unless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing. [415 ILCS 5/31(d)(1)] The definition for duplicative and frivolous can be found at 35 Ill. Adm. Code 101.Subpart B.

Assuming that the Complaint somehow sufficiently alleges that the Monitoring Data demonstrate a violation, the Complaint must be dismissed if it is either duplicative or frivolous. A complaint is "frivolous" if it requests "relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief." *Id.*

15. The Board takes all well-pled allegations in a complaint as true in ruling on a motion to dismiss. *Import Sales, Inc. v. Continental Bearings Corp.*, 217 Ill. App. 3d 893, 900, 577 N.E. 2d 1205, 1210 (1st Dist. 1991) (citations omitted); *People v. Sheridan Sand & Gravel Co.*, PCB 06-177, slip op. at 4 (Sept. 7, 2006), *People v. Pattison Associates, LLC and 5701 S. Calumet, L.L.C.*, PCB 05-181, slip op. at 4 (Sept. 15, 2005), *People v. Stein Steel Mills Services, Inc.*, PCB 02-1, slip op. at 1 (Nov. 15, 2001), *Shelton v. Crown*, PCB 96-53 (May 2, 1996), *Krautsack v. Patel*, PCB 95-143, slip op. at 2 (June 15, 1995), *Miehle v. Chicago Bridge and Iron Co.*, PCB 93-150, slip op. at 5 (Nov. 4, 1993).

16. In ruling on a motion to dismiss, the Board looks to Illinois civil practice for guidance. *Elmhurst Memorial Healthcare et al. v. Chevron U.S.A. Inc. and Texaco Inc.*, PCB 09-66 (Dec. 16, 2010). In assessing the adequacy of pleadings, in a complaint, the Board has recognized "Illinois is a fact-pleading state which requires the pleader to set out the ultimate facts which support his cause of action." *Rolf Schilling, et al. v. Gary Hill et al.*, PCB 10-100, slip op. at 7 (Aug. 4, 2011); *citing Loschen v. Grist Mill Confections, Inc.*, PCB 97-174, slip op. at 4 (Jun. 5, 1997). "[L]egal conclusions unsupported by allegations of specific facts are

insufficient." *LaSalle National Trust N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557, 606 N.E.2d 1297, 1303 (2nd Dist. 1993).

17. "[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003). The Complaint fails to meet this standard – even if the purported "changed circumstance" facts asserted by the Complaint are deemed to be true, such would not entitle the Citizen Groups to their request relief (a Permit modification). In other words, as will be detailed below, the Complaint is frivolous because it does not allege sufficient facts to establish the Board has the authority to grant the requested Permit modification - the allegations of the Complaint, even if deemed to be true,[7] fail to satisfy the relevant criteria of Section 309.182 as a matter of law. Accordingly, the Board is without authority to grant the Complaint's requested relief.

18. In an attempt to appear to satisfy the necessary criteria of Section 309.182, the Complaint asserts (without explanation) that the Monitoring Data constitute the "change in any circumstance that mandates either a temporary or permanent reduction or elimination of the permitted discharge". Complaint, par. 24. While the Monitoring Data may, as post-Permit information, arguably be viewed as constituting a "change in circumstance", it cannot accurately be said, under any set of alleged facts, that the Monitoring Data mandate either a temporary or permanent reduction or elimination of the permitted discharge as required by Rule 309.182.

[7] In truth, the Complaint significantly misstates the Monitoring Data and purportedly applicable mercury water quality standard. We will not detail those misstatements here, however, because alleged facts of a complaint must be deemed to be true for the purposes of a motion to dismiss.

1. The Monitoring Data Do Not Mandate a Post-Permit Issuance Reasonable Potential Analysis or a Reduction of the Permitted Facility's Discharge.

19. In no event can the Complaint be viewed to allege or present facts that, even if true, establish a violation of an applicable water quality standard. The Citizen Groups crafted the Complaint to avoid alleging such a violation due to the fact that the water quality standard asserted by the Complaint – the 12 ng/l human health standard (HHS) for mercury of 35 Ill. Adm. Code 302.208(f) – is, in relevant part, to be assessed as an annual average based on at least eight representative samples. 35 Ill. Adm. Code 302.208(e). The Monitoring Data present fewer than eight sampling results.[8] Instead of alleging a HHS violation, the Complaint asserts that the Monitoring Data somehow establish a reasonable potential to exceed the HHS. Complaint, par. 22. Even were that assertion to be true (it is not[9]), applicable law does not mandate that the Permit be modified to reflect a reasonable potential analysis for mercury.

20. As recently affirmed by a federal court, the federal NPDES reasonable potential regulations do not mandate when Illinois must perform a reasonable potential analysis. Specifically, the United States District Court for the District of Columbia stated as follows with respect to the federal reasonable potential regulations (emphasis added):

> [I]t is clear that the permitting authority is afforded the authority to determine whether a discharge "causes, has the reasonable potential to cause, or contributes to" and excursion of water quality standards. Id. § 122.44(d)(1)(ii). As written, the regulation does not mandate when the state permitting authority must conduct its analysis of the discharge's impact on the water quality standard. . . . [T]here

[8] Neither the Monitoring Data nor the Complaint do anything to illustrate mercury influent concentrations or flow conditions of the Illinois River.

