

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>PRAIRIE RIVERS NETWORK</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>PCB No. 19-93</b>
	)	<b>(Enforcement – Water)</b>
<b>DYNEGY MIDWEST</b>	)	
<b>GENERATION, LLC</b>	)	
	)	
<b>Respondent.</b>	)	

**NOTICE OF FILING**

To:

Don Brown, Clerk of the Board  
Illinois Pollution Control Board  
James R. Thompson Center  
Suite 11-500  
100 West Randolph  
Chicago, Illinois 60601

Thomas Cmar  
Jennifer Cassel  
Earthjustice  
311 S. Wacker Dr., Ste. 1400  
Chicago, IL 60606  
tcmar@earthjustice.org  
jcassel@earthjustice.org

Carol Webb, Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph, Suite 11-500  
Chicago, Illinois 60601  
Carol.Webb@illinois.gov

Mychal Ozaeta  
Earthjustice  
1617 JFK Blvd., Ste. 1130  
Philadelphia, PA 19103  
mozaeta@earthjustice.org

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board a **MOTION FOR LEAVE TO FILE THE ATTACHED REPLY IN SUPPORT OF DYNEGY's MOTION TO STAY OR DISMISS**, copies of which are herewith served upon you.

/s/ Ryan C. Granholm  
Ryan C. Granholm

Dated: June 19, 2019

SCHIFF HARDIN LLP

Daniel J. Deeb  
Joshua R. More  
Ryan C. Granholm  
Caitlin M. Ajax  
233 South Wacker Drive, Suite 7100  
Chicago, Illinois 60606  
Phone: 312-258-5500  
Fax: 312-258-5600  
rgranholm@schiffhardin.com

BALCH & BINGHAM LLP

P. Stephen Gidiere III  
1901 Sixth Avenue North, Suite 1500  
Birmingham, AL 35203-4642  
(205) 226-8735  
sgidiere@balch.com

GIBSON, DUNN & CRUTCHER LLP

Michael L. Raiff  
2100 McKinney Avenue, Suite 1100  
Dallas, TX 75201-6912  
(214) 698-3350  
mraiff@gibsondunn.com

*Attorneys for Dynegy Midwest  
Generation, LLC*

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>PRAIRIE RIVERS NETWORK</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>PCB No. 19-93</b>
	)	<b>(Enforcement – Water)</b>
<b>DYNEGY MIDWEST</b>	)	
<b>GENERATION, LLC</b>	)	
	)	
<b>Respondent.</b>	)	

**Motion for Leave to Reply**

NOW COMES Dynegy Midwest Generation (“DMG”) by their attorneys, Schiff Hardin LLP, and move the Illinois Pollution Control Board (“Board”), pursuant to 35 Ill. Admin. Code §§ 101.500(a)&(e), to grant them leave to file a Reply, attached as Attachment A, in support of its Motion to Stay or Dismiss. In support of its Motion for Leave to Reply, DMG states as follows:

1. On May 1, 2019, DMG filed a three page Motion to Stay or Dismiss along with a seventeen page Memorandum (collectively, the “Motion”), requesting that the Board stay Prairie Rivers Network’s (“PRN”) Complaint ( “Complaint”) or, in the alternative, dismiss Counts 4 & 5 of the Complaint.

2. DMG’s Motion included three separate arguments: (1) this case should be stayed pending resolution of PRN’s federal lawsuit against DMG<sup>1</sup> (the “Federal Complaint”); (2) Counts 4 & 5 of the Complaint should be dismissed as duplicative of Count 2 of PRN’s Federal Complaint; and (3) Count 4 should be dismissed as frivolous because CCR leachate is not “effluent” under the Board’s precedent.

---

<sup>1</sup> No. 2:18-cv-02148 (C.D. Ill. May 30, 2018).

3. On June 5, 2019, after being granted an extension, PRN filed its twenty nine page (169 pages including exhibits) Response to Respondent's Motion to Stay or Dismiss ("Response").

4. The Board's rules provide that the Board or the Hearing Officer may grant leave to reply in order "to prevent material prejudice." 35 Ill. Admin. Code § 101.500(e). A motion for leave to reply must be filed within fourteen days after service of the response. *Id.*

5. DMG's Motion for Leave to Reply is filed within fourteen days of PRN's Response, and is therefore timely under the Board's rules. *Id.*

6. Generally, the Board has allowed reply where it will "aid the Board in its determination" of a motion (*People v. Kershaw*, PCB 92-164, Order of the Board, 2 (June 17, 1993)), particularly where doing so would not "materially prejudice either party." *A&H Implement Co. v. IEPA*, PCB 12-53, Order of the Board, 4-5 (May 17, 2012).

7. The Board has recognized a number of different situations that justify a reply. In *Sierra Club v. Ameren Energy Medina Valley Cogen LLC*, the Board granted leave where the movant cited a need to reply to the "complex and substantive legal issues" raised in response to its motion for summary judgment. PCB 14-134, Opinion and Order of the Board, 3-4 (Nov. 6, 2014). The Board has also allowed reply where a response "raised . . . issues not addressed" in the original motion. *Mather Investment Properties, LLC v. Ill. State Trapshooters Ass'n*, PCB 05-29, Order of the Board, 9-10 (July 21, 2005). In another instance, the Board granted leave to reply where a movant sought to respond to "irrelevant or distinguishable cases" cited in the response. *People v. Amsted Rail Co.*, PCB 16-61, Order of the Board, 1 (Mar. 3, 2016).

8. PRN's Response raises several new legal issues, including distinguishable case law and arguments not anticipated by DMG's Motion. Because of the "complex and substantive

legal issues” raised in DMG’s Motion, as well as PRN’s lengthy Response, Reply is necessary to ensure complete briefing of all issues before the Board. *Ameren Energy Medina Valley Cogen LLC*, PCB 14-134, Opinion and Order of the Board, 3 (Nov. 6, 2014).

9. Specifically, DMG would be materially prejudiced if it were not allowed an opportunity to respond to the “complex and substantive” issues of law PRN raises regarding whether it’s federal appeal should be considered “pending.” *Id.* Additionally, DMG would be materially prejudiced if it were not granted leave to respond to the new federal case law PRN introduced in support of its argument that the Board’s decision in *Central Ill. Pub. Serv. Co. v. IEPA*, PCB 84-105, Opinion and Order of the Board, 1984 WL 37567 (Nov. 8, 1984), should be overturned and “irrelevant and distinguishable” case law cited by PRN regarding the Board’s stay and dismissal standards. *Amsted Rail Co.*, PCB 16-61, Order of the Board, 1 (Mar. 3, 2016).

10. In contrast, PRN would not be prejudiced if the Board accepts DMG’s proposed Reply. PRN previously requested a 21-day extension to file its Response. Motion for Extension of Time to Respond to Respondent’s Motion to Stay or Dismiss (May 6, 2019). PRN ultimately filed a twenty nine page brief, with 136 pages of exhibits. Given the large volume of material it has introduced, and the delay it has already requested, PRN would not be prejudiced by any further delay in the Board’s ruling associated with consideration of DMG’s Reply.

WHEREFORE, DMG respectfully requests that the Board grant it leave to file the attached Reply in support of its Motion to Stay or Dismiss.

Dated: June 19, 2019

*/s/ Daniel J. Deeb*

---

Daniel J. Deeb

SCHIFF HARDIN LLP  
Daniel J. Deeb  
Joshua R. More  
Ryan C. Granholm  
Caitlin M. Ajax  
233 South Wacker Dr., Ste. 7100  
Chicago, Illinois 60606  
(312) 258-5500  
ddeeb@schiffhardin.com

BALCH & BINGHAM LLP  
P. Stephen Gidiere III  
1901 Sixth Ave. North, Ste. 1500  
Birmingham, AL 35203  
(205) 226-8735  
sgidiere@balch.com

GIBSON, DUNN & CRUTCHER LLP  
Michael L. Raiff  
2100 McKinney Ave., Ste. 1100  
Dallas, TX 75201  
(214) 698-3350  
mraiff@gibsondunn.com

*Attorneys for Dynegy Midwest Generation,  
LLC*

# **Attachment A**

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>PRAIRIE RIVERS NETWORK</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>PCB No. 19-93</b>
	)	<b>(Enforcement – Water)</b>
<b>DYNEGY MIDWEST GENERATION, LLC</b>	)	
	)	
<b>Respondent.</b>	)	

**REPLY IN SUPPORT OF DMG’s MOTION TO STAY OR DISMISS**

On May 1, 2019, Respondent Dynegy Midwest Generation, LLC filed its Motion to Stay or Dismiss Complainant Prairie Rivers Network’s Complaint and its accompanying Memorandum in Support (“Memo”).<sup>1</sup> PRN filed its Response to Respondent’s Motion to Stay or Dismiss on June 5, 2019 (“Response”) presenting inaccurate and often misleading arguments. PRN’s primary errors are addressed in Parts I-IV below.

**I. PRN RELIES HEAVILY ON ITS FLAWED ARGUMENT THAT ITS FEDERAL COMPLAINT IS NOT PENDING.**

PRN’s opposition to both the requested stay and dismissal is largely predicated upon its argument that its case currently before the U.S. Court of Appeals for the Seventh Circuit Court (“Seventh Circuit”) is somehow not “pending.” Response at 6-7. To support that curious position, PRN presents three inapposite cases and ignores relevant precedent. As discussed below, PRN’s argument is fatally flawed.

PRN filed a motion to stay its Seventh Circuit appeal on March 6, 2019. Consent Motion for Stay Pending Supreme Court Proceedings, *Prairie Rivers Network v. Dynegy Midwest Generation*, No. 18-3644 (7th Cir. Mar. 6, 2019), docket No. 11. The court granted that motion

<sup>1</sup> This Reply incorporates defined terms from DMG’s Memo.



on March 7, 2019. Order, No. 18-3644 (7th Cir. Mar. 7, 2019), docket No. 12. Three weeks later, seeking a new venue in which to press its claims, PRN filed its Complaint with the Board. Complaint, PCB 19-93 (Mar. 29, 2019). Despite the fact that PRN was the party who initiated the stay of its appeal, and PRN's implicit admission that the stay might be lifted at any time (Response at 12), PRN now repeatedly contends that DMG's motion should be denied because PRN's appeal is not a "pending" case. Response at 5, 6, 7, 17, 18, 19. But a closer review of the relevant case law shows that PRN's argument is meritless.

The only case PRN cites on this issue that applies Illinois law, *Envtl. Site Developers, Inc. v. White & Brewer Trucking*, simply does not address whether an appeal is a "pending" case. PCB 96-180 & PCB 97-11, Order of the Board, 1997 WL 593937 (Sept. 18, 1997).<sup>2</sup> Instead, that case entailed the Board's grant of a stay of its proceedings while similar claims were pending before the federal district court. *Id.* at \*1. After being made aware of respondent's pending motion to dismiss the similar federal claims, the Board noted that its stay would be lifted if that motion was granted. *Id.*<sup>3</sup> Neither party raised the possibility of an appeal of the then-unrendered federal district court decision, nor did the Board speak to a future possible appeal. While the Board's opinion is silent regarding the possibility of stay if a party appeals a decision of the federal district court, there is no reason to believe that the same reasoning the Board used

---

<sup>2</sup> Another portion of the Response cites to *Finley v. IFCO ICS-Chicago, Inc.*, PCB 02-208, Order of the Board (Aug. 8, 2002). Response at 19. However, that case is easily distinguished because it involved only administrative enforcement actions (of which the Board action was allegedly duplicative) *not* a pending federal lawsuit. *Id.* at 7-11. The Board explained in that case that it has consistently held that investigations of potential violations or "preliminary enforcement step[s]" may not be considered potentially duplicative "matters." *Id.* at 9. Instead, only an "adjudicatory proceeding" may satisfy this standard. *Id.* Unlike *Finley*, PRN's Federal Complaint is not a "preliminary enforcement step," it is a pending "adjudicatory proceeding," and therefore requires dismissal of the duplicative Complaint now before the Board.

<sup>3</sup> "The Board believes that these factors now shift the balance of considerations under the *Staley* analysis in favor of a stay of proceedings in PCB 96-180 pending resolution of the federal case. *White & Brewer* has apprised the Board of its pending motion to dismiss count IV of ESDI's federal counterclaim. In the event that count IV is dismissed by the federal court, or in the event that the federal court abstains from consideration of count IV, the Board's stay of proceedings in PCB 96-180 will be lifted." *Id.* at \*2 (citation omitted).

to grant the stay regarding the federal district court proceedings would not have also applied with respect to proceedings before a federal circuit court of appeals.

PRN's two other case cites on this point (neither of which apply Illinois law) are similarly inapposite. In *Trippe Mfg. Co. v. Am. Power Conversion Corp.*, the question was not whether a case should be considered "pending," under Illinois law, while an appeal was underway. Instead, the question was whether the Northern District of Illinois erred under federal law in dismissing a case in favor of a similar pending case in the District of Rhode Island. 46 F.3d 624, 628 (7th Cir. 1995) (affirming the district court's dismissal). Finally, in *Somasekharan v. Lawrence & Assocs., Inc.*, the court only addressed the *possibility* of an appeal, because no appeal had actually been filed. No. 07-CV-2087, 2007 WL 2680954, at \*3 (C.D. Ill. July 13, 2007) ("LAI contends that the dismissed counterclaims are still 'pending' in the Missouri court because the consultants may retain appeal rights."), *report and recommendation adopted*, No. 07-CV-2087, 2007 WL 2685154 (C.D. Ill. Aug. 1, 2007). Neither case, therefore, clearly addresses the situation presented here.

