

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NATURAL RESOURCES DEFENSE COUNCIL)
PRAIRIE RIVERS NETWORK, and)
SIERRA CLUB,)

Petitioners,)

v.)

PCB 13 - 017
(PERMIT APPEAL)

ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY and DYNEGY MIDWEST)
GENERATION, INC.,)

Respondents)

To:

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Please take notice that today I filed with the office of the Clerk of the Pollution Control Board the **Petitioners' Reply Memorandum of Law in Support of Petitioners' Motion for Summary Judgment** on behalf of the Natural Resources Defense Council, Prairie Rivers Network, and Sierra Club, a copy of which is hereby served on you.



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Dated: March 24, 2014

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**NATURAL RESOURCES DEFENSE COUNCIL,)
PRAIRIE RIVERS NETWORK, and)
SIERRA CLUB,)**

Petitioners,)

v.)

**PCB 13 -017
(PERMIT APPEAL)**

**ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY and DYNEGY MIDWEST)
GENERATION, INC.,)**

Respondents.)

**REPLY MEMORANDUM OF LAW IN SUPPORT OF
PETITIONERS' MOTION FOR SUMMARY JUDGMENT**

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Introduction

In their motion for summary judgment and supporting memorandum, Petitioners demonstrated that the permit IEPA¹ issued to the Havana Facility to address its mercury discharge was based on insufficient information, and unreasonable and unlawful interpretation of that information. The memoranda submitted by defendants IEPA and Dynegy do not demonstrate to the contrary. Their arguments attempt to downplay or exempt IEPA entirely from the requirements of law for reasons unsupported by the law itself; and to defend IEPA's decision with the circular reasoning that since IEPA concluded the problem was nothing to worry about, it must be nothing to worry about.

Respondents do not demonstrate that IEPA had sufficient technical and factual support for its conclusions, because they cannot. The record does not support IEPA's decision not to establish mercury limits, but offers only statements that are at best unsupported and at times flatly wrong. The record shows that the Agency based its decision not to include a permit limit for a highly-toxic pollutant regulated in the parts per trillion on vague statements that the discharge will be "minimal." Agency staff expressly acknowledged the existence of information indicating to the contrary, but decided to consider it only "outside of renewal," *i.e.*, not as part of the determination whether to issue the Permit to the Facility. IEPA declined to evaluate antidegradation alternatives based upon the regulated entity's desire not to spend more money, without even determining how much money was at issue. The Agency furthermore admits that it performed no case-by-case BPJ analysis to establish a TBEL as unquestionably required by the CWA – indeed, it did not even respond to Petitioner's comments on that issue.

¹ Abbreviations used in this reply brief are defined in the 'initial Memorandum of Law in Support of Petitioners' Motion for Summary Judgment ("Initial Memorandum") unless otherwise noted.

In the face of all that, Respondents take the only course available to them, to argue that this lack of care is sanctioned by law, and that none of the three permitting requirements addressed by Petitioners require anything more. These arguments are unavailing. The requirement to ensure that pollutants do not exacerbate impairment of the receiving waterbody is mandatory – but even to the extent the agency has discretion not to follow Board rules, that discretion cannot be exercised with a deliberate blind eye toward available information that the Agency chose to look at only “outside of renewal.” While antidegradation review may be more stringent in some cases than others, the review here was not even minimally sufficient. IEPA’s approach to antidegradation review is effectively an attempt to implement a *de minimis* threshold that was rejected by the Board – and to do so with regard to an increased discharge of a toxic bioaccumulative pollutant, which is always significant.

Respondents also cannot carve out an exemption for IEPA from the clear requirement of the CWA and Illinois law that the Agency conduct case-by-case BPJ analysis in order to establish a TBEL. Respondent Dynegy’s effort to do so rests on two legal conclusions that are demonstrably wrong: that the existing 1982 ELG already covers ACI waste, and that case-by-case BPJ TBELs are discretionary rather than mandatory. In fact, the 1982 ELG *expressly exempted* air pollution control waste from coverage, reserving it for future rulemaking (ACI did not even exist then as a control technology). Dynegy’s attempt to wish away the mandatory case-by-case requirement is based on a gross misreading of the text of the requirement itself. Respondents furthermore fail in their effort to justify IEPA’s failure to respond to specific comments on this issue.

Any or all of these legal flaws require a remand of the Permit as procedurally and substantively in violation of the law. The Board should not sanction either IEPA’s inadequate

analysis or Respondents' excuses for it as a basis for declining to include a Permit limit on a dangerous toxic pollutant.

