BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

To:

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board Respondent, MIDWEST GENERATION, LLC'S RESPONSE TO MOTION FOR CLARIFICATION, a copy of which is herewith served upon you.

Dated: May 23, 2016

MIDWEST GENERATION, LLC

By: /s/ Susan M. Franzetti

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached Respondent, MIDWEST GENERATION, LLC'S RESPONSE TO MOTION FOR CLARIFICATION, by U.S. Postal Service by First Class Mail, postage prepaid, upon the following persons:

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

MIDWEST GENERATION, LLC'S RESPONSE TO MOTION FOR CLARIFICATION

NOW COMES, Respondent, MIDWEST GENERATION, LLC ("MWGen"), by its counsel, and requests that the Illinois Pollution Control Board (the "Board") deny the "Motion for Clarification" filed by the petitioners, SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK AND ENVIRONMENTAL LAW & POLICY CENTER (the "Environmental Groups" or "Petitioners"), because the Petitioners are seeking remedies only obtainable through a motion for reconsideration, but have not identified newly discovered evidence, new law, or clear legal error to satisfy the requirements for reconsideration. Alternatively, if the Board does revisit the legal arguments Petitioners already made in their Motion for Summary Judgment, it should find that the Petitioners failed to meet their burden to prove that the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (the "Agency") lacked legal authority to include an alternative effluent limitation in the Waukegan Generating Station's 2000 and 2014 NPDES permits.

FACTS

On April 7, 2016, the Board issued its Order and Opinion denying the cross-motions for summary judgment filed by the parties in this appeal. (Opinion and Order, PCB 15-189 (Apr. 7, 2016).) The Board concluded that it could not rule on the two major legal issues in this permit appeal—whether the 2014 Permit for the Waukegan Generating Station ("WGS") complies with thermal discharge regulations and whether its cooling water intake structure meets new federal regulations—without first resolving facts that the parties dispute. (Id. at 16.)

The Board informed the parties which legal standards would be applied once those facts were resolved. The thermal provisions of the permit hinge on whether "the nature of the thermal discharge [at WGS] has changed materially" and whether the alternative effluent limit adopted by the Board for WGS has caused "appreciable harm" to a balanced, indigenous population of shellfish, fish and wildlife in Lake Michigan. (Id. at 12.) As for the intake structure, the hearing will resolve facts related to whether the plant's intake structure met interim BTA requirements established in 40 U.S.C. § 125.98(b)(6).[1]

On May 9, 2016, petitioners filed a purported "Motion for Clarification." (hereinafter "Mot. Clar.") The motion does not request that the Board clarify the language in its Order and Opinion. Rather, it calls for the Board to "rule on . . . two legal questions." (Mot. Clar. at 4, emphasis added.) Both of these legal questions were already fully briefed to the Board:

1. Did the Board-approved alternative thermal effluent for WGS "expire" on or before July 19, 2000, when the Agency renewed a prior NPDES permit for the WGS?

2. Does Subpart K forbid the renewal of any alternative effluent limit granted prior to 2014?

[1] The Petitioners bear the evidentiary burden on both of these questions. *See Prairie Rivers Network v. IEPA and Black Beauty Coal Co.*, PCB 01-112, slip op. at 8 (Aug. 9, 2001) ("Section 40(e)(3) of the Act unequivocally places the burden of proof on the petitioner, regardless of whether the petitioner is a permit applicant or a third-party.").

Petitioners are seeking to have the Board reconsider and rule in their favor on legal arguments which Petitioners included in their prior Motion for Summary Judgment and which both MWGen and the Agency vigorously opposed. However, the Petitioners have not satisfied the legal requirements for reconsideration.

LEGAL STANDARD

The Board's procedural rules do not expressly contemplate a "motion to clarify."[2] Nonetheless, the Board has historically accepted and ruled on motions to clarify, and it has been careful not to allow parties to abuse them. In particular, parties may be tempted to disguise a motion for reconsideration as a "motion to clarify" in order to avoid the explicit requirements the Board has set on motions for reconsideration. Motions for reconsideration must be based on "newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." *Korogluvan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627 (1st Dist. 1992); *see also* 35 Ill. Adm. Code 101.902 ("In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in law, to conclude that the Board's decision was in error."). And so the Board has made clear that a party cannot avoid these requirements simply by retitling their motion. *See People v. Doren Poland*, PCB 98-148, at 3 (Jan. 24, 2002) (applying reconsideration standards where party purported to be responding to motion to clarify but requested that Board alter a previous legal finding).

[2] Although 35 Ill. Adm. Code 101.904(a) outlines the Board's authority to "correct clerical mistakes in orders or other parts of the record" this procedure is meant to be applied only after the Board has issued a final order. The rule is located in Subpart I of Section 101, which is titled "REVIEW OF FINAL BOARD OPINIONS AND ORDERS."