Rather than the inapplicable cases relied upon by PRN, the Board should look to analogous Illinois case law that clearly addresses the question of whether a case is "pending" while it is on appeal. As DMG noted in its motion, the Illinois Code of Civil Procedure allows for dismissal of a complaint where "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3); Memo at 8. Applying this provision, the Illinois Appellate Court has clearly held that cases remain "pending" while they are under appeal:

[W]e agree with the trial court that *Miller* was still 'pending' under section 2-619 while it was on appeal. This court has stated that dismissal under section 2-619 is appropriate when there is a danger of inconsistent results from duplicative suits. As *Miller* might be reversed on appeal and continue to conclusion, this danger has

not yet been extinguished. *Schnitzer v. O'Connor*, 274 Ill.App.3d 314, 323 (Ill. App. Ct., 5th Dist. 1995) (citation omitted).

The Seventh Circuit has also agreed that, under Illinois law, a case remains “pending” while on appeal. In *Locke v. Bonello*, the court considered whether the statute of limitations was tolled while an appeal was pending. *Locke v. Bonello*, 965 F.2d 534, 534 (7th Cir. 1992). The court ruled that the statute of limitations was tolled because the plaintiff was prohibited, under Illinois law, from seeking relief in federal court while the appeal was pending in state court. *Id.* at 536-37 (“Had [plaintiffs] brought this suit while the state appeal was pending, their case would have been dismissed. . . . A plaintiff cannot bring suit in federal court while that appeal is pending because under ¶ 2-619(a)(3) . . . it will be dismissed *with prejudice*.”).

PRN’s arguments that this case should not be stayed, or Counts 4 & 5 dismissed, because its appeal of the Federal Complaint is not “pending” therefore fail.

**II. PRN FAILS TO DEMONSTRATE THAT A STAY SHOULD NOT BE ISSUED.**

In responding to DMG’s request for a stay of these proceedings, the Response incorrectly quips that DMG has “changed its tune” about the appropriate forum for PRN’s groundwater claims. Response at 5. In fact, DMG continues to maintain that the Board is the proper venue to consider PRN’s groundwater claims. But PRN has chosen to continue its federal suit while *also* attempting to concurrently litigate its claims before the Board. DMG’s motion stands for the simple position that PRN cannot simultaneously litigate the same matter in different forums—it must either choose to continue its prior federal litigation or abandon its Federal Complaint to seek relief from the Board.

PRN attempts to avoid a stay with three arguments: (1) a stay is improper when the second suit is not actually pending; (2) the four *Staley* factors all weigh against a stay; and (3)

PRN and the environment would be harmed by a stay. Response at 6-17. The failings of PRN's first argument have been addressed in Part I above. As explained below, PRN's second and third arguments also fail.

**A. PRN's Analysis of the *Staley* Factors Ignores the Key Similarities Between the Complaint and the Federal Complaint.**

PRN's *Staley* factor arguments attempt to obfuscate the fact that the Complaint and Federal Complaint concern the same alleged discharges from the same facility and that a stay is appropriate given PRN's decision to continue to litigate its prior federal claims. PRN ignores the parallels (demonstrated in DMG's Memo) between Counts 4 & 5 of the Complaint and Count 2 of the Federal Complaint, including the fact that key paragraphs in the two complaints are nearly identical. *See* Memo at 2-3, 9-12, Ex. B. Indeed, PRN does not expressly dispute the Memo's primary point regarding a stay—that the Complaint and Federal Complaint concern the same central issues. Memo at 2-3. Instead, PRN asks the Board to put form over substance and argues that the two proceedings are sufficiently different because its Complaint includes some claims not in the Federal Complaint. While the *Staley* factors allow consideration of form, they inherently also posit the substance PRN wishes to ignore. Examples of errors of PRN's *Staley* factors analysis include:

- PRN's *res judicata* argument focuses on case law requiring an “identity of cause of action.” Response at 8 (citing *Sierra Club v. Midwest Generation*, PCB 13-15, 2014 WL 1630316, at \*16 (Apr. 17, 2014)). But the Board's precedent is not so narrow. Instead, as DMG's Memo notes, Board case law finds *res judicata* effect where the evidence needed to sustain the two actions is the same or both suits arise out of the same factual situation. *See* Memo at 3 n.5. Viewed through this

broader lens, the Complaint and the Federal Complaint, each of which address the same alleged discharges from the Impoundments at the Vermilion Facility, in part under the same Illinois regulations, pose a *res judicata* effect. Memo at 5; *Environmental Site Developers Inc. v. White & Brewer Trucking*, PCB 97-11, 1997 WL 593937, Order of the Board, at \*2 (Sept. 18, 1997) (staying a case where a pending federal court case involved the same “central” issues and thus would have a *res judicata* effect).

- The Response’s *res judicata* argument also inaccurately suggests that the federal district court held that PRN could bring its similar claims before the Board. Response at 9. PRN fails to acknowledge the obvious—because the federal court found that the federal claims could not be maintained, its statement cannot be viewed to suggest that the federal court believed federal and state claims could proceed *concurrently*.
- PRN’s analysis of the potential benefit of avoiding multiplicity, vexation, and harassment is also misleading because much of the cited case law is easily distinguished. Two of the cases PRN cites do not involve another pending lawsuit. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Order of the Board, 3 (Apr. 17, 2014) (citing, *inter alia*, a pending transaction and the impact of a federal CCR rulemaking); *Am. Disposal Servs. of Ill., Inc. v. Cty. Bd. of McLean Cty.*, PCB 11-60, Opinion and Order of the Board, 3, 10-11 (Aug. 7, 2014) (denying a stay request based on pending legislation or a pending permit application). In another, the Board did not even address the “multiplicity,

vexation and harassment” prong. *Vill. of Park Forest v. Sears, Roebuck & Co.*, PCB 01-77, Order of the Board, 5-7 (Feb. 15, 2001).

- As to comity, PRN again focuses on the formalistic conclusion that, on their face, each of its complaints “involves a wholly different legal theory.” Response at 13. As explained below, and in DMG’s Memo, this superficial analysis ignores the core substantive similarities of the two cases. Memo at 2-3, 9-12.
- Finally, analyzing the likelihood of obtaining complete relief, PRN again focuses on technical distinctions between its two complaints (Response at 14-15), failing to concede the obvious: each case implicates the same environmental conditions at the Vermilion Facility and seeks statutory penalties and injunctive relief to ameliorate those alleged conditions. Memo at 2-3, Ex. B.

Viewing this case, and the Federal Complaint, holistically, rather than employing the narrow, formalistic *Staley* analysis PRN recommends, demonstrates that a stay is appropriate here to allow final resolution of PRN’s federal suit before allowing PRN to litigate the same facts before the Board.

**B. PRN’s Alleged Prejudice is of its Own Design.**

PRN alleges that it will be prejudiced, and the environment will be harmed, if this case is stayed while its Federal Complaint is resolved. But throughout the litigation regarding the Vermilion Facility, PRN has dictated the schedule. PRN elected to first pursue its claims in the federal court. Then, PRN chose to appeal the federal court’s ruling on jurisdiction. PRN twice filed for an extension of time to file its initial appellate brief. Plaintiff-Appellant’s Consent Motion for Extension of time to File Appellant Brief, No. 18-3644 (7th Cir. Dec. 21, 2018), docket No. 5; & (Feb. 5, 2019), docket No. 9. Then, it sought an open-ended stay of its appeal.

Consent Motion for Stay Pending Supreme Court Proceedings, No. 18-3644 (7th Cir. Mar. 6, 2019), docket No. 11. The court granted that motion on March 7, 2019. Order, No. 18-3644 (7th Cir. Mar. 7, 2019), docket No. 12. PRN cannot now claim prejudice as a result of the legal strategy that it crafted and the delays that PRN itself requested. PRN has the power to avoid impermissible, overlapping litigation and can do so at any time by simply choosing a single forum in which to seek relief.

PRN's characterization of DMG's bank stabilization proposal is also puzzling. While PRN implores the Board to consider the alleged "serious risk of environmental harm" (Response at 15 (internal quotation marks omitted)), it also suggests that obtaining "evidence" for its lawsuit is somehow more important than Illinois EPA and U.S. EPA efforts to improve site conditions. Response at 16-17. PRN cannot both claim that it would be harmed if action is not immediately taken at the Vermilion Facility, but then also claim that it would be harmed if the state and federal government approves such action.

**C. PRN's Own Arguments Rely On Unsettled Authority Which Would Benefit From a Stay.**

Also weighing in favor of a stay is the fact that PRN's Response relies on decisions for which appeals are pending. Specifically, as discussed further in Part IV below, PRN argues that the Board should look to federal case law—*Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018) and *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018)—to reverse its own decision in *Central Ill. Pub. Serv. Co. v. IEPA*, PCB 84-105, Opinion and Order of the Board, 1984 WL 37567, at \*3 (Nov. 8, 1984). Response at 28-29. The U.S. Supreme Court has granted certiorari in *County of Maui* (139 S. Ct. 1164 (2019)) and is considering a petition for certiorari in *Upstate Forever* (Docket No. 18-268, Aug. 28, 2018). If

the Board agrees that this federal case law may be controlling, the requested stay would allow those pending appeals to be decided and, as a result, allow the Board to consider the proper authority.

**III. PRN'S ATTEMPTS TO EVADE DISMISSAL OF COUNTS 4 & 5 AS DUPLICATIVE MISSTATE THE FACTS AND APPLICABLE LAW.**

In responding to DMG's alternative request for a dismissal of Counts 4 & 5 as duplicative, PRN attempts to sidestep the fact that it has presented identical effluent and surface water quality standard claims to the Board and federal courts, using inaccurate and misleading interpretations of Board precedent.

PRN's first argument concerning "duplicative" actions relies on its position that its appeal before the Seventh Circuit is not a pending action. Response at 17. That argument fails for the reasons outlined in Part I above.

Second, PRN attempts to distinguish Counts 4 & 5 of the Complaint by asserting that those seek to enforce the Illinois Environmental Protection Act, unlike the Federal Complaint, which seeks to enforce the CWA and DMG's NPDES Permit. Response at 17-18. But the text of Counts 4 & 5 of the Complaint reference only three laws: 35 Ill. Admin. Code §§ 304.106, 304.124 (both concerning effluent), and 302.203 (concerning surface water quality standards). Compl. ¶¶ 55-60. As explained in DMG's Memo, these same regulations are being litigated by PRN via Count 2 of the Federal Complaint. Memo at 9-12.

Nonetheless, PRN argues that it may concurrently litigate the same regulations in two forums because the Federal Complaint mentions these regulations in the context of an NPDES permit rather than the Illinois Environmental Protection Act. Response at 17-18. PRN cites no authority supporting its theory and fails to mention that the NPDES permit at issue, challenged



by Count 2 of the Federal Complaint was, in part, issued to ensure compliance with the Illinois Environmental Protection Act. NPDES Permit No. IL0004057, at 2 (Mar. 7, 2003), attached as Exhibit A (“In compliance with the provisions of the *Illinois Environmental Protection Act*, *Subtitle C Rules and Regulations of the Illinois Pollution Control Board*, and the FWPCA, the above-named permittee is hereby authorized to discharge at the above location to the above-named receiving stream in accordance with the standard conditions and attachments herein.”) (emphasis added).

Moreover, PRN’s position ignores the obvious *res judicata* effect adjudication of claims under 35 Ill. Admin. Code §§ 304.106, 304.124, and 302.203 in one forum could have on the other. No matter how PRN attempts to confuse the issues, it remains true that its effluent and surface water claims of the Complaint are duplicative of those of Count 2 of the Federal Complaint.

PRN further attempts to mislead the Board by suggesting under its “Standard of Review” that “[a]ny of the[] criteria [identified in *Sierra Club v. Midwest Generation*<sup>4</sup>] alone is sufficient to establish that a complaint is not duplicative.” Response at 4. But in suggesting that any single factor is determinative, PRN overreaches and misstates the law. PRN proves that point by noting that, in *Midwest Generation EME, LLC*, PCB 04-216, 2006 WL 1046981, at \*7 (Apr. 6, 2006), the Board dismissed a case as duplicative even where there was no *res judicata* argument. Response at 9 n.2; *see* Memo at 7.

The other cases PRN cites do not support its claim either. *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Caterpillar Inc.*, did not consider any of the “factors” PRN identifies and involved only voluntary agency action, not a pending suit. PCB 94-

---

<sup>4</sup> PCB 13-15, 2013 WL 5524474, at \*22 (Oct. 3, 2013).

240, Order of the Board, at 4-5 (Nov. 3, 1994). As noted below, *League of Women Voters v. N. Shore Sanitary Dist.* was decided under a defunct version of the Board's rules. PCB 70-7, Opinion of the Board at 2 (Oct. 8, 1970). Furthermore, the case was not decided on a single ground, rather it was found not "duplicitous" because the parties *and* the alleged violations were different. *Id.* Therefore, PRN has failed to persuasively cite any case law supporting its argument that any single factor may defeat a claim that a complaint is duplicative.