Point I

IEPA UNLAWFULLY TURNED A BLIND EYE TO AVAILABLE EVIDENCE THAT THE FACILITY'S DISCHARGE MAY HAVE REASONABLE POTENTIAL TO CAUSE OR CONTRIBUTE TO MERCURY IMPAIRMENT OF THE ILLINOIS RIVER

Respondents do not meaningfully dispute that IEPA failed to perform analysis to assess whether increased mercury discharge from the Facility had reasonable potential to cause or contribute to an exceedance of water quality standards in the Illinois River, which is already listed as impaired for fish consumption.² Nor do they deny that, to the extent such a reasonable potential exists, a WQBEL should have been imposed. Instead, Respondents' principal argument is that, notwithstanding the express mandatory requirement to perform reasonable potential analysis, agencies may refuse categorically to perform such analysis any time facility-specific data is not available. However, there is no support for IEPA's across-the-board refusal to establish WQBELs based on anything other than facility-specific data, and it violates the law and common sense to ignore relevant data just because it does not come from the specific facility under consideration.³ In this case, it is clear as well that IEPA knew such other data sources were available, but decided not even to consider them in connection with Dynegey's permit

² Dynegey suggests that the listing of the Illinois River as impaired for mercury is somehow of less significance here because that impairment is predicated on the risks of consuming mercury-laden fish rather than a direct measure of instream water quality. Dynegey Memorandum at 13 n. 58. This is a distinction without a difference. IEPA itself relied upon the impaired status of the Illinois River in characterizing it; and the relevant question for purposes of a reasonable potential determination is whether the waterbody is use-impaired, not just whether it numerically exceeds the instream criteria protecting that use. In this regard, it bears note that Bob Mosher suggested in the same proceeding cited by Dynegey that the 12 ng/L criterion may not be sufficient to protect the fish consumption use based upon experience during the 20 years since the criterion was developed. See *Phillips 66 Co. v. IEPA*, PCB 12-101, October 3, 2012 transcript at 125.

³ For example, would someone claim it reasonable to allow an artillery range to be located across the street from a hospital because there was as yet no facility specific data regarding the noise and dust that would come from this particular artillery range?

renewal. The Agency relied instead on non-information from a report proffered by the permittee that does not support its conclusions, coupled with its own unsupportable factual assumptions and loose guesstimate that the discharge of toxic mercury would be “minimal” and standards in the receiving waterbody would not be exceeded.

A. IEPA Had an Obligation to Consider Available Data Concerning the Effluent Proposed to be Discharged

As discussed in Petitioners’ Initial Memorandum, the language of the Illinois Act and federal law create a mandatory requirement that IEPA ensure when issuing NPDES permits that discharges do not cause or contribute to an exceedance of water quality standards. Initial Memorandum at 15-16. *See* ILL. ADMIN. CODE tit. 35 § 309.141(d)(1)⁴ (emphasis added) (“In establishing the terms and conditions of each issued NPDES Permit, the Agency *shall* apply and ensure compliance with ... [a]ny more stringent limitation . . . necessary to meet water quality standards.”); ILL. ADMIN. CODE tit. 35 § 304.105 (emphasis added) (“no effluent *shall*, alone or in combination with other sources, cause a violation of any applicable water quality standard.”); ILL. ADMIN. CODE tit. 35 § 309.143 (emphasis added) (“Effluent limitations *must* control all pollutant or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Agency determines are, or may be, discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard”). *See also* ILL. ADMIN. CODE tit. 35 § 309.141(d)(2) (incorporating federal WQBEL requirements by reference); 33 U.S.C. § 1312 (CWA § 303 WQBEL requirement); 40 C.F.R. §

⁴ IEPA appears to suggest that the language “wherever applicable” in the introductory language of Ill. Admin. Code tit. 35 § 309.141, defining overall permitting requirements, somehow calls into question the applicability here of the WQBEL requirement in § 309.141(d)(1). However, the Agency provides no basis why the requirement is not applicable to a discharge of a toxic pollutant to an impaired waterbody – it clearly is. The “whenever applicable” language plainly requires that the provision be applied whenever the law requires. That language cannot be sensibly interpreted to license IEPA to ignore the law whenever it thinks complying with it would be difficult, or whenever data necessary to make a decision is not available in the form that the IEPA would prefer.

122.44(b) (emphasis added) (“each NPDES permit *shall* include. . . any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under . . .CWA necessary to . . . [a]chieve water quality standards established under section 303 of the CWA”).

In view of this emphatically mandatory language, it is important to proceed very cautiously in inferring unwritten exceptions to it. Yet such caution is nowhere to be found in either IEPA’s permit decision or Respondents’ briefs defending it. IEPA quotes itself, without further support, making a sweeping conclusion in a responsiveness summary written in connection with issuance of another permit⁵ that reasonable potential analysis can only be conducted based upon facility-specific data. IEPA Memorandum at 8. Dynegy argues similarly broadly, based on a misreading of USEPA guidance, that the Agency has unbounded discretion in deciding whether to consider anything other than facility-specific effluent monitoring. Dynegy Memorandum at 13-15.

Nothing in the law, however, supports these claims to categorical and unlimited discretion to disregard available facts. Any unwritten discretion that IEPA may have to ultimately conclude that reasonable potential analysis necessitates facility-specific data in a given instance is necessarily bounded by the basic requirement of rationality and consideration of available facts inherent in the requirement that permit issuance be supported by “substantial evidence,” *Des Plaines River Watershed Alliance, et al. v. IEPA and Village of New Lenox*, PCB 04-88, slip op. at 7 (Nov. 17, 2005), coupled with the plainly mandatory requirement that the

⁵ IEPA’s brief appears to suggest, nonsensically, that the fact that Petitioners did not challenge the cited Met-South, Inc. permit means that they acquiesced to everything in it. No law supports the notion that citizens have impliedly approved agency conduct if they do not file an action to challenge it, regardless of standing, resources, institutional priorities, or other usual citizen enforcement considerations. Certainly, IEPA and the Board should not wish to force citizen groups to bring an appeal whenever they feel something wrong was stated by IEPA in a responsiveness summary.