[9] DMG respectfully submits that, with respect to a water quality standard expressed as annual average based on at least 8 representative samples, only 4 samples over of a period of less than 4 months cannot and should not be used to establish a reasonable potential.

> can be no question that a plain reading of the regulation leaves that determination, and the decision as to when it must be made, solely to state permitting authorities.

National Mining Association, et al., v Jackson, 880 F.Supp.2d 119, 141 (D.D.C. 2012). Because the timing of a reasonable potential analysis is a discretionary decision for the IEPA, the Monitoring Data cannot be said, as a matter of federal law, to mandate the IEPA (or the Board) to conduct a post-Permit issuance reasonable potential analysis.

21. Similarly, Illinois' reasonable potential regulations do not mandate a post-Permit issuance reasonable potential analysis. That is, Illinois' regulations mandate a reasonable potential analysis, at most, only when the IEPA is "establishing the terms and conditions of each issued NPDES Permit".[10] 35 Ill. Adm. Code 309.141. It is thus clear, as a matter of Illinois law, that the Monitoring Data do not mandate that the IEPA or Board modify the Permit post-issuance to reflect a reasonable potential analysis.

22. Moreover, even were the Monitoring Data to somehow mandate a post-Permit issuance reasonable potential analysis under federal or Illinois law (it does not), the Complaint does not (and cannot) demonstrate that a reasonable potential analysis, or the requested establishment of a mercury effluent limit, would necessarily mandate a reduction or elimination of the Havana Power Station's currently permitted discharge. That is, it has not been alleged or established (nor could it be) that a reduction or elimination of the permitted discharge would be necessary to achieve compliance with any imposed new mercury effluent limitation.

[10] A reasonable potential analysis could not be done in connection with the Permit's issuance because there was then no available monitoring data.

2. The Complaint Does Not Allege or Establish that the Monitoring Data Mandate Post-Permit Issuance Antidegradation or BJP BAT Analyses or that the Monitoring Data Mandate a Change in the Permitted Discharge.

23. With respect to antidegradation and "BPJ BAT"[11] analyses, tbe Complaint asserts that the Monitoring Data "eliminate the stated basis for IEPA's refusal to preform" such analyses in connection with the IEPA's issuance of the Permit. Complaint, par. 23. Even if true (it is not), neither that assertion, nor any other statement of the Complaint, establisbes that any applicable law requires, based on the Monitoring Data, that the Permit must be modified post-issuance to incorporate post-Permit issuance antidegradation and BPJ BAT analyses. Indeed, DMG submits that no authority mandating such post-Permit issuance analysis based on post-Permit Monitoring Data exists.

24. Moreover, even were the Monitoring Data to somehow mandate post-Permit issuance antidegradation and BPJ BAT analyses under federal or Illinois law (it does not), the Complaint does not (and cannot) demonstrate that such analyses, or the requested establishment of a mercury effluent limit, would necessarily mandate eliminate reduction or elimination of the Havana Power Station's currently permitted discharge. That is, it has not been alleged or established that compliance with any new Permit requirements that could emerge from the requested analyses would require a reduction or elimination of the currently permitted discharge.

3. The Board Is Without Authority to Itself Modify the Permit.

25. In its prayer for relief, the Complaint asks that the Board modify the Permit or, alternatively, that the Board remand the Permit to the IEPA with an order to modify. While DMG recognizes that Section 309.182 states that "The Pollution Control Board . . . may modify,

[11] Although the Complaint itself does not define "BPJ", we understand the reference to refer to an alleged duty of the IEPA to use its "best professional judgment" in establishing technology-based mercury limitations in the Permit.

suspend or revoke" an NPDES permit, DMG submits that NPDES permit modification should be done by the IEPA and in accordance with the NPDES permitting regulations found at Part 309 of the Illinois water pollution regulations. 35 Ill. Adm. Code 309.101 *et al.* Such would be consistent with USEPA's 1977 delegation of NPDES permitting authority to the IEPA. *NPDES Regulations*, R73-11, 12 (Nov. 10, 1977). With said delegation in mind, DMG submits and requests that the Complaint's request for a Permit modification by the Board itself be stricken as frivolous (*i.e.*, beyond the Board's authority to grant). To the extent the Board interprets Section 309.182 to allow only the Board itself to modify an NPDES permit, DMG submits that such may be inconsistent with the aforementioned delegation of NPDES permitting authority from USEPA and with 415 ILCS 5/33(b).

*IV. **Conclusion***

WHEREFORE, for the reasons state above, Dynegy Midwest Generation respectfully requests that the Board dismiss the Complaint for want of jurisdiction and/or as for failing to sufficient state a claim for which the Board can provide the requested relief. With respect to the latter, the dismissal is requested with prejudice because the Citizen Groups can prove no set of facts that that, if proven, would afford the relief (Permit modification) requested by the Citizen Groups.

Respectfully submitted,

DYNEGY MIDWEST GENERATION, INC.

By: _____
Daniel Deeb

Dated: June 17, 2013

Amy Antoniolli
Daniel Deeb
Stephen Bonebrake
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 17th day of June, 2013, I have served electronically the attached **Motion to Dismiss and Special Appearances of Daniel Deeb and Amy Antoniolli**, upon the following persons:

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

and electronically and by first class mail, postage affixed, upon:

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