

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCES DEFENSE COUNCIL,)
PRAIRIE RIVERS NETWORK and SIERRA)
CLUB,)

Petitioners,)

vs.)

ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY and DYNEGY MIDWEST)
GENERATION, INC.,)

Respondents.)

PCB 2013-065
(Petition to Modify, Suspend,
or Revoke NPDES Permit)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on July 17, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, an ENTRY OF APPEARANCE and RESPONSE TO DYNEGY'S MOTION TO DISMISS PETITION TO MODIFY, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: *Rachel R. Medina*
Rachel R. Medina
Assistant Attorney General
Environmental Bureau

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: July 17, 2013

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ENTRY OF APPEARANCE

On behalf of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, RACHEL R. MEDINA, Assistant Attorney General of the State of Illinois, hereby enters her appearance as attorney of record.

Respectfully submitted,

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: *Rachel R. Medina*

RACHEL R. MEDINA
Environmental Bureau
Assistant Attorney General

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The objection regarding the lack of service is a valid concern, but should be considered in the context of this particular situation. Dynegy is already subject to the jurisdiction of the Board through the pending permit appeal. The Petition to Modify is a collateral pleading that was docketed as a separate action and pursuant to Section 103.204(a) would typically require service via certified mail, messenger service or personal service. The Board may cure this apparent defect by allowing the consolidation or directing the petitioners to effectuate service of the petition via certified mail, messenger service or personal service. Dismissal for want of jurisdiction is not necessary in this context, but a totally new action (where the present parties are not already subject to the jurisdiction of the Board) would obviously require strict compliance with Section 103.204(a). In other words, a "failure" to establish jurisdiction through any of the mandated service mechanisms (as the Board opinions cited by Dynegy indicate) would be fatal unless jurisdiction has already been established. The relevant question is not whether any knowledge of the complaint legitimizes improper service but rather whether subsequent service via certified mail, messenger service or personal service is strictly required where the parties are already before the Board in a related proceeding, and consolidation is sought at the outset. In any event, this problem may be corrected without dismissal.

Dynegy also claims that the Board lacks subject matter jurisdiction to consider the Petition to Modify while the permit appeal is pending. This argument is premised upon three prior Board opinions that involve a subsequent permit decision regarding the same facility, same operations, same regulatory scheme, and same parties (only the permit applicant and the permitting agency). Here, however, the Petition to Modify as a subsequent action pertains to the *same permit decision*. In the Board opinions cited by Dynegy "the second permitting decision in each of said cases involve the issuance of a new permit." Motion at footnote 3, page 7. Although Dynegy contends that the "rationale" is the same, it fails to articulate such a rationale. The jurisdictional problem, of course, is that a permitting agency simply does not have authority to modify or reissue a permit regarding the same facility, same operations, and same regulatory

scheme, while a previous permit regarding the same facility, same operations, and same regulatory scheme, is on appeal. There is no such problem in the instant situation.

The main contentions of the dismissal request pertain to the allegations of the Petition to Modify. The State concurs that grounds for relief under Section 309.182 must be pleaded with specificity. Even though the actions ought to be consolidated, the request for permit modification improperly seeks to incorporate by reference factual and legal contentions set forth in the permit appeal. In fact, the requested consolidation will preclude the problems raised by Dynegy regarding the litigation (or re-litigation) of related issues.

The State also agrees that this action should be not dismissed with prejudice unless it is clear that no set of facts could be proved to entitle the petitioners to relief. Petitioners ought to be allowed to replead the Petition to Modify with factual sufficiency and without incorporation by reference to the permit appeal claims. The monitoring and control of mercury discharges to the environment, and the applicability of changed circumstances to a consideration of reasonable potential to exceed human health standards, are issues of substantial importance. For instance, Dynegy's assertion that the monitoring data do not currently establish a water quality violation is accurate but Dynegy acknowledges that this is not actually the claim of the petitioners. It appears, moreover, that the data may show a reasonable potential to exceed and this is qualitatively different than proof of violation. Section 309.182 does not require proof of any violation of water quality standards or other regulatory requirements; instead, Section 309.182(b)(1) provides that the violation of any permit terms or conditions is grounds for relief. Changed circumstances are a separate and alternative grounds under Section 309.182(b)(3).

In any event, the petitioners ought to be afforded the opportunity to amend their Petition to Modify.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

LISA MADIGAN,
Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY:



RACHEL R. MEDINA
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Assistant Attorney General

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Dated: 7/17/13

THIS FILING PRINTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I hereby certify that I did on July 17, 2013, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING, ENTRY OF APPEARANCE and RESPONSE TO DYNEGY'S MOTION TO DISMISS PETITION TO MODIFY upon the persons listed on the Service List.



Rachel R. Medina
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

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