Agency “shall...ensure” compliance with water quality standards in issuing a permit. ILL. ADMIN. CODE tit. 35 § 309.141(d)(1).

In fact, the TSD relied upon by Dynegy to argue that data from sources other than the facility at issue need not be considered plainly implies that there are some instances where a WQBEL based upon data other than facility-specific monitoring data is necessary, stating that such data is to be used “If the regulatory authority so chooses, *or if the circumstances dictate....*” TSD at 50. It furthermore makes clear that a determination whether this approach is necessary should rest upon careful scrutiny of available information, stating that postponement of a WQBEL in favor of monitoring is only appropriate if the agency “after evaluating all available information on the effluent, in the absence of effluent monitoring data, is not able to decide whether the discharge causes, has the reasonable potential to cause, or contributes to, an excursion above a numeric or narrative criterion.” *Id.* at 51. USEPA clearly did not contemplate that permitting authorities could implement a categorical, across-the-board rule that outside data is *never* considered, and ignore without further analysis any such data that came their way.

At issue is not whether the IEPA had the option to carefully consider available data concerning ACI-contaminated effluent from outside the Facility and conclude, after analysis, that this data could not form the basis for developing WQBELs – because that is not at all what happened here. As discussed in Subsection B, Agency staff expressly acknowledged the availability of data from the Newton facility, but declined to even consider it in the context of issuing the Permit. It did so even though that data had formed the basis for a WQBEL at

Newton.⁶ IEPA moreover could readily have obtained extensive data from USEPA gathered in connection with USEPA's ultimate decision to recommend a zero discharge standard. Instead, the Agency chose to rely on an industry-sponsored laboratory-scale study that the study authors themselves cautioned against relying upon, and a dated and inapplicable USEPA report, together with IEPA's own guesswork and misinformation.

In the end, IEPA's extreme posture on this issue proves too much. Its position amounts to an across-the-board refusal to predict an undesirable event – in this case, exceedance of water quality standards – before it actually happens, no matter what available data may support such a prediction. Such an assumption is fundamentally irrational and highly risky. Moreover, as discussed in Point II, antidegradation analysis expressly requires consideration of “Agency experience with factually similar permitting scenarios,” III. Admin. Code tit. 35 § 302.105(c)(2)(C).⁷ Also, as discussed in Point III, USEPA has stated very clearly that lack of monitoring data does not excuse failing to establish technology-based limits, and such limits must be established based on outside data if there is no facility-specific data available.

⁶ As discussed in Point II, *infra*, IEPA was expressly *required* under the antidegradation regulations to consider “Agency experience with factually similar permitting scenarios” in developing its antidegradation analysis, including identification and characterization of the waste stream. Admin. Code tit. 35 § 302.105(c)(2)(C)(iii).

⁷ It is noteworthy that in the antidegradation context, Dynegy touts data from a different facility, the Baldwin coal plant, as a basis for characterizing the ash pond effluent at the Havana Facility when facility-specific information was not available. Dynegy states, in its argument concerning antidegradation, “DMG's antidegradation submission included sampling data of scrubber/ACI waste from its Baldwin facility because that waste stream did not yet exist at the Havana Station. R. at 000531. Although the pond systems and ultimate discharges of the two stations are significantly different, the similarity of the air pollution controls made Baldwin sampling data the most representative data available.” Dynegy Memorandum at 6 and 18 n. 79.⁷ While Dynegy's citation of Baldwin data is inapplicable to the ACI-contaminated waste (*see infra* Point II), it is clear that even Dynegy does not in practice hold the view that data from other facilities cannot be considered.

B. The Agency Categorically Rejected Available Data in Favor of Plainly Insufficient Information

IEPA's decision not to impose a WQBEL, and to require only monitoring, was made on irrational grounds. The Agency refused to even consider available monitoring data, turning instead to information that was facially insufficient and unreliable. If there is a basis for allowing years of mercury pollution before placing a limit on the Facility's discharge of toxic mercury, the record shows IEPA never took the steps necessary to identify that basis.

1. The Agency Irrationally Refused to Consider the Newton Data

As discussed in Plaintiffs' Initial Memorandum, IEPA was well aware that at another Illinois coal plant that had installed ACI equipment, the Ameren Newton facility, mercury in the plant's discharge had been increasing steadily since the installation of ACI equipment, and "we have seen mercury in the [ash] pond effluent that exceeds the WQS." The permit writer acknowledged, "we have not reviewed very much data in the course of WQ analysis at permit renewal," to which the Bureau of Water chief responded, "I would not want us to continue to assume that no or very little mercury is being discharged if we have monitoring data in house that says differently." Despite that, the two decided to review monitoring data from coal ash ponds "outside of [Dynegey's] permit renewal, just to evaluate what the data are telling us." Initial Memorandum at 11, citing R. 692-93 (Sept. 5, 2012 email exchange between Maria Willhite and Bob Mosher).

