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Amber Battin

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# THE REVIVAL OF NEW SOURCE REVIEW PROVISIONS UNDER THE CLEAN AIR ACT: *MIDWEST GENERATION* LITIGATION

by **AMBER BATTIN**

The Obama administration recently re-invigorated the focus on pollution from energy production by promising to clean up the environment.<sup>1</sup> The center of this revival of regulatory provisions for air quality is Illinois, due to the litigation surrounding the pollution output of six Chicago-area coal energy plants.<sup>2</sup>

The United States and the state of Illinois recently filed a complaint against Midwest Generation, claiming that it is operating the six plants in violation of

the New Source Review provisions of the Clean Air Act.<sup>3</sup> Midwest Generation has improved its pollution output in the past 10 years;<sup>4</sup> however, Illinois Attorney General Lisa Madigan said that she is “very concerned about the negative health effects that these aging plants have on the people who live in the communities where the Midwest Generation facilities are located.”<sup>5</sup> Midwest Generation has not yet filed an answer to the pending complaint.<sup>6</sup>

#### WHAT IS NEW SOURCE REVIEW?

Congress enacted the Clean Air Act<sup>7</sup> in 1963 and added the New Source Review provisions<sup>8</sup> in 1970.<sup>9</sup> With the enactment of the New Source Review provisions, Congress intended that as established energy plants altered their facilities, they would simultaneously install the best available control technology<sup>10</sup> to manage their output of pollutants.<sup>11</sup> When an energy plant is looking to make major modifications<sup>12</sup> to its facilities, beyond routine maintenance, they are required by law to apply for construction permits certifying that the pollution output of the facility will not increase.<sup>13</sup>

#### MIDWEST GENERATION LITIGATION

In 1999, Midwest Generation purchased six Chicago-area coal power plants from Commonwealth Energy.<sup>14</sup> At that time, there were nine maintenance projects in progress to make various repairs to the facilities at the six plants.<sup>15</sup> When it purchased the plants, Midwest Generation accepted liability for these maintenance projects.<sup>16</sup> At the core of the current litigation against Midwest Generation is whether the execution of these maintenance projects sufficiently alters the output of criteria pollutants from those six plants to trigger the application of New Source Review provisions.<sup>17</sup>

Since 1999, Midwest Generation has reduced the output of nitrous oxide from their plants by 50 percent and reduced the output of sulfur dioxide by 30 percent.<sup>18</sup> In December 2006, Midwest Generation entered into an agreement with the Illinois Environmental Protection Agency (IL EPA) to reduce the output of mercury and to further reduce the output of nitrous oxide and sulfur dioxide from the six plants by the end of 2018.<sup>19</sup> Midwest Generation is presently complying with the agreements regarding nitrous oxide and sulfur dioxide and has fully implemented mercury controls.<sup>20</sup> In fact, “Mercury output

from the six plants is down 80 percent,” says Charlie Parnell, spokesperson for Midwest Generation.<sup>21</sup>



Map of the six Chicago-area coal plants operated by Midwest Generation.<sup>22</sup> Their locations are:

*Crawford Station:*  
3501 S. Pulaski Rd.,  
Chicago, IL 60623

*Fisk Station:*  
1111 W. Cermak Rd.,  
Chicago, IL 60608

*Joliet Station:*  
1800 Channahon Rd.,  
Joliet, IL 60436

*Powerton Station:*  
13082 E. Manito Rd.,  
Pekin, IL 61554

*Waukegan Station:*  
401 E. Greenwood Ave.,  
Waukegan, IL 60087

*Will County Station:*  
529 E. 135th St.,  
Romeoville, IL 60446

Despite this reduction in emissions, on July 31, 2007, the U.S. Environmental Protection Agency (U.S. EPA) issued a Notice of Violation to Midwest Generation for operating its plants in violation of the Clean Air Act<sup>23</sup> and its New Source Review provisions<sup>24</sup> regarding opacity and particulate matter.<sup>25</sup> Midwest Generation and the U.S. EPA met on several occasions in attempts to negotiate an agreement that would respond to the issues raised in the Notice of Violation.<sup>26</sup> However, the parties never reached an agreement.<sup>27</sup>

On Aug. 29, 2009, the U.S. government and the state of Illinois filed a lawsuit against Midwest Generation in the Northern District of Illinois, alleging the improper operation of its six Chicago-area coal plants.<sup>28</sup> The complaint identifies four environmental concerns: nitrous oxide emissions, sulfur dioxide emissions, opacity and particulate matter.<sup>29</sup> The claims asserted in the lawsuit are three-fold:

- (1) Failure to file petitions before making modifications<sup>30</sup> to Midwest Generation coal plants;<sup>31</sup>
- (2) Failure to use the best available control technology<sup>32</sup> in operation of their coal plants;<sup>33</sup> and

- (3) Continued operation of coal energy plants in such a manner causing unsafe levels of air pollutants to be released into the air in Illinois.<sup>34</sup>

Mr. Parnell, spokesperson for Midwest Generation, states that, “[Midwest Generation is] unsure as to what action [it is] required to take in regards to opacity and particulate matter.”<sup>35</sup> However, the U.S. EPA Notice of Violation issued to Midwest Generation states that from 2002 to 2006 Midwest Generation’s six plants emitted particulate matter having opacity greater than 30 percent for a total of 38,378 minutes<sup>36</sup> in violation of Illinois law.<sup>37</sup>