A major distinction between a motion to clarify and a motion for reconsideration is that they call for different forms of relief. A party filing a motion to clarify seeks an "order of clarification," while a party seeking reconsideration requests a favorable judgment. *See Eugene W. Graham v. IEPA*, PCB 95-89, at 1 (July 20, 1995) ("[T]he Agency is not asking for the Board to issue an order of clarification, but is instead asking for the Board to rule in its favor.").

ARGUMENT

The Petitioners have filed a motion for reconsideration, not a motion for clarification. Rather than asking the Board to explain its April 2016 Order through an order of clarification, the motion generally criticizes the Board for committing, in Petitioners' eyes, legal errors. For instance, the Board's call for a hearing is accused of being "premature" because the Board declined to explicitly rule on two of Petitioners' arguments prior to hearing. (Mot. Clar. at 4.) Nor are the Petitioners confused as to what facts need to be resolved for these arguments to be decided: They correctly assess that the relevant facts underlying their authority arguments are simple and undisputed.[3] (Id. at 3.) As such, it is unnecessary for the Board to "identify the factual issues pertinent to determining whether IEPA has authority to renew the variance" as Petitioners demand. (Id.)

The Board has informed the parties that they should "expeditiously" proceed to a hearing on the disputed facts in this case. (Opinion & Order, at 16.) The Board expressly addressed and resolved most of the legal issues the parties raised in their cross-motions for summary judgment.

[3] MWGen does not concede that the particular facts listed by Petitioners in their motion is a complete or correct list of the decisive issues. However, the Petitioners are generally correct to say that the arguments rely on a small number of undisputed facts that are already contained in the administrative record.

The Board specified the disputed facts and related legal issues arising from those factual issues. The Board also explained that it was aware of contested legal arguments but decided to move this matter forward to hearing. (Id. at 11 n.20.)

The Petitioners cite no procedural regulation or precedent that forbids the Board from conducting these proceedings in the manner it outlined in its Opinion and Order. And, in addition to failing to identify any errors of law, the Petitioners cite no newly discovered evidence or subsequent changes in the relevant laws. Without satisfying the legal requirements for obtaining reconsideration, the Petitioners are seeking a "second bite at the apple." As such their motion for reconsideration, cloaked in the guise of a motion for clarification, should be denied.

Alternatively, if the Board wishes to rule on the merits of the legal arguments Petitioners raise in their Motion for Clarification, it should deny Petitioners' requested relief. MWGen has already explained in prior submissions why Petitioners' arguments regarding the Agency's authority to renew alternative thermal limitations are groundless. (See MWGen Mot for S.J. at 28-31; MWGen Reply Mot. S.J. at 13-14, 21-24.)[4] MWGen will not burden the Board with a recitation of these arguments. Nor would such arguments be necessary in a response to a proper motion to clarify. However, MWGen does specifically dispute Petitioners' contention that the Board "concurred in substance with [Petitioners' argument that only the Board could renew thermal alternative effluent limit], concluding that "[a]n alternative thermal effluent limitation is a condition to an NPDES permit." (Mot. Clar. at 3.) The Board clearly did not so concur. The subject WGS alternative effluent limit was a condition of the previous WGS NPDES permit prior to its renewal in 2015. As such, it could be renewed in the 2015 NPDES Permit at issue in this appeal. The Board's direction to the parties to proceed to hearing on the factual disputes regarding the

[4] MWGen hereby incorporates these arguments by reference.

Agency's 2015 decision to renew the thermal alternative effluent limit shows that it did not concur with Petitioners' argument that the limit had previously expired and could not be renewed as a matter of law.

If the Board does wish to proceed on the merits, then MWGen requests that the Board also reconsider all of MWGen's and the Agency's arguments in opposition to Petitioners' requested relief and amend its Order and Opinion to include legal findings that: (a) the WGS thermal alternative effluent limit did not expire prior to its renewal in the current 2015 NPDES permit at issue in this appeal; and (b) the Subpart K regulations do not prohibit the Agency's renewal of any thermal alternative effluent limit granted by the Board prior to 2014.

CONCLUSION

The Board's Order directs the parties to proceed to a hearing to resolve disputed factual issues that are preventing the resolution of other legal questions. The Petitioners' motion shows that they understand the meaning of the Board's Order. They simply maintain that this course of action is not the one that they would have preferred. That is not a valid basis for a motion for clarification and, in the absence of any identifiable legal error, new evidence or new law, it is also not a valid basis for a motion to reconsider. As such, the motion should be denied. In the alternative, if the Board elects to proceed to consider the merits of the two legal arguments raised in Petitioners' Motion to Clarify, it should amend its Order and Opinion to include legal findings that: (a) the WGS thermal alternative effluent limit did not expire prior to its renewal in the current 2015 NPDES permit at issue in this appeal; and (b) the Subpart K regulations do not prohibit the Agency's renewal of any thermal alternative effluent limit granted by the Board prior to 2014.

Dated: May 23, 2016

Respectfully submitted,

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