Thus, despite acknowledging that it would be improper to "continue to assume" minimal discharge of mercury if the Agency had data on hand to the contrary, that is exactly what IEPA did, describing the mercury discharge increase as "minimal" and discounting its significance multiple times throughout the record. *See* Initial Brief at 17-18. That decision was especially arbitrary when viewed in light of IEPA's earlier decision to include a WQBEL at the Newton

facility. In its responsiveness summary accompanying the Newton permit,⁸ the Agency took the position that mercury effluent is “difficult to monitor” and the data “difficult to interpret”; that there was a limited track record of ACI-contaminated wastewater data in Illinois on which to base a limit; and that some of the measurements of mercury in the effluent were “very low.” Despite all that, IEPA made the decision to impose a WQBEL “due to a reasonable potential to exceed water quality standards,” that “will require the discharge to meet the human health water quality standard found at 35 IAC 302.208(f)” of 12 ng/L, based on data points indicating mercury concentrations of 17.8 and 18 ng/L in the Newton effluent. IEPA appropriately treated this incomplete information concerning a highly toxic pollutant as sufficient basis to impose WQBEL, rather than taking the position that incomplete information precludes doing so. It makes no sense for IEPA to refuse to do the same in this case merely due to the lack of facility-specific data.

It is possible, as Dynegy suggests, that the Newton facility is sufficiently unlike the Havana facility that a comparison of the two effluents is not useful. Dynegy Memorandum at 14-15. However, the extent to which Newton data is relevant is not a question that can be appropriately answered before the Board with non-record information supplied by Dynegy in its brief on appeal to the Board,⁹ which IEPA itself declined to consider during the permit issuance process itself. That is particularly the case when even IEPA staff, although declining to consider it in the context of issuing Dynegy’s permit, thought it sufficiently pertinent to assess “outside of renewal” to determine whether its assumptions of minimal mercury discharge associated with ACI residue deposited to ash ponds were correct; not to mention sufficiently reliable to form the

⁸ The Newton Responsiveness Summary is available at <http://www.epa.state.il.us/public-notices/2011/ameren-newton/responsiveness-summary.pdf>. The cited language is at pp. 13-15.

⁹ Dynegy acknowledges that the information in its brief concerning differences between the Newton and Havana facilities is not in the record. Dynegy Memorandum at 14 n. 64.

basis for a WQBEL at the Newton facility. The applicability of the Newton data should be assessed on remand, so that the Board can review the matter if need be based on a proper record.

2. IEPA Focused on Unreliable and Inapplicable Information

As discussed in the Initial Memorandum, Dynegey pointed IEPA to a laboratory-scale, industry-sponsored study, which IEPA relied heavily upon. IEPA also made passing reference to the 2006 USEPA Characterization, which was a study of leaching of ACI-contaminated waste into groundwater. Initial Memorandum at 24-25.

Petitioners' concern with the EPRI study is not, as Dynegey suggests, that it was poor science. Petitioners assume for purposes of this discussion that the study was properly performed, notwithstanding its industry origins and sponsorship. The problem, rather, is that by its own terms, the study was far too preliminary to form the basis for any conclusions regarding the fate of mercury and other toxic pollutants in ACI-contaminated waste – with the EPRI researchers themselves characterizing it as “a preliminary review of a small number of samples intended to identify potential issues and guide future research,” and noting that “[l]ong-term fate of the mercury, such as mercury adsorbed to carbon that settled to the bottom of the pond, was not measured during this test.” R. 994 and 1007, EPRI Study at v and 2-3. The full context for the tiny snippet of language relied upon by IEPA is as follows:

The fly ash sluice water with carbon had a mercury concentration of 3.3 ng/L. The fly ash sluice water without carbon had a concentration of 2.5 ng/L. It is not possible, from this limited data, to determine whether the difference between these low mercury concentrations is statistically significant, however, the low magnitude of the concentrations would suggest that mercury captured from the flue gas by the carbon is generally stable and does not leach out during the simulated sluicing process.

EPRI Study at 2-3, R. 1007. Thus, the laboratory analysis showed the dissolved mercury actually increased with the addition of mercury-contaminated carbon, but the researchers were unable to draw any conclusions from that, noting only that the overall levels “suggest” that mercury was “generally” stable in the “simulated” laboratory process.

The researchers specifically warned against applying the study’s results to real-world ash ponds:

The release of volatile metals from carbon is not likely to occur in aerobic water. In fact, carbon is used in water treatment to remove parameters from the water. However, under anaerobic conditions, mercury may be released from ash. Mercury has been shown to convert to soluble methyl mercury under anaerobic conditions in the bottom of streams containing organic sediments and mercury. When this conversion occurs, it causes a higher concentration of mercury than would be expected from inorganic mercury solubility. Fly ash ponds typically have very little organic material. However, the possibility exists that the decay of an algae bloom, due to ammonia levels, settled on the bottom of the pond could create an anaerobic condition - a layered combination of algae and fly ash with carbon.

EPRI Study at 2-3R. 1007. They further stated that, despite their preliminary data showing mercury being sorbed to the carbon particles, the study did not answer the question whether the contaminated carbon particles actually settle in the ash pond as opposed to being a “compliance concern”:

Of significant interest is whether the TSS and specifically the carbon particles are removed in the ash pond. Since the carbon particles may contain Hg, carbon particles that do not settle may be a compliance concern. Mercury is the main parameter targeted for removal from the flue gas via the carbon injection, and data from only one sample pair of mercury were available in this study.