Next, PRN includes nearly a page-long citation to a string of cases applying a previous, narrower, version of the Board's "duplicitous" standard, which was satisfied only where both cases at issue were filed before the Board. Response at 20 (citing a line of cases beginning with *League of Women Voters v. N. Shore Sanitary Dist.*). That standard is no longer applicable, and PRN does not explain why this case law should have any bearing on the Board's decision here.

In twisting the case law to craft the narrowest possible construction of the definition of "duplicative," PRN also omits important details in an attempt to distinguish the key case law cited in DMG's motion. For example, with regards to *DoAll Co. v. Skokie Valley Asphalt Co.*, PCB 94-256, Order of the Board (July 7, 1995), PRN states that the Board dismissed the "case based on [a] finding that it involved substantially the same legal theory as [the] pending circuit court case." Response at 23. But, crucially, PRN fails to note that in *DoAll*, the complainant alleged that the "circuit court action [was] premised on state common law theories while the complaint before the Board seeks reimbursement . . . [under the Act]." *DoAll* at 3. Nevertheless, despite the fact that the "legal theories" were not *identical*, the Board dismissed those portions of the complaint that were "premiered on the same facts, and [sought] the same relief." *Id.*

Similarly, PRN suggests that *Village of Addison v. City of Wood Dale*, PCB 98-104, 1998 WL 112507, Order of the Board, at \*1-2 (Mar. 5, 1998), involved two cases between "the same

parties.” Response at 23. In fact, as the Memo notes, the Board dismissed the complaint as duplicative, despite the fact that “Addison state[d] that it [was] not a party to the circuit court action” and the requested relief (penalties vs. damages) differed between the two cases. *Village of Addison*, 1998 WL 112507 at \*1-2; Memo at 7.

Taking into account the key details PRN omitted from its description of the cases DMG cites, and ignoring the outdated case law PRN cites, it becomes clear that the Board’s definition of “duplicative” is not nearly as narrow as PRN argues. Instead, as demonstrated in DMG’s Memo, because Counts 4 & 5 of the Complaint are “substantially similar” to Count 2 of the Federal Complaint, they should be dismissed as duplicative. 35 Ill. Admin. Code § 101.202; *DoAll Co. v. Skokie Valley Asphalt Co.*, PCB 94-256, Order of the Board, 3 (July 7, 1995); Memo at Part II.

**IV. PRN HAS PROVIDED INSUFFICIENT EVIDENCE FOR THE BOARD TO REVERSE CIPSCO.**

PRN criticizes the Board’s straightforward holding in *Central Ill. Pub. Serv. Co. v. IEPA*, PCB 84-105, Opinion and Order of the Board, 1984 WL 37567, at \*3 (Nov. 8, 1984), that subsurface leachate from unlined CCR impoundments is not “effluent” under Illinois law as “uninformed” and “erroneous.” Response at 28. But PRN has failed to show why that case should be distinguished or overruled.

**A. CIPSCO is Indistinguishable.**

PRN halfheartedly attempts to distinguish the *CIPSCO* decision. Response at 27. Specifically, PRN argues that the groundwater at issue in *CIPSCO* flowed “generally” towards the river and “spread radially out from the borders of the pond.” *Id.* (citing *CIPSCO* at \*2). At the Vermilion Facility, PRN alleges, the “hydrological connection is more definite and immediate” and “with minimal exception” all groundwater flows into the Middle Fork. *Id.*

A closer review of the record, however, eliminates any distinction. For example, CIPSCO's witness testified that while there was radial flow out from each of the ponds for "relatively short distances," ultimately the groundwater "resumes the prevailing general groundwater flow towards the Wabash River." PCB 84-105, Hearing Transcript 46:6-18 (Sept. 13, 1984), relevant portions of which are attached as Exhibit B. Similarly, the witness described the site conditions as an "ash pond or surface impoundment that is located close to a large river where the groundwater flow is going from the direction of the surface impoundment toward and discharging into the river." *Id.* at 58:9-12. That description is indistinguishable from the conditions outlined in the Complaint, as summarized in PRN's Response: "Because of [the Impoundments'] proximity to the river, coal ash pollution from the ash ponds discharges directly to the Middle Fork via the groundwater that saturates and flows laterally through the ash." Response at 27 (citing Compl. ¶¶ 21, 23). Thus there is no factual basis to distinguish *CIPSCO* and escape its holding that subsurface leachate from a CCR impoundment is "a classic nonpoint source of pollution" and therefore not effluent. *CIPSCO*, 1984 WL 37567, at \*3.

**B. PRN Has Failed to Show Why *CIPSCO* Should be Reversed.**

Recognizing the weakness of this argument, PRN next asks the Board to reverse *CIPSCO* and determine that subsurface leachate from CCR impoundments is point source pollution and therefore effluent. The Board, it argues, should reject the extensive fact finding underlying the *CIPSCO* decision in favor of federal precedent (covering a range of industrial activities) regarding point source discharges. Response at 28-29. But not only has PRN failed to carry its burden of showing that the Board should reverse its prior holding, it has also omitted key federal case law holding that discharges of the types alleged in the Complaint are *not* point source discharges and therefore cannot be effluent.

i. Board Precedent May Not Be “Lightly Changed.”

PRN notes that “the Board ‘is not absolutely bound by its prior rulings but can make adjustments to its precedents so long as the adjustments are not arbitrary or capricious.’” Response at 28-29 (quoting *People v. Sheridan-Joliet Land Dev., LLC*, PCB 13-19, 2013 WL 5762896, at \*3 (Oct. 17, 2013)). PRN, however, makes no attempt to define what “arbitrary and capricious” means in this context. In the only case PRN cites where the standard is examined in any detail, *Illinois Council of Police v. Illinois Labor Relations Bd.*, the Illinois Appellate Court found that an administrative board’s reconsideration of its precedent was not arbitrary and capricious because it occurred gradually, over a period of three years. 404 Ill. App. 3d 589, 597-99 (Ill. App. Ct., 1st Dist. 2010).

The Board has noted that it applies a “presumption of adherence” to its prior decisions. *M.I.G. Investments, Inc. v. IEPA*, PCB 85-60, Opinion and Order, 7-8 (Aug. 15, 1985). Further, the Board and Illinois courts, have explained that longstanding interpretations of regulations should not be “lightly changed,” because the legislature is free to change incorrect interpretations. *Id.* at 7-8 (“The Agency has been implementing that interpretation for the past two years. . . . The area of law is now settled. The legislature has been free to change the . . . court’s interpretation, and the Agency’s implementation . . . for two years and has not done so.”); *Marathon Oil Co. v. Briceland*, 75 Ill. App. 3d 189, 192 (Ill. App. Ct., 5th Dist. 1979) (“Administrative rules and regulations are in the nature of legislation. Because, like legislation, such rules and regulations can be amended, their judicial construction should not be lightly changed.”).

Here, where PRN has provided no evidence that the Board’s interpretation of the term “effluent” (as applied to subsurface leachate) has changed since 1984, the Board should not

“lightly change[]” its longstanding interpretation. *M.I.G. Investments, Inc.*, at 7-8. An abrupt reversal, as PRN recommends, would be “arbitrary and capricious.” *Illinois Council of Police*, 404 Ill. App. 3d at, 597-99.

ii. PRN Omits Important Federal “Point Source” Case Law Contrary to its Position.

Instead of its own precedent, PRN argues that the Board should apply “the weight of [federal] authority confirming that discharges from coal ash are point sources.” Response at 28. But PRN fails to mention three important federal court decisions in the past two years—including two from federal appellate courts, one of which involved current counsel for PRN—that directly contradict PRN’s broad construction of the term “point source.” In *Sierra Club v. Va. Elec. & Power Co.*, the U.S. Court of Appeals for the Fourth Circuit considered “leaching arsenic, from the coal ash in [a] landfill and settling ponds, polluting the groundwater, which carried the arsenic into navigable waters.” 903 F.3d 403, 406 (4th Cir. 2018). The court held that a “point source,” in that context, required a “conveyance,” *i.e.* a “channel or medium . . . for the movement of something from one place to another.” *Id.* at 410-11. Reversing the district court, the Fourth Circuit held that “the landfill and settling ponds could not be characterized as discrete ‘points,’ nor did they function as conveyances. Rather, they were . . . static recipients of the precipitation and groundwater that flowed through them.” *Id.* at 411. Therefore, the discharges the Fourth Circuit considered would not be “effluent” under Illinois law.

Similarly, the Sixth Circuit, also considering alleged discharges from CCR impoundments to groundwater, noted that “[a] point source, by definition, is a ‘conveyance.’ 33 U.S.C. § 1362(14). Coal ash ponds are not conveyances—they do not take or carry [pollutants] from one place to another. In fact, ash ponds are quite the opposite; they are designed to *store*

coal ash in place.” *Kentucky Waterways All. v. Kentucky Utilities Co.*, 905 F.3d 925, 934 n.8 (6th Cir. 2018) (internal quotation omitted) (citing the Fourth Circuit’s decision in *Va. Elec. & Power Co.*); see *Toxics Action Center, Inc. v. Casella Waste Systems, Inc., et al.*, 347 F. Supp. 3d 67, 74 (D. Mass. Sept. 30, 2018) (citing *Kentucky Waterways All.* and holding that “a landfill is not a point source within the meaning of the CWA”).

Although the Seventh Circuit Court of Appeals has not specifically addressed whether a CCR impoundment is a point source (with respect to subsurface discharges), it has held, consistently with *CIPSCO*, that discharges from a pond to groundwater hydrologically connected to a waters of the United States is outside the jurisdiction of the Clean Water Act. *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 964-66 (7th Cir. 1994); *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 350 F. Supp. 3d 697, 704-06 (C.D. Ill. 2018). With these federal cases in mind, PRN is simply wrong to contend there is a weight of federal authority in its favor. To the contrary, ample federal authority continues to support the Board’s longstanding *CIPSCO* precedent that subsurface leachate from CCR impoundments is not a “point source” discharge and therefore not “effluent.”

**CONCLUSION**

For the reasons stated above and in its Memo, DMG respectfully requests that the Board stay this matter, or, in the alternative, dismiss Counts 4 & 5 of the Complaint as duplicative and dismiss Count 4 as frivolous.

Dated: June 19, 2019

/s/ Daniel J. Deeb  
Daniel J. Deeb

SCHIFF HARDIN LLP

Daniel J. Deeb  
Joshua R. More  
Ryan C. Granholm  
Caitlin M. Ajax  
233 South Wacker Dr., Ste. 7100  
Chicago, Illinois 60606  
(312) 258-5500  
ddeeb@schiffhardin.com

BALCH & BINGHAM LLP

P. Stephen Gidiere III  
1901 Sixth Ave. North, Ste. 1500  
Birmingham, AL 35203  
(205) 226-8735  
sgidiere@balch.com

GIBSON, DUNN & CRUTCHER LLP

Michael L. Raiff  
2100 McKinney Ave., Ste. 1100  
Dallas, TX 75201  
(214) 698-3350  
mraiff@gibsondunn.com

*Attorneys for Dynegy Midwest Generation,  
LLC*



# **Exhibit A**



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276  
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601

217/782-0610

ROD R. BLAGOJEVICH, GOVERNOR

RENEE CIPRIANO, DIRECTOR

March 7, 2003

Dynegy Midwest Generation, Inc.  
Attn: Manager, Environmental Resources  
2828 North Monroe Street  
Decatur, Illinois 62526

*Expired Permit*

Re: Dynegy Midwest Generation, Inc.  
Dynegy Midwest Generation, Inc.-Vermilion Power Station  
NPDES Permit No. IL0004057  
Final Permit

Gentlemen:

Attached is the final NPDES Permit for your discharge. The Permit as issued covers discharge limitations, monitoring, and reporting requirements. The failure of you to meet any portion of the Permit could result in civil and/or criminal penalties. The Illinois Environmental Protection Agency is ready and willing to assist you in interpreting any of the conditions of the Permit as they relate specifically to your discharge.

The Permit as issued is effective as of the date indicated on the first page of the Permit. You have the right to appeal any condition of the Permit to the Illinois Pollution Control Board within a 35 day period following the issuance date.

To assist you in meeting the self-monitoring and reporting requirements of your reissued NPDES permit, a supply of preprinted Discharge Monitoring Report (DMR) forms for your facility is being prepared. These forms will be sent to you prior to the initiation of DMR reporting under the reissued permit. Additional information and instructions will accompany the preprinted DMRs upon their arrival.

Should you have questions concerning the Permit, please contact Darin LeCrone at the telephone number indicated above.

Sincerely,

Toby Frevert, P.E.  
Manager  
Division of Water Pollution Control

TDF:TGM:DEL:01082905.bah

Attachment: Final Permit

cc: Records  
Compliance Assurance Section  
Champaign Region  
U.S. EPA

Electronic Filing: Received, Clerk's Office 6/19/2019

Illinois Environmental Protection Agency

Division of Water Pollution Control

1021 North Grand Avenue, East

P.O. Box 19276

Springfield, Illinois 62794-9276

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Reissued (NPDES) Permit

Expiration Date: February 28, 2008

Issue Date: March 7, 2003

Effective Date: March 7, 2003

Name and Address of Permittee:

Facility Name and Address:

Dynegy Midwest Generation, Inc.  
Attn: Manager, Environmental Resources  
2828 North Monroe Street  
Decatur, Illinois 62525

Dynegy Midwest Generation, Inc.  
Vermilion Power Plant  
Post Office Box 250  
Oakwood, Illinois 61858  
(Vermilion County)

Discharge Number and Name:

Receiving Waters

0.001 Ash Lagoon Overflow  
J.A01 Cooling Tower Blowdown ✓  
No. B01 Chemical Metal Cleaning Waste  
Treatment System Effluent ✓  
No. C01 Activated Carbon System Effluent ✓  
No. 002 Make-Up Water Reservoir Overflow ✓  
No. 003 East Ash Pond ✓  
No. A03 Cooling Tower Blowdown ✓  
No. B03 Chemical Metal Cleaning Waste Treatment System Effluent ✓  
No. C03 Activated Carbon System Effluent ✓

Middle Fork Vermilion River

In compliance with the provisions of the Illinois Environmental Protection Act, Subtitle C Rules and Regulations of the Illinois Pollution Control Board, and the FWPCA, the above-named permittee is hereby authorized to discharge at the above location to the above-named receiving stream in accordance with the standard conditions and attachments herein.

