

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: **Attached Service List**

PLEASE TAKE NOTICE that on May 9, 2016, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois *Motion for Clarification* on behalf of Sierra Club, Natural Resources Defense Council, Prairie Rivers Network, and Environmental Law & Policy Center, copies of which are served upon you along with this notice.

Respectfully Submitted,



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May 9, 2016

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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RESOURCES DEFENSE COUNCIL,)	
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MOTION FOR CLARIFICATION

Petitioners Sierra Club, Natural Resources Defense Council, Prairie Rivers Network, and Environmental Law & Policy Center respectfully request clarification regarding the Illinois Pollution Control Board's ("the Board's") April 7, 2016 Opinion and Order in the above-captioned matter, PCB 15-189, Third Party Appeal of the NPDES permit issued to Waukegan Station. Specifically, we ask the Board to rule on two related legal arguments that were not addressed in the Opinion and Order, which go to the heart of the questions in this proceeding concerning IEPA's thermal variance authority.

We appreciate that the Board's Opinion and Order generally agrees with Petitioners' interpretation of the legal requirements that apply to thermal variances from otherwise applicable water quality requirements. However, the Board apparently did not resolve certain legal arguments that are pivotal in determining how this proceeding unfolds. Petitioners presented two distinct legal bases to conclude that IEPA had no authority to renew the purported existing thermal variance. The Board recognized in its Opinion and Order that a dispute exists as to IEPA's renewal authority, but it neither resolved the dispute on summary judgment nor identified (as it had for other disputes) the factual questions to be addressed at hearing. Petitioners therefore request that the Board either resolve the dispute concerning IEPA's authority on summary judgment – which Petitioners believe would be appropriate given that there are no disputed issues of material fact concerning it – or else identify any disputed factual questions the Board would like the parties to address in order to resolve the question of IEPA's authority to renew the variance.

Petitioners' first argument demonstrating that IEPA's lacked authority to renew the variance was that there was no variance in existence for IEPA to renew, since the original variance granted by

the Board in 1978 has expired, and was never renewed by the Board (as was required prior to the promulgation of Subpart K). *See* Petitioners' Motion for Summary Judgment dated October 22, 2015 (Motion) at 17-19. The Board concurred in substance with this argument, concluding that "[a]n alternative thermal effluent limitation is a condition to an NPDES permit. Therefore, like the permit as a whole, it is not permanent"; and that "an alternative limitation expires along with the associated NPDES permit." (*Id.* at 11-12). There was no dispute that the Board has not acted to renew or reissue the thermal variance at issue in this case since 1978. However, in concluding that a hearing was necessary regarding IEPA's "renewal" of the variance, the Board never actually explained how the variance could still have been in existence, and thus able to be "renewed" by IEPA, given that the Board – the only entity with authority to renew the 1978 variance prior to Subpart K promulgation – had never renewed it and it had hence expired.

Petitioners also made the related argument that, even if the 1978 variance were still in existence at the time IEPA purported to renew it, IEPA lacked the authority to renew it under Subpart K, 35 Ill. Admin. Code § 106.1180(a) (2015), because that regulation grants IEPA the authority to renew an alternative thermal effluent limitation *only if the alternative thermal effluent limitation was granted pursuant to Subpart K*. Motion at 24; Petitioners' Reply and Response dated January 21, 2016 (Reply) at 19-25. Since the Board's 1978 variance was not granted pursuant to Subpart K, IEPA does not have authority under that Subpart to renew the Board's 1978 variance.

The Board's Order did not render a decision on either legal argument. It did acknowledge in a footnote that the argument had been raised, but does not appear to have decided those issues or identified any disputed issues of fact necessary to resolve them. The footnote states, "This order does not address whether IEPA had the authority to renew the alternative limitation. The Environmental Groups and Respondents disagree on this point." Opinion and Order, FN 20.

It is not clear from the Board's Order how and when it intended for the identified disagreement to be resolved. With respect to the other issues on which the Board ordered a hearing, the Board expressly specified the disputed issues of fact to be addressed at hearing, but it specified no such issues of fact pertinent to the question of IEPA's thermal variance renewal authority. Petitioners do not believe any such unresolved factual issues exist, as all relevant facts necessary to determine the question of IEPA's authority have already been recognized as undisputed in the Board's April 7, 2016 Opinion and Order, as follows:

- The Board granted an alternative thermal effluent limitation to Waukegan Station in 1978. Opinion and Order at 5.
- "Before renewing the permit in 2015, IEPA had most recently issued a renewed permit on July 19, 2000." *Id.*
- The Subpart K rules were adopted in 2014. *Id.* at 4.
- IEPA issued a final NPDES permit that included an alternative thermal effluent limitation on March 25, 2015. *Id.* at 6.

The parties therefore need for the Board to either decide the question of the Board's authority on summary judgment based on these undisputed facts, or identify the factual issues pertinent to determining whether IEPA has authority to renew the variance.

Resolution of the dispute over IEPA's authority is critical, because if IEPA lacked authority to renew the thermal variance then that renewal is void. *See* Reply at 19. Thus, to the extent IEPA's 2015 grant of an alternative thermal effluent limitation to the Waukegan Station was in excess of or contrary to its authority, as Petitioners contend that it was, then proceedings to determine whether IEPA complied with the specific procedures of Subpart K are premature.

Accordingly, we ask the Board to rule on these two legal questions:

- 1) Whether IEPA had authority to renew the Board's 1978 variance in the 2000 NPDES permit renewal.
- 2) Whether the plain language of 35 Ill. Admin. Code § 106.1180(a) gives IEPA authority to renew alternative thermal effluent limitations that were not granted pursuant to Subpart K.

In the alternative, we ask the Board to clarify what, if any, factual questions need to be resolved at hearing in order to decide the dispute concerning IEPA's authority.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Jessica Dexter, hereby certify that I have filed the attached *Notice of Filing* and *Motion for Clarification* upon the service list below by depositing said documents in the United States Mail, postage prepaid in Chicago, Illinois on May 9, 2016.

Respectfully submitted,



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May 9, 2016

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