EPRI Study at 3-1, R. 1313.

In view of these self-defined limitations to the study, IEPA had no basis to use it to draw a general conclusion that levels of toxic mercury would be “minimal” and not sufficient to

contribute to an exceedance of water quality standards in the Illinois River. The EPRI study was simply not a valid basis for any conclusion at all.

IEPA's reliance upon the 2006 USEPA Characterization was similarly unfounded given that, as pointed out in the Initial Memorandum, it not only addressed underground leaching rather than surface water discharge from ash ponds, but was an initial step in USEPA's investigatory process that ultimately concluded in its recommendation of zero discharge from ACI-contaminated waste. 78 Fed. Reg. 34431, 34456 (June 7, 2013). At issue is not, as Dynegy suggests, whether USEPA "discredited" the study as unscientific (Dynegy Memorandum at 12), but rather whether USEPA ultimately considered it to support allowing continued use of ash ponds to control ACI-contaminated waste. Self-evidently, it did not.

What IEPA should have done, rather than relying on a largely irrelevant study conducted far back in the history of USEPA's ongoing investigation of coal ash pond discharges, was to rely on the more recent USEPA data concerning this investigation that was available to them; and obtain relevant additional data that was available from USEPA. As discussed in the Initial Memorandum, USEPA conducted a survey in 2010 leading to the conclusion that settling ponds were an antiquated and ineffective means of controlling mercury discharge from ash ponds. Additionally, it concluded in the USEPA 2009 Report cited by Petitioners that settling ponds are an ineffective means of removing dissolved mercury; and issued the Hanlon Memo concluding that "[t]echnologies more advanced than settling ponds are available and more effective at removing both soluble and particulate forms of metals." NRDC Comments at 11, R. 902 (quoting Hanlon Memo Attachment A at 3-4).

Dynegy attempts to discount the Hanlon Memo conclusions because they specifically addressed the dissolved contaminants in flue gas desulfurization (FGD) wastewater rather than ACI residue, but this is not a valid distinction. Dynegy Memorandum at 38. As discussed in the Initial Memorandum, USEPA has specifically identified the presence of the dissolved form of pollutants in ACI-contaminated wastewater as a basis for the conclusion that wet ash ponds are an insufficient form of control for such wastewater, stating, “Although surface impoundments can effectively remove particulate forms of metals and other pollutants, they are not designed for nor are they effective at removing other pollutants of concern such as dissolved metals and nutrients. Effluent limits based on dry handling would completely eliminate the discharge of pollutants in FGMC [ACI-contaminated] wastewater.” USEPA Draft ELG, 78 Fed.Reg. at 34464.¹⁰ Additionally, as discussed *supra* this section, the EPRI study did not hold itself out as conclusive on the question whether ACI waste generated dissolved mercury in ash ponds (the report identified conditions in which mercury could be converted to soluble form) and USEPA clearly did not consider it so. Moreover, neither the Hanlon memo nor the Draft ELG concluded that settling ponds are completely effective at removing the particulate fraction of mercury, with both the Hanlon memo and USEPA specifically concluding that “[t]echnologies more advanced than settling ponds are available and more effective at removing *both soluble and particulate forms* of metals.” NRDC Comments at 11, R. 902 (quoting Hanlon Memo, *supra*, Attachment A at 3-4) (emphasis added); *see* 78 Fed.Reg. at 34459. While that conclusion applies most obviously to a BPJ BAT determination establishing a TBEL, it also severely undercuts any

¹⁰ IEPA asks the Board to disregard all citations to the Draft ELG on the ground that it was not part of the record. IEPA Memorandum at 13. Leaving aside IEPA’s own reliance on an extra record document (the Met-South, Inc. permit responsiveness summary), the draft ELG, a public document, is cited here to respond to an assertion by Dynegy that has no support in the record, *i.e.*, that dissolved mercury is not of concern in assessing discharge of mercury ash ponds containing ACI residue. The Draft ELG should be seen also as an authority, like a treatise, rather than as evidence that must be in the record.

reliance on the EPRI study for the proposition that dissolved mercury is not present in the ash pond wastewater so as to potentially cause or contribute to an exceedance of water quality standards.

The question is not whether IEPA could have carefully analyzed all of this information and reached a reasoned conclusion that the situation here was sufficiently unlike Newton as to warrant a decision not to impose a WQBEL; or that the available information was otherwise insufficient to reach a conclusion. Once again, that is not what happened here. In place of reasoned analysis, IEPA ignored available data and leaped to a general conclusion that discharge of mercury would be “minimal” and hence not of concern to water quality based upon wholly unreliable sources.

3. IEPA Based its Determination upon Assumptions that were Demonstrably Wrong

IEPA not only exhibited an irrational approach to available data, but relied upon strange and obviously wrong statements in the RS to support its decision. Specifically, it supported its decision as follows:

Any sorbent that does discharge will settle in the Illinois River. Mercury is strongly attracted to sediments where it can be transformed into methyl mercury by bacteria. Mercury would remain in the sediments or become methylated. Mercury discharging in the permitted low parts per trillion range will not result in the contamination of sediments.