Permittee is not authorized to discharge after the above expiration date. In order to receive authorization to discharge beyond the expiration date, the permittee shall submit the proper application as required by the Illinois Environmental Protection Agency (IEPA) not later than 180 days prior to the expiration date.



Toby Frevert, P.E.  
Manager  
Division of Water Pollution Control

NPDES Permit No. IL0004057

Effluent Limitations and Monitoring

PARAMETER	LOAD LIMITS lbs/day		CONCENTRATION LIMITS mg/l		SAMPLE FREQUENCY	SAMPLE TYPE
	30 DAY AVG.	DAILY MAX.	30 DAY AVG.	DAILY MAX.		
1. From the effective date of this permit until the expiration date, the effluent of the following discharge(s) shall be monitored and limited at all times as follows:						
<u>Outfall(s): 001 North Ash Lagoon</u>						
This discharge consists of:			Approximate Flow			
	1. Fly ash and bottom ash transport water*		0.84 MGD			
	2. Ash hopper overflow		0.4 MGD			
	3. Demineralizer regenerant wastes		0.015 MGD			
	4. Water treatment clarifier sludge		0.015 MGD			
	5. Water filter backwash waste		0.005 MGD			
	6. Coal pile runoff		0.05 MGD			
	7. Area runoff		Intermittent			
	8. Non-chemical metal cleaning wastes		Intermittent			
	9. Boiler room and dust collector area floor drains		0.06 MGD			
	10. Pyrites from coal crushing		0.01 MGD			
	11. Chemical metal cleaning waste treatment system effluent		Intermittent			
DW					1/Week	Single Reading Calculation
pH	See Special Condition No. 1				Continuous	****
Total Suspended Solids			15.0	30.0	1/Week	24 Hour** Composite
Oil and Grease			15.0	20.0	1/Month	Grab
Total Dissolved Solids (TDS)				***	1/Week	24 Hour** Composite
Sulfates				***	1/Week	24 Hour** Composite
Boron				***	1/Week	24 Hour** Composite
Iron (Total)			2.0	4.0	1/Month	24 Hour** Composite

\*Cooling tower blowdown and plant service water are used for ash transport.

\*\*See Special Condition No. 7.

\*\*\*See Special Condition No. 13 for Effluent limitations for boron, sulfate, and TDS

\*\*\*\*See Special Condition 8.

NPDES Permit No. IL0004057

Effluent Limitations and Monitoring

PARAMETER	LOAD LIMITS lbs/day		CONCENTRATION LIMITS mg/l		SAMPLE FREQUENCY	SAMPLE TYPE
	30 DAY AVG.	DAILY MAX.	30 DAY AVG.	DAILY MAX.		

1. From the effective date of this permit until the expiration date, the effluent of the following discharge(s) shall be monitored and limited at all times as follows:

Outfall(s): A01 Cooling Tower Blowdown

Approximate Flow  
0.84 MGD

See Special Condition No. 3 and No. 5

Total Zinc	See Special Condition No. 9	1/Month	Grab
------------	-----------------------------	---------	------

Outfall(s): B01 Chemical Metal Cleaning Waste Treatment System Effluent

Approximate Flow  
Intermittent

Flow		Daily When Discharging	24 Hour Total
Total Iron	1.0	Daily When Discharging	24 Hour Composite
Total Copper	1.0	Daily When Discharging	24 Hour Composite

NPDES Permit No. IL0004057

Effluent Limitations and Monitoring

PARAMETER	LOAD LIMITS lbs/day		CONCENTRATION LIMITS mg/l		SAMPLE FREQUENCY	SAMPLE TYPE
	30 DAY AVG.	DAILY MAX.	30 DAY AVG.	DAILY MAX.		

1. From the effective date of this permit until the expiration date of this permit, the effluent of the following discharge(s) shall be monitored and limited at all times as follows:

Outfall(s): C01 Activated Carbon System Effluent\*\*\*\*

PARAMETER	LOAD LIMITS (lbs/day)	CONCENTRATION LIMITS (mg/l)	SAMPLE FREQUENCY	SAMPLE TYPE
Flow			1/Month*	Measure When Monitoring
Oil and Grease		15 / 30	1/Month*	Grab
Benzene		-- / 0.05	1/Month*	Grab
Ethylbenzene		0.017 / 0.21	1/Month*	Grab
Toluene		0.14 / 1.75	1/Month*	Grab
Xylenes (total)		0.073 / 0.92	1/Month*	Grab
Total BETX**		-- / 0.75	1/Month*	Calculation
Priority Pollutant PNA's***			0.1 / 1/Month*	Grab

\*See Special Condition 17 for more frequent monitoring of a new discharge.

\*\*Benzene, Ethylbenzene, Toluene, Xylenes.

\*\*\*Not required for discharge involving only gasoline. See Special Condition 18.

\*\*\*\*This outfall consists of an intermittent discharge which may result from the remediation of spills at the Vermilion Power Station.

Outfall(s): 002 Make Up Water Reservoir Overflow

This discharge consists of:  
 1. Water pumped into the reservoir from the Middle Fork Vermilion River  
 2. Area runoff  
 3. Boiler blowdown  
 4. Plant roof and floor drainage  
 5. Cooling tower basin drains and overflows

Approximate Flow Intermittent

PARAMETER	LOAD LIMITS (lbs/day)	CONCENTRATION LIMITS (mg/l)	SAMPLE FREQUENCY	SAMPLE TYPE
Flow			Daily When Discharging	Single Reading Calculation
pH	See Special Condition No. 1		1/Week	Grab
Total Suspended Solids		15.0 / 30.0	1/Week	24 Hour* Composite
Oil and Grease		15.0 / 20.0	1/Week	Grab

See Special Condition 7.

Electronic Filing: Received, Clerk's Office 6/19/2019

NPDES Permit No. IL0004057

Effluent Limitations and Monitoring

PARAMETER	LOAD LIMITS lbs/day		CONCENTRATION LIMITS mg/l		SAMPLE FREQUENCY	SAMPLE TYPE
	30 DAY AVG.	DAILY MAX.	30 DAY AVG.	DAILY MAX.		

1. From the effective date of this permit until the expiration date, the effluent of the following discharge(s) shall be monitored and limited at all times as follows:

Outfall(s): 003 East Ash Pond

This discharge consists of:	Approximate Flow
1. Fly ash and bottom ash transport water*	0.84 MGD
2. Ash hopper overflow	0.4 MGD
3. Demineralizer regenerant wastes	0.015 MGD
4. Water treatment clarifier sludge	0.015 MGD
5. Water filter backwash waste	0.005 MGD
6. Coal pile runoff	0.05 MGD
7. Area runoff	Intermittent
8. Non-chemical metal cleaning wastes	Intermittent
9. Boiler room and dust collector area floor drains	0.06 MGD
10. Pyrites from coal crushing	0.01 MGD
11. Chemical metal cleaning waste treatment system effluent	Intermittent

PARAMETER	30 DAY AVG.	DAILY MAX.	30 DAY AVG.	DAILY MAX.	SAMPLE FREQUENCY	SAMPLE TYPE
pH	See Special Condition No. 1				1/Week	Single Reading Calculation
Total Suspended Solids			15.0	30.0	1/Week	24 Hour** Composite
Oil and Grease			15.0	20.0	1/Month	Grab
Total Dissolved Solids (TDS)				***	1/Week	24 Hour** Composite
Sulfates				***	1/Week	24 Hour** Composite
Boron				***	1/Week	24 Hour*** Composite
Iron (Total)			2.0	4.0	1/Month	24 Hour** Composite

\*Cooling tower blowdown and plant service water are used for ash transport.

\*\*See Special Condition No. 7.

\*\*\*See Special Condition No. 13 for Effluent limitations for boron, sulfate, and TDS.

\*\*\*\*See Special Condition 8.

NPDES Permit No. IL0004057

Effluent Limitations and Monitoring

PARAMETER	LOAD LIMITS lbs/day		CONCENTRATION LIMITS mg/l		SAMPLE FREQUENCY	SAMPLE TYPE
	30 DAY AVG.	DAILY MAX.	30 DAY AVG.	DAILY MAX.		

1. From the effective date of this permit until the expiration date, the effluent of the following discharge(s) shall be monitored and limited at all times as follows:

Outfall(s): A03 Cooling Tower Blowdown

Approximate Flow  
0.84 MGD

See Special Condition No. 3 and No. 5

Total Zinc	See Special Condition No. 9		1/Month	Grab
------------	-----------------------------	--	---------	------

Outfall(s): B03 Chemical Metal Cleaning Waste Treatment System Effluent

Approximate Flow  
Intermittent

Flow			Daily When Discharging	24 Hour Total
Total Iron		1.0	Daily When Discharging	24 Hour Composite
Total Copper		1.0	Daily When Discharging	24 Hour Composite



NPDES Permit No. IL0004057

Effluent Limitations and Monitoring

PARAMETER	LOAD LIMITS lbs/day		CONCENTRATION LIMITS mg/l		SAMPLE FREQUENCY	SAMPLE TYPE
	30 DAY AVG.	DAILY MAX.	30 DAY AVG.	DAILY MAX.		

1. From the effective date of this permit until the expiration date of this permit, the effluent of the following discharge(s) shall be monitored and limited at all times as follows:

Outfall(s): C03 Activated Carbon System Effluent\*\*\*\*

Flow					1/Month*	Measure When Monitoring
Oil and Grease			15	30	1/Month*	Grab
Benzene			--	0.05	1/Month*	Grab
Ethylbenzene			0.017	0.21	1/Month*	Grab
Toluene			0.14	1.75	1/Month*	Grab
Xylenes (total)			0.073	0.92	1/Month*	Grab
Total BETX**			--	0.75	1/Month*	Calculation
Priority Pollutant PNA's***				0.1	1/Month*	Grab

\*See Special Condition 17 for more frequent monitoring of a new discharge.

\*\*Benzene, Ethylbenzene, Toluene, Xylenes.

\*\*\*Not required for discharge involving only gasoline. See Special Condition 18.

\*\*\*\*This outfall consists of an intermittent discharge which may result from the remediation of spills at the Vermilion Power Station.

# Electronic Filing: Received, Clerk's Office 6/19/2019

Page 8

NPDES Permit No. IL0004057

## Special Conditions

SPECIAL CONDITION 1. The pH shall be in the range 6.0 to 9.0. Effluents which are monitored to provide a permanent, continuous pH record may be outside of the listed range for a total of not more than fifteen minutes in any day provided the excursion is accidental and less than one pH unit above or below the listed range.

SPECIAL CONDITION 2. Samples taken in compliance with the effluent monitoring requirements shall be taken at a point representative of the discharge, but prior to entry into the receiving stream unless specified otherwise.

SPECIAL CONDITION 3. Chlorine may not be injected into the recirculating cooling water system more than two hours per day per generating unit.

SPECIAL CONDITION 4. There shall be no discharge of polychlorinated biphenyl compounds.

SPECIAL CONDITION 5. The discharge of one hundred twenty-four toxic pollutants (FR Vol. 47, No. 224, November 19, 1982, pp. 52309, Appendix A) is prohibited in detectable amounts from cooling tower discharges if the pollutants come from cooling system maintenance chemicals. The use of cooling system maintenance chemicals containing chromium is prohibited unless this permit has been modified to include the use and discharge of these chemicals.

SPECIAL CONDITION 6. Dynegy Midwest Generation, Inc.'s demonstration submitted pursuant to Section 316(b) of the Clean Water Act for the Vermilion Power Plant (Phase I, Physical Measurements) has been reviewed by IEPA and the review determination is that while additional intake monitoring is not being required at this time, further monitoring (i.e., Phase II Biological Investigations) is not precluded if determined necessary at the time of any reissuance of NPDES Permit No. IL0004057.

SPECIAL CONDITION 7. If inclement weather prohibits the collection of a 24-hour composite sample, sampling shall consist of a grab sample.

SPECIAL CONDITION 8. If equipment maintenance or malfunction prohibits the continuous sampling for pH at outfalls 001 and 003 then sampling shall consist of a grab sample taken once per week.

SPECIAL CONDITION 9. Total Zinc concentration in the Cooling Tower Blowdown under operational conditions, shall be adequately controlled and limited to the present level of 1.0 mg/l or less when used to prevent corrosion in the cooling system. Analysis for Total Zinc concentration at Outfalls A01 and A03 shall be conducted and the results reported on the Discharge Monitoring Report (DMR) only during months when Zinc is used. If Zinc is not being used, it shall be so indicated on the DMR.