Additionally, five citizens groups have moved to intervene in the opacity claims against Midwest Generation.<sup>38</sup> The Sierra Club states, “Midwest Generation’s own reports document that all of the company’s coal plants regularly violate opacity regulations.”<sup>39</sup>

## CONCLUSION

Midwest Generation has not yet filed its answer to the pending complaint, but Mr. Parnell states that “Midwest Generation believes their [December 2006] agreement with the IL EPA [is] compliant with the New Source Review provisions.”<sup>40</sup> What direction this New Source Review litigation involving the US EPA will take is yet to be seen, but the IL EPA has not joined as a party to this lawsuit.

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## NOTES

1 Michael Hawthorne, *Illinois Coal Plants Sued Over Dirty Air*, Chicago Breaking News, Aug. 27, 2009, available at <http://www.chicagobreakingnews.com/2009/08/illinois-coal-plants-sued-over-dirty-air.html?obref=obnetwork>.

2 *Complaint, United States and Illinois v. Midwest Generation*, No. 09-CV-5291 (N.D.Ill. Aug 26, 2009).

3 *Id.*

4 Telephone Interview with Charlie Parnell, Spokesperson, Midwest Generation (Oct. 12, 2009).

5 Michael Hawthorne, *Air Pollution Lawsuit: Federal and State Lawyers Sue Midwest Generation over Illinois Power Plant Emissions*, CHI. TRIBUNE, Aug. 28, 2009, available at <http://www.chicagotribune.com/health/chi-chicago-pollution-suit-28-aug28,0,2243476.story>.

6 Parnell, *supra* note 4.

7 42 U.S.C. §§ 7401-7671 (2009).

8 42 U.S.C. §§ 7475, 7501-7515 (2009).

9 S. Rep. No. 101-549 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3387, 3395.

10 The term ‘best available control technology’ is defined by statute as that technology which reduces pollution output as much as possible taking into account the individual circumstances involved. 42 U.S.C. § 7479(3) (2009).

11 Nathaniel Lord Martin, *The Reform of New Source Review: Toward a More Balanced Approach*, 23 STAN. ENVTL. L.J. 351, 356 (2004).

12 The term ‘modification’ is defined by statute as, “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” 42 U.S.C. § 7411(a)(4) (2009).

13 Martin, *supra* note 11.

14 Parnell, *supra* note 4.

15 *Id.*

16 *Id.*

17 Complaint, *supra* note 2.

18 Parnell, *supra* note 4.

19 *Id.*; See also Illinois Gov. Blagojevich Announces Historic Agreement with Midwest Generation to Reduce Power Plant Pollutants and Deliver Dramatic Clean Air Benefits, Great Lakes Directory, Dec 13, 2006, available at [http://www.greatlakesdirectory.org/il/121106\\_great\\_lakes.htm](http://www.greatlakesdirectory.org/il/121106_great_lakes.htm).

20 Parnell, *supra* note 4.

21 *Id.*

22 Map created using Google Maps ([maps.google.com](http://maps.google.com)) on September 15, 2009.

23 42 U.S.C. §§ 7401-7671 (2009).

24 42 U.S.C. §§ 7475, 7501-7515 (2009).

25 *Notice and Finding of Violation issued to Midwest Generation, LLC, and to Commonwealth Edison Company*, U.S. EPA, (redacted in conjunction with a claim of Confidential Business Information under 40 C.F.R. Part 2, Subpart B), July 31, 2007.

26 Parnell, *supra* note 4.

27 *Id.*

28 Complaint, *supra* note 2.

29 *Id.*

30 Definition of ‘modification’, *supra* note 12.

31 Complaint, *supra* note 2, Counts 1, 3, 4, 6, 7, 9, 10, 12, 13, 15, 17, 18, 20, 21, 23, 24, 26, 27, 29, 36, 38.

32 Definition of ‘best available control technology’, *supra* note 10.

33 Complaint, *supra* note 2, Counts 3, 6, 9, 12, 13, 15, 20, 23, 26, 27, 29, 38.

34 Complaint, *supra* note 2, Counts 2, 5, 8, 11, 14, 16, 19, 22, 25, 28, 30, 32, 34, 35, 37.

35 Parnell, *supra* note 4.

36 U.S. EPA, *supra* note 25.

37 35 Ill. ADC § 212.123 (2009).

38 The citizens groups are: Citizens Against Ruining the Environment, The Environmental Law and Policy Center, Natural Resources Defense Council, Respiratory Health Association of Metropolitan Chicago and Sierra Club, *Sierra Club Joins Lawsuit Against Midwest Generation*, Sierra Club, Oct. 12, 2009, available at <http://www.sierraclub.org/coal/il/pr/pr2009-10-21.aspx>.

39 *Sierra Club Joins Lawsuit Against Midwest Generation*, Sierra Club, Oct. 12, 2009, available at <http://www.sierraclub.org/coal/il/pr/pr2009-10-21.aspx>.

40 Parnell, *supra* note 4.