RS at 13 ¶ 34, R. 684. Petitioners explained in the Initial Memorandum the bizarre nature of these statements. *See* Initial Memorandum at 19, 25. There is no “permitted low parts per trillion” range relevant here, because *there is no permitted discharge level at all*. And the statement concerning methyl mercury is the exact opposite of the truth, since methyl mercury is the more toxic form that accumulates in fish tissue.

No attempt to explain these gross misstatements was made by either Respondent. They are important here in underscoring the degree of irrationality underpinning IEPA's decisionmaking. It appears from this statement that the permit writer assumed the presence of a nonexistent mercury limit in the Permit (or at least was mightily confused on the point), and misunderstood the most basic facts concerning evaluation of the potential impact of mercury discharge on compliance with the applicable health-based water quality standard.

Additionally, Dynegy asserts that IEPA's statements that the mercury discharge would be "minimal" should be interpreted to mean nonexistent or undetectable, because the Agency in other statements suggests such a conclusion. Dynegy Memorandum at 18-19. However, as discussed in Point III, IEPA's conflicting statements are merely more evidence that the Agency did not think its conclusions through. When dealing with a highly toxic pollutant that is both detectable and regulated in the low parts per trillion, the difference between "minimal" and "undetectable" is quite meaningful.

The permit should be therefore remanded with instructions that the Agency conduct a reasonable analysis on the critical issue of the Facility's potential to cause or contribute to an exceedance of mercury standards based upon accurate and available facts and assumptions.

Point II

IEPA'S ANTIDEGRADATION ANALYSIS DID NOT MEET MINIMUM REGULATORY REQUIREMENTS

Respondents defend IEPA's extraordinarily limited antidegradation analysis not so much by arguing that it was complete (which it fairly obviously was not), but by contending that the

few cursory sentences with which the Agency summarily dispatched the issue were all that was necessary at the far end of a “sliding scale” of required levels of review. IEPA Memorandum at 10. Petitioners do not claim that every discharge calls rigidly for the same level of scrutiny. But that does not mean IEPA can flout even the minimal requirements applicable to *any* antidegradation analysis, and gloss over such deficiencies with glib assurances that discharges of a toxic bioaccumulative pollutant are too small to worry about.

In addition to their concern with IEPA’s failure to comply with the antidegradation prohibition against causing or contributing to an exceedance of water quality standards, which mirrors the WQBEL requirement and is addressed in Point I, Petitioners’ Initial Memorandum identified the following fatal deficiencies in IEPA’s antidegradation analysis:

- *Failure to characterize the waste stream.* Dynegy submitted no information concerning characterization of its ACI-contaminated waste stream except the fact that it would be placing up to .6 pounds of mercury per day into the ash pond and the EPRI report (the information submitted from its Baldwin facility did not reflect ACI waste, only FGD waste). IEPA conducted no further waste stream characterization before concluding that mercury discharge would be “minimal,” and did not address at all the presence of other ACI-related contaminants, including arsenic and selenium. Initial Memorandum at 22-26.
- *Failure to meaningfully evaluate alternatives.* The alternatives analysis to establish whether the increased discharge is “necessary” mentioned only one alternative, dry ash landfilling. It acknowledged the feasibility of that alternative, but provided no cost data concerning it, and rejected it essentially on the basis that Dynegy did not wish to pay for it. The Agency also did not consider the NSPS requiring zero-

discharge handling that should have governed the selection of alternatives, or USEPA's conclusions in the Hanlon memo (as well as other data readily available from USEPA) that there are superior alternatives to wet ash ponds. Initial Memorandum at 26-32.

- *Reliance on a non-existent exemption.* IEPA asserted, incorrectly, that it was under no obligation to perform antidegradation review at all because the Facility's increased loading was not the result of "a major change in ash handling." Initial Memorandum at 32 -33.
- *Conflation of unrelated benefits.* IEPA's analysis essentially used the fact that Dynegey's ACI system will reduce air pollution and associated water deposition as a basis to downplay the significance of the identified "minimal" discharge. Initial Memorandum at 21-22.

Respondents proffer a few arguments why individual elements of IEPA's antidegradation analysis were purportedly sufficient, but rely mostly on the notion that variation in the required level of antidegradation scrutiny requires that the Board give it a pass entirely. Neither approach has merit.

A. IEPA's Antidegradation Analysis Did Not Meet the Basic Requirements of Law as Interpreted by the Board and USEPA

Apart from their arguments (addressed in Subsection B, *infra*) for an overall watered-down antidegradation analysis standard, Respondents proffer a few arguments as to why IEPA's threadbare discussion of antidegradation was legally sufficient. These arguments, addressed in turn below, fall apart under scrutiny.

1. Dearth of Data. IEPA asserts that deficiencies in the antidegradation analysis were excusable because ILL. ADMIN. CODE tit. 35 § 302.105(c)(2)(C) specifies that data

that must be used by the Agency in its analysis “when available,” extrapolating from that language an argument that if the Agency lacked data it had no responsibility to take steps to get it. Nothing in the regulation, however, supports this argument for doing nothing. Subsection 302.105(c)(2)(C) lists the following categories of information to be relied upon “when available”:

- i) Information, data or reports available to the Agency from its own sources;
- ii) Information, data or reports supplied by the applicant;
- iii) Agency experience with factually similar permitting scenarios; and
- iv) Any other valid information available to the Agency.