SPECIAL CONDITION 10. The permittee shall record monitoring results on Discharge Monitoring Report Forms using one such form for each discharge each month.

The completed Discharge Monitoring Report forms shall be submitted to IEPA no later than the 15th day of the following month, unless otherwise specified by the permitting authority.

Discharge Monitoring Reports shall be mailed to the IEPA at the following address:

Illinois Environmental Protection Agency  
Division of Water Pollution Control  
1021 North Grand Avenue, East  
Springfield, Illinois 62706

Attention: Compliance Assurance Section

SPECIAL CONDITION 11. Standard Condition 11(a) of Attachment H is revised as follows:

An application submitted by a corporation shall be signed by a principal executive officer of at least the level of vice president, or his duly authorized representative, if such representative is responsible for the overall operation of the facility from which the discharge described in the application form originates. In the case of a partnership or a sole proprietorship, the application shall be signed by a general partner or the proprietor, respectively. In the case of a publicly owned facility, the application shall be signed by either the principal executive officer, ranking elected official, or other duly authorized employee.

NPDES Permit No. IL0004057

Special Conditions

SPECIAL CONDITION 12. Standard Condition 11(b) of Attachment H is revised as follows:

Pursuant to 40 CFR 122.22(b) all reports required by permits, other information requested by the Director, and all permit applications shall be signed by a person described in 40 CFR 122.22(a), or by a duly authorized representative of that person. A person is a duly authorized representative only if:

- (1) The authorization is made in writing by a person described in paragraph (a) of this section;
- (2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.) and
- (3) The written authorization is submitted to the Director.

SPECIAL CONDITION 13. For Outfalls 001 and 003 the Permittee shall determine on a daily basis compliance with the General Use water quality standards for boron (1.0 mg/l), sulfate (500 mg/l), and total dissolved solids (1000 mg/l), in the Middle Fork of the Vermilion River. The following equations shall be used to make these determinations.

1) Flow Limitations

When Outfall 001 or 003 is discharging, the river concentration downstream from either Outfall 001 or 003 when discharging alone shall be computed for that outfall as follows:

$$C(ds) = [Q(e)*C(e) + 0.25*Q(us)*C(us)]/[0.25*Q(us) + Q(e)]$$

- where Q(e) = allowable effluent flow (cfs)
- Q(us) = river flow upstream of all plant outfalls (cfs)
- C(ds) = general use water quality standard (not to be exceeded at any time)(mg/l)
  - for boron: 1.0 mg/l
  - for sulfate: 500 mg/l
  - for TDS: 1000 mg/l
- C(us) = river concentration upstream of all plant outfalls (mg/l)
- C(e) = effluent pollutant concentration (mg/l)

2) Mass Limitations

When outfalls 001 and/or 003 are discharging, neither outfall may violate the flow restrictions of equation 1. above. In addition, the combined mass limitations for these outfalls shall be computed as follows:

$$M_{plant} = [(0.25)*Q(us) + Q_{plant}]*5.394*C(ds) - [(0.25)*Q(us)*5.394*C(us)]$$

- where:  $M(lb/day) = conc(mg/l)*Q(cfs)*5.394$
- $M_{plant} = M(001) + M(003)$
- $M_{tot} = M_{plant} + M(us)$
- $M_{plant} = M_{tot} - M(us)$
- $M(us) = (0.25)*Q(us)*5.394*C(us)$
- $M_{tot} = [(0.25)*Q(us) + (5.394)*C(ds)]$
- M<sub>tot</sub> = total mass of pollutant in the river (lb/day)
- M<sub>plant</sub> = total mass of pollutant discharged from Outfalls 001 and 003 (lb/day)
- M(us) = mass of pollutant flowing past plant (lb/day)
- Q<sub>plant</sub> = flow from outfall 001 (cfs) + flow from Outfall 003 (cfs)
- Q(us) = upstream river flow (cfs)
- C(ds) = general use water quality standard
  - boron: 1.0 mg/l
  - sulfate: 500 mg/l
  - TDS: 1000 mg/l
- C(us) = upstream river concentration (mg/l)

Special Conditions

For the purpose of these calculations, upstream river flows,  $Q(us)$ , shall be estimated daily by measuring the river flow at the USGS gauging station at Kickapoo State Park, subtracting from that measurement, any concurrent upstream ash pond discharge flow to the river. Effluent boron, sulfate, and TDS values,  $C(e)$ , shall be determined from the analysis of a 24-hour composite sample collected once-weekly of the ash pond discharge. Upstream boron, sulfate, and TDS concentrations,  $C(us)$ , shall be determined by the means of grab samples taken upstream, once per week on the same day that the ash pond outfalls are sampled. If river conditions (such as ice) prohibit sampling, the Permittee may use the long-term average upstream concentrations for boron, sulfate and TDS of 0.16 mg/l, 63 mg/l and 378 mg/l respectively, based upon historical IEPA water quality sampling at the ISWS sampling station at Collision. Quarterly samples shall also be collected instream, by grab sample, for boron, sulfate, and TDS, downstream of the plant at the downstream river pump house. Downstream sampling data shall be submitted with the January, April, July, and October Discharge Monitoring Reports. At the time of application for renewal of the permit, the Permittee may request that the composite effluent sampling be changed to grab, subject to Agency review and approval.

In order to comply with the monitoring and reporting requirements of the monthly Discharge Monitoring Reports for Outfalls 001 and 003, the Permittee shall also include a table which will indicate the actual measured daily ash pond discharge flows from each ash pond for the month, the effluent concentrations, the computed downstream river concentrations, the computed maximum allowable daily flows, the computed maximum allowable daily mass loading and the actual mass discharged from each outfall. The weekly measured boron, sulfates, and TDS effluent concentration values (upstream and end of pipe) shall also be reported. Supporting calculations which indicate how the maximum allowable daily flows and mass loadings were calculated shall be attached as well.

SPECIAL CONDITION 14. The Agency has determined that the effluent limitations in this permit constitute BAT/BCT for storm water which is treated in the existing treatment facilities for purposes of this permit reissuance, and no pollution prevention plan will be required for such storm water. In addition to the chemical specific monitoring required elsewhere in this permit, the permittee shall conduct an annual inspection of the facility site to identify areas contributing to a storm water discharge associated with industrial activity, and determine whether any facility modifications have occurred which result in previously-treated storm water discharges no longer receiving treatment. If any such discharges are identified the permittee shall request a modification of this permit within 30 days after the inspection. Records of the annual inspection shall be retained by the permittee for the term of this permit and be made available to the Agency on request.

SPECIAL CONDITION 15. Disposal of sludge contained in the chemical metal cleaning waste treatment tank at the Vermilion Power Plant, generated from a six-stage ammonical bromate and hydrochloric acid cleaning procedure may be pumped onto the active area of the coal pile at the Vermilion Power Plant. Sludge shall be applied to the coal pile within the following guidelines:

1. Sludge shall only be applied to an active area of the coal pile.
2. Sludge shall be applied on an active area of the coal pile at a rate to prevent coal pile runoff and not to exceed 10,000 gpd.
3. Sludge application shall not be permitted if the coal pile has been wetted by rainfall within the 24 hour period preceding the intended application time.
4. Sludge application shall not be permitted on the coal pile during precipitation or when precipitation is imminent.
5. The filter cake from the portable sock filter may be disposed on site with the sludge generated by the chemical metal cleaning wastewater treatment process.
6. Sludge or filter cake which is a hazardous waste shall not be placed on the coal pile.

This Special Condition does not relieve the permittee of any State or federal requirements for management of hazardous waste. Documentation to support a hazardous waste determination pursuant to 40 CFR 262.11 shall be maintained by the permittee.

SPECIAL CONDITION 16. The Agency has received the results of Dynegy Midwest Generation, Inc.'s Whole Effluent Toxicity testing and river sediment sampling at outfalls 001 and 003. The results of effluent toxicity testing at outfall 003 for the three required tests indicate no acute toxicity to the three test species. Therefore additional whole effluent toxicity testing will not be required at this time.

River sediment samples taken downstream of outfall 001 and downstream of outfall 003 do not indicate the presence of boron downstream of these outfalls. Based on these results, no further sediment sampling will be required.

Special Conditions

SPECIAL CONDITION 17. (Outfalls C01 and C03) During the first month of a new discharge, the sample frequency shall be once per week. During the next two months the frequency shall be twice per month, and thereafter the frequency shall be once per month. Discharges of less than one week duration shall be monitored at least per discharge events.

SPECIAL CONDITION 18. (Outfalls C01 and C03) Discharges of water which could have been impacted by any fuel other than gasoline shall be analyzed for the following polynuclear aromatic hydrocarbons.

Acenaphthene  
Acenaphthylene  
Anthracene  
Benzo (a) anthracene  
Benzo (a) pyrene  
3,4 Benzofluoranthene  
Benzo (ghi) perylene  
Benzo (k) fluoranthene  
Chrysene  
Dibenzo (a,h) anthracene  
Fluoranthene  
Fluorene  
Indeno (1,2,3-cd) pyrene  
Naphthalene  
Phenanthrene  
Pyrene

SPECIAL CONDITION 19. The permittee shall monitor the five performance monitoring wells around the east ash pond on a quarterly basis. Each sample shall be analyzed for boron, manganese, pH, sulfates and total dissolved solids, with the groundwater elevation being noted in each well at the time of sampling. Sample results shall be submitted to the Agency at the address in Special Condition 10 within 60 days of the quarterly sampling date.

## **Exhibit B**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

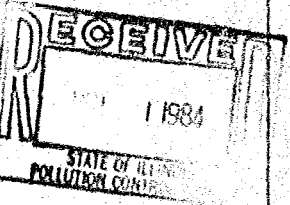
BEFORE THE POLLUTION CONTROL BOARD

STATE OF ILLINOIS

CENTRAL ILLINOIS PUBLIC SERVICE,

Petitioner,

-vs-



PCB 84-105

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Hearing held, pursuant to Notice, on the 13th day of September, 1984, at the hour of 9:30 a.m., at Room B-9 Prairie Capitol Convention Center, Springfield, before Joshua Sachs, duly appointed Hearing Officer.

TRANSCRIPT OF PROCEEDINGS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

APPEARANCES:

SORLING, NORTHRUP, HANNA,  
CULLEN & COCHRAN, by  
MR. T. KENT COCHRAN  
Attorney at Law  
800 Illinois Building  
Springfield, Illinois

on behalf of the Petitioner;

MR. BRUCE L. CARLSON  
Attorney Advisor  
Division of Water Pollution Control  
Enforcement Programs  
2200 Churchill Road  
Springfield, Illinois

on behalf of the Respondent.

WITNESSES:

INDEX

PAGE

MARK COCHRAN		
Direct Examination		18
Cross-Examination		65
Redirect Examination		72
Recross-Examination		74
TIMOTHY KLUGE		
Direct Examination		75
SALLY ANN SPRINGER		
Direct Examination		77
Cross-Examination		83
GARY CIMA		
Direct Examination		85
Cross-Examination		108
Redirect Examination		109
ROGER SELBRUG		
Direct Examination		111
Cross-Examination		119
THOMAS G. McSWIGGIN		
Direct Examination		123
Cross-Examination		137



	<u>INDEX (Cont'd)</u>	<u>PAGE</u>
1		
2		
3	WITNESSES:	
4	GARY CIMA	
5	Direct Examination	139
6	Cross-Examination	144
7	Redirect Examination	147
8	MONTE NIENKERK	
9	Direct Examination	148
10	Cross-Examination	150
11	Redirect Examination	152
12	Recross-Examination	154
13	DAVID P. RUBNER	
14	Direct Testimony	159
15	Cross-Examination	167

16	EXHIBITS:	
17	Petitioner's Exhibits Number 1, 2 and 3	17
18		
19		

16 HEARING OFFICER: It's 9:30 and I'm going  
 17 to call the hearing to order. This is Central  
 18 Illinois Public Service Company versus Illinois  
 19 Environmental Protection Agency. PCB Number 84-105.

20 My name is Joshua Sachs, S-a-c-h-s, I'm the  
 21 Hearing Officer for the Pollution Control Board.  
 22 Could I have appearances of counsel for the record,  
 23 please?

24 MR. COCHRAN: Yes, sir, my name is Kent  
 Cochran, I'm an attorney for Central Illinois Public

Electronic Filing: Received, Clerk's Office 6/19/2019

1 HEARING OFFICER: Of course, the Agency  
2 record is part of the record and it will be admitted  
3 in this hearing.

4 MR. COCHRAN: If we have no other  
5 preliminary matters I'd like to call my first  
6 witness, Mr. Mark Cochran.

7 HEARING OFFICER: You may.

8 MARK COCHRAN  
9 called as a witness herein, at the instance of the  
10 Petitioner, having been duly sworn on his oath,  
11 testified as follows:

12 DIRECT EXAMINATION BY

13 MR. COCHRAN:

14 Q. Would you state your name and current  
15 address for the record?

16 A. My name is Mark Cochran, my current address  
17 is Rural Route 2, Box 158B, Springfield.

18 Q. Are you currently employed?

19 A. Yes, I am.

20 Q. And where are you employed?

21 A. At Central Illinois Public Service Company.

22 Q. And that's the petitioner in this matter?

23 A. Yes, it is.

24 Q. And how long have you been employed there?

## Electronic Filing: Received, Clerk's Office 6/19/2019

1 A. Approximately seven years.

2 Q. And what is your present position with CIPS?

3 A. My title is Environmental Program  
4 Supervisor.

5 Q. And would you briefly describe your  
6 responsibility in that capacity?

7 A. My major areas of responsibility would  
8 involve areas of water, solid wastes, hazardous  
9 materials.

10 Q. Would you briefly describe your educational  
11 background?

12 A. I graduated from Purdue University with  
13 honors with a degree in environmental engineering, a  
14 Bachelor of Science. I graduated from Indiana  
15 University School of Law with honors with a Doctor  
16 of Jurisprudence.

