

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 2013-17
(APPEAL FROM IEPA
DECISION GRANTING
NPDES PERMIT)

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on May 29, 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, a RESPONSE TO MOTION TO CONSOLIDATE, 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: May 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that I did on May 29, 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 and RESPONSE TO MOTION TO CONSOLIDATE 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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2. The burdens of proof do not vary in the Permit Appeal and the Petition to Modify. In both cases, the same Petitioners bear the burden of proof. See 415 ILCS 5/40(e)(3)(ii), 35 Ill. Adm. Code 309.182(b).

3. Consolidating the two matters cited above would be in the interest of "convenient, expeditious, and complete determination of claims." The Permit Appeal and the Petition to Modify concern nearly identical issues and therefore consolidation would be a convenient and expeditious manner of resolving both claims. The primary issue in both matters is whether the NPDES Permit No. IL0001571, issued on September 14, 2012, is adequate to protect the receiving water from mercury, a known waste stream component of the new air pollution control equipment Dynegey planned to install pursuant to its permit application.

In part, the Petitioners claim in the Permit Appeal that Dynegey failed to provide adequate information and the Illinois EPA failed to perform the adequate analysis to determine whether the discharge authorized by the NPDES Permit has the reasonable potential to cause or contribute to an excursion above the water quality standards. Of particular concern to the Petitioners is the failure to adequately analyze the contributions of mercury to the proposed waste stream.

In the Petition to Modify, the Petitioners claim that monitoring data by Dynegey, reported since the issuance of the permit, shows that the discharge has a reasonable potential to contribute to a violation of the water quality standard for mercury. The Permit Appeal and the Petition to Modify, while partially based on separate information – the Permit Appeal is based on the Record, and the Petition to Modify additionally concerns new monitoring information – are necessarily intertwined. If certain relief were to be granted on the Petition to Modify, it might render the issues raised on the Permit Appeal moot. Thus, to aid in a complete determination of claims, it would be appropriate for the Board to consider the issues simultaneously.

4. Consolidating the two matters would not cause material prejudice to any party provided the Board considers the appropriate evidence in turn for each the Permit Appeal and

the Petition to Modify. In reaching its decision on both matters, the Board should be cognizant that in deciding the Permit Appeal issues, only the Record should be considered as evidence, pursuant to Section 105.214, and the relevant caselaw. See *City of Quincy v. PCB*, 08-86, citing *Alton Packaging Corp. v. IEPA*, 162 Ill. App. 3d 731, 738 (5th Dist. 1987) (Information developed after IEPA's determination typically is not admitted at hearing or considered by the Board); See also *Soil Enrichment Materials Corp. v. Environmental Protection Agency* (1972), 5 Ill.P.C.B.Op. 715.) and *Illinois E.P.A. v. Pollution Control Bd.*, 118 Ill. App. 3d 772, 780-781 (1 Dist. 1983) ("The Board may not be persuaded by new material..."). The Petition to Modify, on the other hand, may look additionally at "a change in any circumstance that mandates either a temporary or permanent reduction or elimination of the permitted discharge" pursuant to 35 Ill. Adm. Code 309.182.

WHEREFORE, the Attorney General of the State of Illinois does not object to the Motion to Consolidate.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

LISA MADIGAN,
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of the State of Illinois

MATTHEW J. DUNN, Chief
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