Two things are important to note here. First, the requirement to rely on information “supplied by the applicant” does not mean that the applicant can fail to supply necessary information, and that IEPA can then claim it had nothing to rely upon and hence may perform inadequate analysis. The subsection governing permit applications, § 302.105(f)(1), specifically requires that the applicant supply “to the extent necessary for the Agency to determine that the permit application meets the requirements of this Section, the following information,” and lists types of data necessary to support the required four prongs of analysis. Where an applicant fails to supply the necessary data, IEPA must declare the application incomplete, not simply throw up its hands and make a poorly-informed determination based on the inadequate data supplied.

Second, §§ 302.105(c)(2)(C)(i) and (iii) specifically require that the Agency rely upon both “data or reports available to the Agency from its own sources,” and “agency experience with factually similar permitting scenarios.” Thus, any arguments (per the discussion in Point I, *supra*) that IEPA was not obligated to look at the Newton waste stream data or information available from USEPA as part of reasonable potential analysis are precluded with respect to antidegradation analysis, which expressly *requires* the agency to seek out and apply data from

such sources. IEPA was required to consider the data from Newton, clearly a “factually similar” scenario even if not identical, but did not.

2. “Inherent” Inclusion of Arsenic and Selenium. Dynegy argues that, while IEPA may not have “named every parameter,” its “mentioning” two studies concerning mercury that also happened to contain information about arsenic and selenium “inherently also advised” concerning those toxic pollutants, and therefore was sufficient to fulfill the antidegradation requirement concerning waste stream characterization. Dynegy Memorandum at 22. Nothing in the antidegradation regulations permits the enormous loophole that Dynegy is proposing. The law requires specific “identification and quantification” of pollutants in both the waste stream and the receiving water body. Dynegy’s approach inappropriately limits that requirement, and would leave the public in the position of having to scour every document “mentioned” by IEPA for references to contaminants that may or may not be of concern.

3. “Minimal” Pollution vs. No Pollution. Dynegy goes to great lengths to try to demonstrate that despite IEPA’s frequent use of terms such as “minimal” or “not significant” to describe the increased mercury loading, other references suggesting that the mercury will not be “detectable” should prevail, and IEPA should be deemed to have found the increased loading nondetectable or nonexistent rather than small. Dynegy Memorandum at 18-21. Accordingly, Dynegy asserts, there was no need to evaluate alternatives for a nonexistent mercury discharge. *Id.* at 23. This argument is not logical, since if the increased mercury discharge did not exist at all then it made no sense for Dynegy and IEPA to include it in the antidegradation analysis. Moreover, IEPA’s shifting terminology signals confusion borne of failure to actually perform the required effluent characterization. IEPA should be required on remand to state what level of

pollution is in the waste stream, rather than having the Board guess on appeal as to which of its statements is operative.

The additional extra-record information presented by Dynegy from the Mercury Rule proceeding to bolster its preferred interpretation¹¹ of IEPA's jumble of statements is wholly unpersuasive. It was proffered by the industries with an interest in employing the ACI technology, in a hearing that was not about water quality, with one of the experts cited by Dynegy stating in his testimony, "I'm not an expert on water quality." Mercury Rule, R06-25, June. 22 and 23 Tr., Testimony of Dr. James E. Staudt, PhD, p. 36. However, it bears note that one of the experts quoted by Dynegy also testified that while he believed mercury leaching associated with ACI would not pose significant environmental risks, "arsenic and selenium may be leached at levels of potential environmental concerns." *Id.*, Testimony of Ishwar Prasad Murarka, Aug. 17, 2006 (pm) Tr. At 1050.

4. Failure to Consider Alternatives Per the Hanlon Memo. Dynegy argues that IEPA rejected the Hanlon Memo as a basis for evaluating alternatives other than antiquated wet ash pond technology as irrelevant because the Memo pertained only to FGD wastewater. The applicability of the Memo to the dissolved fraction of mercury from either FGD or ACI-contaminated wastewater is addressed in Point I, *infra*. As also addressed in that discussion, the Hanlon Memo – and eventually USEPA in the Draft ELG – concluded that "[t]echnologies more advanced than settling ponds are available and more effective at removing both soluble *and particulate forms* of metals." NRDC Comments at 11, R. 902 (quoting Hanlon Memo, *supra*, Attachment A at 3-4) (emphasis added); *see* 78 Fed.Reg. at 34459. The Hanlon Memo should

¹¹ Dynegy notes that Board "precedent" may always be considered, but self-serving testimony by one party to a rulemaking hearing does not constitute "precedent."

thus have been at least considered in any evaluation of available alternatives, but the RS failed to even mention it. The Agency should be required to consider it on remand.