17 Q. And are you currently involved in any  
18 industry groups or societies dealing with among  
19 other things groundwater issues?

20 A. Yes, I actively participate in the Utility  
21 Solid Waste Activities Group and the Illinois  
22 Utility Group.

23 Q. And what roll if any do you play in those  
24 societies?

## Electronic Filing: Received, Clerk's Office 6/19/2019

1           A.    Well, in the Utility Solid Waste Activities  
2 Group which is a consortium of about 65 utilities  
3 around the country, I am chairman of their Land  
4 Disposal Task Force.

5           Q.    And how long have you had that position?

6           A.    Since its inception, about three and a half  
7 years ago.

8           Q.    Could you briefly describe the purpose of  
9 that task force and your roll?

10          A.    The responsibility of that task force is to  
11 follow, monitor and participate in the rule making  
12 efforts that the United States EPA is conducting  
13 with regard to the development of solid and  
14 hazardous waste management standards.

15          Q.    I would refer you to the photograph which  
16 has been admitted as CIPS Exhibit Number 1 and ask  
17 you if you recognize that as an aerial photo of the  
18 Hutsonville Power Station?

19          A.    Yes, I do.

20          Q.    And if you would with the permission of the  
21 Hearing Officer approach the photo I'd like to ask  
22 you a few questions.

23                   HEARING OFFICER: Counsel, we have the  
24 problem that I mentioned to you before we started,

Electronic Filing: Received, Clerk's Office 6/19/2019

1 that are you planning to have that large photo  
2 admitted into the record?

3 MR. COCHRAN: No, I'm not, that's the  
4 purpose of having the smaller photos.

5 HEARING OFFICER: I understand. Would you  
6 like to have your witnesses make marks on any of the  
7 smaller photos, they can use my copy if you want?

8 MR. COCHRAN: All right. I don't think  
9 that at this time that I would anticipate that they  
10 would need to make any marks on the photo, in that  
11 some of the items they will be referring to are also  
12 marked and numbered already on CIPS Exhibits Number  
13 2 and Number 3.

14 HEARING OFFICER: All right, I'll let you  
15 go ahead. Just remember, counsel both, that the  
16 Board is going to be working off of a transcript and  
17 to work from a transcript to a photo and try to  
18 figure out what the witness is talking about is not  
19 always the easiest thing in the world.

20 Q. Doctor, if you'd approach the photo, I  
21 think it would be better if you could stand to your  
22 left of the photo so that you won't distract the  
23 view of the Hearing Officer.

24 A. All right.

## Electronic Filing: Received, Clerk's Office 6/19/2019

1 Q. Would you just briefly describe the power  
2 plant there and the surrounding area and if you will  
3 in view of the comments of the Hearing Officer take  
4 particular care to be as descriptive as you can  
5 rather than saying this is something, if you can  
6 either identify it by a quadrant or by boundaries.

7 A. All right.

8 Q. Go ahead.

9 A. To start off the left side of the picture  
10 is west, the right side is east and the top of the  
11 picture is north to orient the directions.

12 The power plant complex itself is in the center  
13 of the photograph. The station itself which is  
14 directly in the center of the photo currently  
15 consists of two coal fired boilers with associated  
16 generators.

17 In the center area there's also a dark area  
18 which is the coal pile. The body of water running  
19 along the right-hand side of the photograph is the  
20 Wabash River which is the source of major volumes of  
21 water required by the plant. And located off the  
22 river is the intake structure where we draw water  
23 off for the plant uses.

24 Other features on here, this area that has a

1 dike berm around it on the right side of the picture  
2 or the east side of the picture is the existing  
3 bottom ash, fly ash pond complex.

4 The area where we are proposing to construct the  
5 new ash pond, fly ash pond is to the south and west  
6 of the center of the picture where the plant is  
7 located, it is in this area bounded by the incoming  
8 plant road and the coal pile on the eastern edge.

9 Other features to the -- directly east of the  
10 existing fly ash pond are two deep wells from which  
11 we withdraw water for various plant purposes,  
12 including drinking water.

13 Q. And at this point if you would refer to  
14 CIPS Exhibit Number 2, you had mentioned two deep  
15 wells. Are they marked on CIPS Exhibit Number 2?

16 A. Yes, they are identified to the right of  
17 the existing fly ash pond as existing well number  
18 one and to the north of that existing well number  
19 two.

20 Q. Continue on with your --

21 A. I think that basically covers the major  
22 features of the complex.

23 Q. When was the existing fly ash pond  
24 constructed?





Electronic Filing: Received, Clerk's Office 6/19/2019

1 there been any environmental harm or adverse health  
2 impacts or health effects associated with the  
3 existing fly ash pond at the Hutsonville Station?

4 A. No, there haven't.

5 Q. And as pertains to the Hutsonville Station  
6 and the existing fly ash pond, do you have any  
7 opinion as to whether the discharge from that fly  
8 ash pond is adversely affecting the water quality of  
9 the Wabash River?

10 A. Yes, in my opinion the discharge from that  
11 ash pond is not having an adverse impact on the  
12 Wabash River water quality.

13 Q. And do you have any opinion as to the  
14 impact if any on the subsurface discharge from the  
15 existing fly ash pond?

16 A. In a similar manner I don't feel that the  
17 subsurface discharge is having any -- in fact it has  
18 a lesser impact than the surface discharge would.

19 Q. Addressing your attention to the existing  
20 fly ash pond, are you aware of any problems  
21 associated with it?

22 A. Well, there is a very real operational  
23 problem in that it's filling up and it is close to  
24 reaching the point where it will no longer function

Electronic Filing: Received, Clerk's Office 6/19/2019

1 as it was intended to, as a sedimentation basin.

2 Q. And is CIPS making any efforts to address  
3 this problem?

4 A. Yes, we've been studying the problem for  
5 several years. We evaluated a lot of different  
6 options. We considered installing a fly ash system  
7 at the station which would alleviate the need for an  
8 ash pond. We've looked at the option of completely  
9 cleaning out the existing fly ash pond and hauling  
10 that material off site to a third party landfill,  
11 and we've considered constructing a new ash pond on  
12 site.

13 Q. And at the conclusion of your assessment  
14 did you come to an opinion as to what was the best  
15 option or alternative for CIPS to pursue?

16 A. It was our judgment that the best option,  
17 that the most economical and it would present the  
18 least environmental problems would be to build a new  
19 unlined ash pond on the site.

20 Q. And what was your intent as far as the size  
21 or the nature of the proposed fly ash pond?

22 A. Well, we try to put it in an operative  
23 location and maximize its size and based on that the  
24 largest pond we could accommodate was just under

## Electronic Filing: Received, Clerk's Office 6/19/2019

1 Q. And if implemented would that type of a  
2 philosophy or approach by the EPA have any impact on  
3 Illinois utilities?

4 A. Yes, it would have a tremendous impact.  
5 We've -- the Illinois Utility Group has done some  
6 cost estimates and among those estimates we have  
7 estimated that if all existing utility ash ponds in  
8 the state were required to be retrofitted or go back  
9 in and put a liner in, it would cost in the  
10 neighborhood of 400 million dollars. And when  
11 you're talking about new --

12 MR. CARLSON: I'm going to object to the  
13 introduction of testimony on the economic costs of  
14 putting in liners or other facilities at different  
15 utility companies on two reasons basically. Number  
16 one is that the Board has clearly held in previous  
17 cases that in a permit appeal proceeding of this  
18 type economic reasonableness and technical  
19 feasibility issues are not relevant to the permit  
20 appeal, whereas they are relevant in other types of  
21 Board proceedings.

22 And to that effect I'd particularly call  
23 attention to page three of a Board opinion in East  
24 St. Louis and Interurban Water Company versus EPA

Electronic Filing: Received, Clerk's Office 6/19/2019

1 which is PCB 76-297 and 298 consolidated. And then  
2 secondly --

3 HEARING OFFICER: Counsel, do you have that?

4 MR. CARLSON: Yes.

5 HEARING OFFICER: Could you show it to  
6 Counsel?

7 MR. COCHRAN: I've just received a copy of  
8 it.

9 MR. CARLSON: And then secondly in the Amax  
10 Coal Company case which was a permit appeal  
11 proceeding PCB 80-63 and 64 consolidated, it was  
12 held there that the history of other facilities  
13 other than the one in question in the particular  
14 permit appeal proceeding was not relevant and that  
15 is cited at the middle of page seven. I'll give you  
16 a copy, Mr. Hearing Officer, here, and also to  
17 Counsel.

18 HEARING OFFICER: Anything further in your  
19 objection, Mr. Carlson?

20 MR. CARLSON: No.

21 HEARING OFFICER: Let me ask you this  
22 question. These economic questions, are they part  
23 of the Agency record?

24 MR. COCHRAN: Yes, they are.

## Electronic Filing: Received, Clerk's Office 6/19/2019

1 HEARING OFFICER: Mr. Cochran, would you  
2 like to respond to --

3 MR. COCHRAN: Yes, I would. I think that  
4 our position here is that among other things the  
5 effluent standards of Part 304 have no application  
6 because we are dealing with leachate and therefore,  
7 it's all outside the definition.

8 If on the other hand the Agency is correct in  
9 saying that they can apply an effluent standard or  
10 limitation to leachate, in particular manganese, the  
11 Board has clearly stated that before standards can  
12 be developed to apply to particular contaminants,  
13 there has to be a study of the treatment process  
14 that would be used to reach that desired limitation,  
15 in this case 1.0 milligrams per liter.

16 And I think in reaching that the Board clearly  
17 says that they have to look at what limitation or  
18 standard it wants to be obtained, the treatment  
19 process to obtain that and whether that is  
20 technically feasible and economically reasonable.

21 And it's our position that they have not done  
22 that in respect to leachate, that there has been no  
23 study on either of those as provided under Section  
24 27 of the Act to allow for an application of that

1 particular type study.

2       So I think that our evidence as to what is  
3 economically reasonable should be admitted for the  
4 purpose of showing that in trying to apply this  
5 particular standard to leachate, the Board would  
6 never take the position that this was an  
7 economically reasonable method and therefore would  
8 not adopt this as part of the rulings.

9       Secondly I think that as far as things outside  
10 the scope as governed by the two cases, I have not  
11 had an opportunity to look at the cases and I  
12 received them just at the same time as you did and  
13 I'm not sure as to the application, but I think the  
14 underlying rule that needs to be applied here is if  
15 there's a question about the admissibility or  
16 relevancy, I think that the Hearing Officer has the  
17 duty to admit the evidence and let the Board make a  
18 determination, especially if the Board is interested  
19 in allowing us to present evidence as to our  
20 position. Even though the EPA may feel confident  
21 that the regulation or rules clearly show that 304  
22 does apply, we don't think it applies for a number  
23 of reasons, one of which is the lack of any kind of  
24 economic reasonableness study. And I think to

1 include that type of evidence is to in a sense to  
2 frustrate us in trying to prove our case which we  
3 have a right to do in these proceedings.

4 HEARING OFFICER: Do both you Counsel have  
5 the Oscar Mayer case in front of you?

6 MR. COCHRAN: I can get it.

7 MR. CARLSON: Yes.

8 HEARING OFFICER: I'd like you to turn to  
9 page four in that case, in the middle of the first  
10 full paragraph, which is "The Board can then  
11 determine which of those materials the Board  
12 intended by Board regulation to be included in the  
13 proper calculation". Do either of you see that  
14 language as bearing on this objection?

15 MR. COCHRAN: We're looking at the first  
16 full paragraph?

17 HEARING OFFICER: Near the bottom of the  
18 first full paragraph.

19 MR. COCHRAN: I don't think that that is  
20 any bearing on the issue raised by Mr. Carlson. I  
21 think that's a determination of an objective  
22 standard is there too much being admitted into the  
23 area or whatever the facts were.

24 MR. CARLSON: I don't think it's really on

Electronic Filing: Received, Clerk's Office 6/19/2019

1 point with this question either in that the Board  
 2 there -- well, the Board there was considering on a  
 3 particular air emission question and it is clear  
 4 there that they only wanted the information that  
 5 would be relevant to what was before the Agency for  
 6 the permit application itself.

7 But also in that air rule it is a less definite  
 8 standard than we're dealing here with here in the  
 9 effluent limitation, whether it is a specific number  
 10 for very specific parameters. And in that sense the  
 11 Board of course considered a number of factors when  
 12 it actually adopted its effluent limitation and that  
 13 of course was appropriate in the regulatory  
 14 proceeding in which they were participating there.

15 But the effluent limitations themselves are as  
 16 set forth in the Board regulations definite numbers  
 17 apply in a definite manner and there's no provision  
 18 there in the Board regulation for the other issues  
 19 that are trying to be raised by CIPS here to be  
 20 considered in whether or not those effluent  
 21 limitations apply.

22 MR. COCHRAN: If I may make one comment, in  
 23 referring to the Oscar Mayer case, on page two, the  
 24 second full paragraph states "In a hearing on a



## Electronic Filing: Received, Clerk's Office 6/19/2019

1 section before the proceedings the applicant must  
2 verify the facts of his application as submitted to  
3 the Agency." We have submitted financial documents  
4 or financial information on the economic impact of a  
5 liner being a requirement for this particular  
6 proposed fly ash pond.

7 And I think that what we're saying is the EPA  
8 application of the 304 effluent standards to  
9 leachate which we do not feel is justified by the  
10 rules and regulations, if it were it would have a  
11 significant economic impact, not only on CIPS but  
12 other utilities, of a nature that has not been  
13 addressed by the Board. And before the Board is  
14 asked to take what in our opinion has no application  
15 for leachate and apply it, they have to assess what  
16 are the consequences of adopting as a position and  
17 we clearly think they will take into consideration  
18 the significant adverse economic impact to all  
19 utilities and in particular CIPS.

20 And that's why we feel that it is not only  
21 admissible but it will carry great weight with the  
22 Board when they're dealing with this particular case.

23 HEARING OFFICER: I'm going to sustain the  
24 objection. I think we do have a proof problem, a

Electronic Filing: Received, Clerk's Office 6/19/2019

1 scope problem. Let's go off the record for a moment.  
2 (Whereupon an off the record  
3 discussion transpired.)

4 HEARING OFFICER: Let's go back on the  
5 record.

6 MR. COCHRAN: Mr. Hearing Officer, in view  
7 of the fact that you have sustained the objection as  
8 to the EPA's position on this, and in view of our  
9 position we would like to make an offer of proof and  
10 have the witness answer the question as directed  
11 with the EPA's objections and your ruling noted for  
12 resolution by the Board.

13 HEARING OFFICER: Well, I'll certainly let  
14 you make an offer of proof. I think we have the  
15 practical question of whether we should do offers of  
16 proof as we go along or whether we should wait until  
17 a convenient point in the proceedings and take them  
18 all. If you'd like to do each -- cover any matters  
19 as to which objections have been sustained at the  
20 conclusion of the testimony of each witness, do you  
21 have any opinion, and Mr. Carlson, do you have any  
22 suggestion?

23 MR. CARLSON: Yes, Mr. Hearing Officer, I  
24 would suggest that as far as offers of proof we hold

Electronic Filing: Received, Clerk's Office 6/19/2019

1 those until the end of the proceeding where they can  
2 be more clearly viewed in a particular portion of  
3 the transcript by the Board and not thereby be quite  
4 so confusing in terms of jumping back and forth in  
5 the evidence.

6 MR. COCHRAN: My recollection was, we might  
7 need the court reporter to help us with it, I  
8 believe the question was asked and a response was  
9 either entirely given or almost entirely given prior  
10 to the objection. I think, Mr. Carlson, correct me  
11 if I'm wrong, you may have objected after he  
12 answered.

13 HEARING OFFICER: We got part of an answer.  
14 I don't know how much more the witness had to say  
15 and I don't know how much further he intended to go  
16 with it.

17 MR. COCHRAN: I think that if we could look  
18 at the answer, I think the offer of proof will take  
19 you know, a minute. All it will involve is with him  
20 giving his response and there's just two aspects of  
21 it.

22 HEARING OFFICER: Well, do you expect -- I  
23 don't know what areas you intend to cover with this  
24 witness. If we may have a minute of offer of proof

1 as to this matter and a minute of something else and  
2 five minutes of something else, you may ultimately  
3 have half an hour of offer of proof, I don't know.  
4 If that's the case I would rather hold it if that  
5 can be done without it completely confusing your  
6 presentation because I know it's hard for an  
7 attorney to go back and pick these things up.

8 MR. CARLSON: If I may comment as far as  
9 the objection, I think he did get to a certain stage  
10 in stating the information before I quite realized  
11 what was coming out in the testimony. And since the  
12 objection was sustained I would ask that that  
13 response be stricken from the record, from the main  
14 part of the record as such. If it's an offer of  
15 proof subsequently that's a different matter.

16 HEARING OFFICER: Well, when an objection  
17 is sustained as to the question and as to the answer --

18 MR. COCHRAN: We'll make our offer of proof --

19 HEARING OFFICER: The answer, because it's  
20 already in the record the answer I'm going to take  
21 that as an offer of proof, that answer. Now, I  
22 think that any further offers of proof as we go  
23 along, Counsel, and this is going to apply to both  
24 of you because it may be on the other foot in a

Electronic Filing: Received, Clerk's Office 6/19/2019

1 little while. Are you able to keep -- without  
2 completely getting things messed up can you keep  
3 your notes and put in your offers of proof at the  
4 completion of each witness?

5 MR. COCHRAN: I'm certain that we can.

6 HEARING OFFICER: Well, let's do it that  
7 way then. Because I think Mr. Carlson is correct, I  
8 think there ought to be some distinction made in the  
9 record so that it's clear to the Board what has been  
10 admitted and what has not. So I will sustain the  
11 objection and I'll strike the answer but I'll let  
12 the part of the answer stand as an offer of proof.  
13 But for any further offers of proof we'll save them  
14 until the conclusion of the testimony of that  
15 witness.

16 MR. COCHRAN: One point though is that  
17 answer will not be dispositive of the offer of proof  
18 because there were two parts of the answer and I  
19 believe Mr. Cochran only answered the first part so  
20 that won't conclude --

21 HEARING OFFICER: I'm assuming you'll go  
22 back and pick up the whole subject again. I'll try  
23 to keep notes for you but I don't promise to catch  
24 everything so you'll have to watch your own records

## Electronic Filing: Received, Clerk's Office 6/19/2019

1 on this. Please continue.

2 Q. What was done with the study that was  
3 prepared by the Illinois Utilities group?

4 A. We submitted it to the -- submitted it to  
5 the Illinois EPA and we also sent copies of it  
6 the Pollution Control Board.

7 Q. And what was the purpose of that?

8 A. We had hoped to be able to persuade the  
9 Agency that it was a reasonable proposal for the  
10 regulation of utility wastes and have the Agency  
11 present that to the Board in some type of rule  
12 making petition and ultimately for the Board to  
13 adopt it as rules governing.

14 Q. So are you saying that included within this  
15 study was a suggested approach to your existing fly  
16 ash pond?

17 A. Well, the -- one of the if not the basic  
18 premise of the proposal was that where you have a  
19 situation with an ash pond for example that's  
20 located near or adjacent to a large river, where the  
21 groundwater flow in that area can be established as  
22 going from the ash pond into the river, where you  
23 can establish that there's no existing or potential  
24 uses of that groundwater between the ash pond and

## Electronic Filing: Received, Clerk's Office 6/19/2019

1 the river, and where you can also establish that  
2 there is no impact on the receiving river, in that  
3 situation with those factual assumptions proven out,  
4 that you should be able to construct an ash pond  
5 without a liner.

6 Q. I think you indicated that your work with  
7 the Illinois Utilities Group was your initial  
8 approach in trying to obtain an approval. Did you  
9 follow it up with a subsequent step?

10 A. That was about a two or three year process  
11 and at the end of that process when we had submitted  
12 our last submittal to the Agency, our last  
13 supplement, that was also the time where due to our  
14 situation with our existing fly ash pond filling up  
15 was it was a point in time where we needed to make  
16 design, engineering decisions as to how we were  
17 going to go.

18 So at that point in time we contacted the Agency  
19 and had a series of preliminary meetings to discuss  
20 our proposal to build a new ash pond at the  
21 Hutsonville Station.

22 Q. And what transpired during the course of  
23 these meetings, in particular regard to your report  
24 furnished by the Illinois Utilities Group?





## Electronic Filing: Received, Clerk's Office 6/19/2019

1 our engineering there, our consulting Hanson  
2 Engineers there, and then we met with several people  
3 from the Agency, Gary Cima, Tim Kluge, Sally  
4 Springer from their Division of Land Pollution  
5 Control, to present our proposal, to get the EPA's  
6 feedback, then they suggested modifications that they  
7 might have and just to get their approval for the  
8 program so we could go ahead and implement it as  
9 quickly as possible.

10 Q. At some point in time did EPA and CIPS  
11 reach an agreement on the nature and the design of  
12 the groundwater study?

13 A. I believe it was at a February 6th meeting  
14 where we presented the proposal, got some input. At  
15 the end of that meeting we requested, received a  
16 verbal authorization from the EPA to go ahead and  
17 implement this study, that it would -- that the  
18 design and study would be adequate to develop the  
19 type of data the Agency would need. And based on  
20 that verbal authorization the next day we began to  
21 install the groundwater monitoring system to develop  
22 this data.

23 Q. And the parameters of this study are  
24 outlined in a series of letters between CIPS and the

Electronic Filing: Received, Clerk's Office 6/19/2019

1 EPA that you submitted as part of your permit  
2 application?

3 A. Right.

4 Q. And that are in the current record.

5 A. Following this meeting where we got the  
6 verbal authorization we followed it up with a  
7 written letter to the Agency summarizing what the  
8 program was and requesting their written approval  
9 which we subsequently obtained in a letter from Tim  
10 Kluge to CIPS.

11 Q. What was the purpose of the groundwater  
12 studies?

13 A. There were three basic purposes. One was  
14 to determine the direction of groundwater flow in  
15 the area of the Hutsonville Station. Two was to  
16 establish existing background groundwater quality in  
17 the area where the proposed pond would be  
18 constructed. And three was to be able to monitor  
19 and assess the impacts of the existing fly ash pond  
20 on local groundwater.

21 Q. Now in the course of development of this  
22 study how did you as a practical matter plan to  
23 actually look at or evaluate the groundwater, was  
24 that through the use of monitoring wells?

Electronic Filing: Received, Clerk's Office 6/19/2019

1 A. Right, I think I'd like to describe the  
2 groundwater monitoring system, I think it's Exhibit  
3 2 which will show the locations of some of these  
4 wells as I refer to them.

5 Q. Why don't you describe the different  
6 monitoring wells and their locations and indicate  
7 where they exist on CIPS Exhibit Number 2?

8 A. Okay. We installed a system of nine  
9 groundwater monitoring wells. M-1 which is on the  
10 west or left edge of the exhibit, it's identified as  
11 M-1, was installed to establish background water  
12 quality, groundwater quality.

13 M-2, 3, 4 and 5 were installed to establish  
14 background quality in the area of the proposed  
15 facility and to be able to monitor the effects of  
16 the proposed facility once it was placed in  
17 operation.

18 M-2 is at the midpoint of the southern edge of  
19 the proposed facility. M-3 is in the southeast  
20 corner of the proposed facility. M-4 is in the  
21 midpoint of the eastern boundary of the proposed  
22 facility. And M-5 is in the northeast corner of the  
23 proposed facility.

24 We installed four additional monitoring wells,

Electronic Filing: Received, Clerk's Office 6/19/2019

1 three of which were installed to monitor some of the  
 2 effects of the existing fly ash pond. And these are  
 3 M-6 which is located at the midpoint of the southern  
 4 edge of the existing fly ash pond. M-7 which is on  
 5 the eastern edge of the existing fly ash pond in  
 6 close proximity to what's identified as existing  
 7 well number two. And M-8 is along the midline,  
 8 midpoint of the side of the existing fly ash pond  
 9 that runs along the Wabash River. M-9 was installed  
 10 as another background well and also to establish  
 11 groundwater flow direction and it is north of the  
 12 station proper.

13 Q. Referring to CIPS Exhibit Number 2, there's  
 14 a -- in the upper right-hand corner of the exhibit  
 15 there's a notation legend that has among other  
 16 things water level contour elevation in feet and GW  
 17 flow directions. What is the purpose of those  
 18 legends?

19 A. Well, these maps or drawings were developed  
 20 to establish in what direction groundwater is  
 21 flowing in this area and basically they do that by  
 22 recording the depth to groundwater in these wells  
 23 and from those elevations developing in an essence  
 24 contours of the subsurface groundwater elevations.

## Electronic Filing: Received, Clerk's Office 6/19/2019

1 From those contours you can draw conclusions as to  
2 which directions the groundwater is flowing.

3 Q. And at the conclusion of the  
4 hydrogeological study, what did this ground  
5 monitoring show?

6 A. Well, with respect to the flow, it shows  
7 that in general groundwater flows from the western  
8 extreme of the plant site toward the east and  
9 discharges into the Wabash River. It also shows  
10 that at least with a couple of surface features the  
11 existing coal pile and the existing fly ash pond  
12 that there are what are referred to as as mounding  
13 effects of groundwater which for relatively short  
14 distances around these two features the flow is  
15 radially, it goes out in all directions from these  
16 planned features and then it turns and resumes the  
17 prevailing general groundwater flow toward the  
18 Wabash River.

19 With respect to the actual groundwater quality  
20 observed, in monitoring wells M-6, 7 and 8 which are  
21 around the existing fly ash pond show that leachate  
22 or subsurface seepage from the existing fly ash pond  
23 is impacting the local groundwater in that area and  
24 the things that were impacted or some of the things

## Electronic Filing: Received, Clerk's Office 6/19/2019

1 that were impacted were manganese, boron, sulfate  
2 and total dissolved solids.

3 With respect to the manganese, sulfate and total  
4 dissolved solids levels, the data indicates  
5 relatively few instances where these levels slightly  
6 exceed the General Use Water Quality Standards. For  
7 boron, the data shows a consistent pattern of  
8 significant exceedances of the boron General Use  
9 Water Quality Standards.

10 Q. You talked about the subsurface leakage or  
11 discharge. What is that commonly known as?

12 A. It's commonly referred to as leachate.

13 Q. Would you describe --

14 HEARING OFFICER: Pardon me, could you  
15 spell that for the record?

16 A. Yes, it's l-e-a-c-h-a-t-e.

17 HEARING OFFICER: Please continue.

18 Q. Could you define it or describe what  
19 leachate is?

20 A. I would describe it as it's -- when you  
21 have a pond or landfill or a pile of material it's  
22 water precipitation or processed water going to that  
23 facility that percolates, it migrates, seeps through  
24 the bottom of that facility down into the underlying

## Electronic Filing: Received, Clerk's Office 6/19/2019

1 soils or groundwater.

2 Q. As a result of your application and  
3 meetings with EPA was your permit application  
4 granted?

5 A. No, it was denied.

6 Q. And isn't it a fact that the permit was  
7 denied because the EPA held that subsurface  
8 discharge violated the effluent standards under Part  
9 304 and the General Use Water Quality Standards  
10 under Part 302?

11 A. That's correct.

12 Q. Were you advised by the EPA what would have  
13 to be done in order to get a permit appeal, permit  
14 approval?

15 A. Yes, in their denial letter it indicated  
16 that a liner would have to be installed as part of  
17 the proposed facility in order to obtain the permit.

18 Q. Do you have any idea what the EPA  
19 requirements were for a liner, what they were  
20 talking about?

21 A. Yes, I have a general idea what they were  
22 probably considering an acceptable liner.

23 Q. And what is the basis of that idea?

24 A. Well, for years the concept that has been

## Electronic Filing: Received, Clerk's Office 6/19/2019

1 discussed or relied on or considered by the Agency  
2 for liners is a standard of 10 feet of 10 to the  
3 minus seven clay and that standard appears in their  
4 current proposal that's before the Board for design  
5 criteria for Class 1 and Class 2 landfills.

6 MR. CARLSON: I'm going to object that that  
7 statement on what kind of liner is required is not  
8 part of the permit record.

9 HEARING OFFICER: Well, I'm going to let  
10 him go on with this for a short period, I think it's  
11 close enough, I'm going to let him go on.

12 Q. Continue on.

13 A. It was our feeling or impression from --

14 HEARING OFFICER: I'm sorry, let me explain  
15 the basis of that ruling. I think that where a  
16 subject has been raised in the EPA record and the  
17 matter has been gone into with the Agency, I'm going  
18 to permit the witness to expand on a subject which  
19 is before the Agency. I'm not going to permit any  
20 new material which was not raised at all. I won't  
21 let you go too far afield but I think that I'm going  
22 to permit this. Please continue.

23 A. I guess it was our feeling or I mean  
24 impression from our discussions, negotiations with



## Electronic Filing: Received, Clerk's Office 6/19/2019

1 the Agency personnel, that something less than a 10  
2 foot 10 to the minus seven foot liner would be  
3 required and that they would find that acceptable in  
4 our application.

5 As to the specific nature, you know, we did not  
6 discuss depths, we were assuming that we were  
7 talking about a considerably thinner liner than a 10  
8 foot or possibly alternative types of liners, soil  
9 cements, tower walls, synthetic liners, a number of  
10 options that they might be agreeable to.

11 Q. And in assessing the permit denial I would  
12 assume there is a period of time where CIPS can make  
13 a determination they are going to do what is  
14 requested by the EPA to get approval, isn't that  
15 correct?

16 A. Well, I think whenever you receive a denial  
17 that includes an alternative for a provision that  
18 the Agency indicates would be acceptable and they  
19 would be able to grant a permit on that basis. You  
20 have to evaluate whether that is acceptable to you  
21 or whether you feel that you know, that your best  
22 course of action or your normal course of action is  
23 to appeal that. I think we went through that process  
24 and our decision was to appeal.

Electronic Filing: Received, Clerk's Office 6/19/2019

1 Q. Was one of the variables that you gave  
2 consideration to during this period of time whether --  
3 in trying to make a decision whether to appeal the  
4 permit or to go ahead and make the required  
5 modifications, the economic impact of the request by  
6 the Agency?

7 A. Certainly.

8 MR. CARLSON: Objection, again that's the  
9 economic reasonableness ruling from the East St.  
10 Louis case cited earlier, 76-297 and 298.

11 HEARING OFFICER: I'm going to let that  
12 question and answer stand but I'm not going to let  
13 you go any further in that area, Mr. Cochran.

14 Q. Drawing your attention to the Part 304  
15 effluent limitations that served as part of the  
16 basis for denying the permit, are you familiar with  
17 the manganese effluent standard?

18 A. Yes, I am.

19 Q. And what is that standard based on?

20 MR. CARLSON: I'd object that he's not been  
21 shown to be an expert on that question as to what  
22 the Board based its regulations on.

23 HEARING OFFICER: I'm going to let him  
24 answer.

## Electronic Filing: Received, Clerk's Office 6/19/2019

1           A.    Based on my review of the rule making  
2 record that the Board went through when they adopted  
3 the effluent standards in particular for manganese,  
4 it's my opinion that it was based on conventional  
5 chemical precipitation, treatment technology  
6 followed by clarification.

7           Q.    In reviewing that treatment process for  
8 arriving at the particular effluent limitation or  
9 standard for manganese, did the Board look at that  
10 particular treatment process as far as to whether it  
11 was technically feasible or economically reasonable?

12          A.    Yes, it did.

13          Q.    And it was based on that decision that they  
14 adopted that particular standard of 1.0 milligrams  
15 per liter?

16          A.    Correct.

17               MR. CARLSON: I would just like to note a  
18 continuing objection for the record.

19               HEARING OFFICER: The record will show a  
20 continuing objection.

21          Q.    Do you know if leachate as you described,  
22 in particular leachate from the proposed fly ash  
23 pond, can be subject to this type of a treatment  
24 process?

## Electronic Filing: Received, Clerk's Office 6/19/2019

1           A.    Yes, it could be if you would -- you would  
2 have to install some type of leachate collection  
3 system at the bottom of your facility to collect the  
4 leachate and then to pump or transfer it into a  
5 traditional type treatment facility.

6           Q.    And do you know whether the Board has  
7 looked at this in any rule making proceeding to  
8 determine whether that's technically feasible?

9           A.    No, they have not in connection with the  
10 effluent standards.

11          Q.    Have they made any determination as to  
12 whether that's economically reasonable?

13          A.    No, they have not.

14          Q.    As you know a second part or second reason  
15 given for the denial of the permit was violation of  
16 the required 302 standards. Are you familiar with  
17 the Part 302 General Use Water Quality Standards?

18          A.    Yes, I am.

19          Q.    In your opinion does the leachate have a  
20 present or potential impact on the agricultural use  
21 of the groundwater at the Hutsonville site?

22          A.    No, there are no present or potential uses,  
23 agricultural uses of this groundwater in the area  
24 between the proposed fly ash pond and the Wabash

## Electronic Filing: Received, Clerk's Office 6/19/2019

1 River.

2 Q. Are there any present or potential  
3 industrial uses contemplated of that groundwater?

4 A. No, other than the continued use by CIPS of  
5 their deep wells for their industrial boiler  
6 purposes and for drinking water.

7 Q. Do you have any idea what the present or  
8 future anticipated needs or use of that groundwater  
9 would be?

10 A. The only anticipated needs are going to be  
11 the continued use by the station through its  
12 remaining life.

13 Q. Dealing with the groundwater in the area of  
14 the Hutsonville Power Station and in particular the  
15 groundwater that is flowing from the site of the  
16 propose fly ash pond toward the Wabash River, do you  
17 have an opinion as to what if any impact it is  
18 having on the Wabash River?

19 A. In my opinion the groundwater that is  
20 flowing from that area, from the existing and near  
21 the proposed fly ash pond is not having any impact  
22 on the water quality in the Wabash River.

23 Q. It's my understanding that if there are  
24 contaminants contained in the fly ash, that they

Electronic Filing: Received, Clerk's Office 6/19/2019

1 could make their way out into what a layman would  
2 consider the natural environment, either through the  
3 direct discharge or outflow into the Wabash River or  
4 through seepage into the groundwater, is that  
5 correct?

6 A. That's correct.

7 Q. Okay. And in viewing those two types of  
8 possibilities, direct discharge and the subsurface  
9 groundwater flowing into the Wabash River, is there  
10 a concept known or dealt with called the dilution  
11 factor that would shed some light on the various  
12 impacts of those two types of sources?

13 A. Well, within the Board's regulations on  
14 water pollution they do take into consideration  
15 dilution ratios and those are the dilution ratios  
16 between what you're discharging versus the flow in  
17 the receiving stream.

18 Q. And what is the significance of dilution  
19 ratios in our particular case in regards to the  
20 proposed fly ash ponds?

21 A. Well, the Wabash River is one of the major  
22 rivers in Illinois with a very large flow so its  
23 dilution potential is very, very great. Therefore,  
24 the -- any impacts of either the surface discharge

Electronic Filing: Received, Clerk's Office 6/19/2019

1 from the fly ash pond or subsurface groundwater flow  
2 into the Wabash River are greatly diminished by the  
3 large flow of the river.

4 Q. Can you briefly describe the contaminants,  
5 any that we are concerned with and which the EPA  
6 addressed in their meetings with you in the permit  
7 denial?

8 A. Yes, the four parameters, manganese, boron,  
9 sulphates and TDS, those boron in the low part per  
10 million range is primarily of concern with respect  
11 to the irrigation of crops. The TDS, total  
12 dissolved solids, sulfate and manganese levels that  
13 are provided in the General Use Water Quality  
14 Standards are primarily or are mainly for the  
15 protection of aquatic life.

16 Q. Did the EPA when it was reviewing your  
17 application to construct the proposed fly ash pond  
18 provide for or allow CIPS a mixing zone?

19 A. No, they did not, in the groundwater.

20 Q. During the course of your performance of  
21 your job duties have you worked with the EPA in  
22 other matters that concerned the establishment of a  
23 mixing zone?

24 A. Yes.

1 Q. And you're familiar with the parameters and  
2 the factors and circumstances and the rules and  
3 regulations that govern the establishment of a  
4 mixing zone?

5 A. Yes, I am.

6 Q. And based on that experience and actual  
7 work with the EPA, do you have an opinion as to what  
8 a proper mixing zone would be in this particular  
9 circumstance?

10 A. Yes, I do.

11 Q. What is that?

12 A. Could I refer to the --

13 Q. Yes.

14 A. In my opinion an appropriately drawn mixing  
15 zone based on the criteria set in the Board's  
16 regulation would say encompass the groundwater  
17 between the proposed facility and extend into the  
18 Wabash River a discrete or finite distance which  
19 would be a matter of a very few feet because the  
20 impact of the groundwater would be quickly lost once  
21 it enters the Wabash River. So that the edge of the  
22 mixing zone would be established at some point  
23 within the Wabash River but that would be a  
24 relatively short distance off its bank.



## Electronic Filing: Received, Clerk's Office 6/19/2019

1 Q. Were you aware of any efforts the USEPA has  
2 undertaken to address a similar type problem?

3 A. Yes, I am.

4 Q. What are those?

5 A. In the development of the USEPA's standards  
6 for hazardous waste management they have  
7 specifically recognized a situation that is very  
8 analogous to the Hutsonville situation where you  
9 have a fly ash pond or surface impoundment that is  
10 located close to a large river where the groundwater  
11 flow is going from the direction of the surface  
12 impoundment toward and discharging into the river,  
13 where there are no uses of that groundwater between  
14 the proposed facility and the receiving river, and  
15 where the discharge, that groundwater impact of that  
16 proposed facility is not impacting the river quality --

17 MR. CARLSON: I object, it has not been  
18 shown that any of USEPA's opinions are relevant in  
19 this proceeding as to the permit.

20 HEARING OFFICER: Is this part of the  
21 record?

22 MR. COCHRAN: Yes. We're trying to  
23 establish that they are relevant because they are  
24 addressing a similar and analogous situation.

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 19th day of June, 2019, I have served electronically the attached **Motion for Leave to File the Attached Reply**, upon the following persons by e-mail at the email addresses indicated below:

Carol Webb, Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph, Suite 11-500  
Chicago, Illinois 60601  
Carol.Webb@illinois.gov

Thomas Cmar  
Jennifer Cassel  
311 S. Wacker Dr., Ste. 1400  
Chicago, IL 60606  
tcmar@earthjustice.org  
jcassel@earthjustice.org

Mychal Ozaeta  
Earthjustice  
1617 JFK Blvd., Ste. 1130  
Philadelphia, PA 19103  
mozaeta@earthjustice.org

I further certify that my email address is [rgranholm@schiffhardin.com](mailto:rgranholm@schiffhardin.com); the number of pages in the email transmission is 82; and the email transmission took place today before 5:00 p.m.

*/s/ Ryan C. Granholm*  
\_\_\_\_\_  
Ryan C. Granholm

SCHIFF HARDIN LLP  
Daniel J. Deeb  
Joshua R. More  
Ryan C. Granholm  
Caitlin M. Ajax  
233 South Wacker Drive, Suite 7100  
Chicago, Illinois 60606  
Phone: 312-258-5633  
Fax: 312-258-5600  
rgranholm@schiffhardin.com

*Attorneys for Dynegy Midwest  
Generation, LLC*