B. Varying Levels of Antidegradation Review Do Not Justify Failure to Comply with Antidegradation Requirements, Particularly Where Bioaccumulative Pollutants are at Issue

Dynegy and IEPA both make much of the fact that all involved in the antidegradation rulemaking, including the Board, agreed that not every situation called for the same level of analysis. IEPA Memorandum at 10, Dynegy Memorandum at 24-29. The context, however, is critical. The case-by-case approach¹² supported by environmental community stakeholders (including some Petitioners)¹³ was the alternative to the approach proposed by the industry stakeholders, which was to require IEPA to establish a “significance threshold,” pursuant to USEPA Region 8 guidance, below which no antidegradation review would be required. The Board expressly declined to adopt the significance threshold. Antidegradation Rulemaking First Notice (Jun. 21, 2001) at 8-13 (First Notice).

In the first instance, the Board’s allowance for case-by-case determination of the appropriate level of analysis does not help IEPA here, because it was manifestly clear to everyone involved in that rulemaking that new and increased discharges of toxic bioaccumulative pollutants should *not* qualify for diminished antidegradation scrutiny. The Board’s determination on First Notice cites IEPA’s position that while levels of review may vary, “even small amounts of increased loading of certain pollutants” warrant scrutiny of

¹² IEPA’s brief asserts that the Board “recognized that the antidegradation analysis could be implemented on a sliding scale,” IEPA Memorandum at 10, but the Board expressly did *not* hold that. What it said was, “the Agency’s proposal [adopted by the Board] does not require the review to be based upon a ‘sliding scale’ or ‘tiered’ approach. The proposal allows the Agency to decide on a case-specific basis what level of review is necessary.” *In The Matter of: Revision to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, and 102.800-102.8, R01-13* (“Antidegradation Rulemaking”) First Notice (Jun. 21, 2001) at 13.

¹³ Petitioner NRDC did not participate in the Antidegradation Rulemaking.

alternatives, and that “a review of a new loading of chloride would differ significantly from a review for an increased loading of dioxin even if the pollutants are being discharged into the same stream at the same time.” First Notice at 10. The Board also cited the Region 8 guidance relied on by the industry stakeholders as follows:

The guidance states that special consideration should be given to activities that result in increased loading of persistent toxics. *Id.* Further, the guidance recommends that the permitting authority should make the significance determination based on appropriate modeling techniques in conjunction with detailed characterization of the existing background water quality.

Id. at 12. The Board further stated with respect to the industry stakeholders proposal for a *de minimis* threshold, which it characterized as similar to the significance threshold,

The Board notes that since the proposed exception does not make any distinctions based on the nature and characteristics of the discharge, IERG’s proposal would allow discharge of bioaccumulative and persistent chemicals without an Agency review as long as the increased level is below the *de minimis* level. Discharge of even small amounts of such chemicals may not be advisable in certain water bodies.

First Notice at 15. Neither the Board nor anyone involved in the proceeding voiced the view that a pollutant such as mercury, harmful even in nanograms per liter, should receive the extraordinarily minimal level of scrutiny that IEPA gave it here. Neither, for that matter, does USEPA hold such a view, as it recently rejected Idaho’s proposed antidegradation regulations because their *de minimis* antidegradation threshold would have applied to bioaccumulative pollutants¹⁴; and the Great Lakes Water Quality Initiative Antidegradation Policy defines any addition of bioaccumulative pollutants as a significant lowering of water quality. 40 C.F.R. § 132 App. E. II.A (“A significant lowering of water quality occurs when there is a new or

¹⁴ See Letter dated July 23, 2013 to Barry N. Burnell, Idaho Department of Environmental Quality, from Daniel D. Opalski, USEPA Region 10, available at http://www.epa.gov/region10/pdf/water/wqs/id_de_minimis_disapproval_072313.pdf.

increased loading of any BCC [bioaccumulative contaminant of concern] from any regulated existing or new facility.”).

The Board also indicated in the Antidegradation Rulemaking that even where a lesser level of antidegradation scrutiny might be allowable, evaluation of alternatives is the heart of the process and must be reasonably robust. In rejecting the proposed significance threshold, the Board stated as follows:

[T]he Board strongly believes that antidegradation implementation procedures should not limit the Agency’s ability to ensure compliance with the antidegradation standard’s *main objective of identifying and implementing alternatives that reduce or eliminate the increased loadings*. In this regard, the Board finds that IERG’s proposed significance determination procedure precludes the Agency from performing analyses of alternatives and benefits unless the proposed increase is determined to have significant impact on the receiving stream.

First Notice at 13-14 (emphasis added).

Moreover, the Board made clear in *New Lenox* that the Region 8 guidance, “which was part of the record considered by the Board in adopting the antidegradation rules,” establishes minimum threshold requirements for such analysis, *i.e.*, that “alternatives analysis must include substantive information pertaining to costs and environmental impacts associated with the alternatives considered for evaluation.” *Des Plaines River Watershed Alliance v. IEPA (New Lenox)*, PCB 04-88 at 35 (April 19, 2007), *aff’d sub nom. IEPA v. IPCB*, 896 N.E.2d 479 (Ill. App. Ct. 3d. 2007). This is especially the case when a bioaccumulative pollutant is involved, since as discussed above the Region 8 guidance makes clear that a diminished level of review is inappropriate for such pollutants. Respondents’ efforts to distinguish *New Lenox* are unavailing. Dynegy Memorandum at 28. Nothing in the Board’s holding in *New Lenox* suggests that the minimum alternatives analysis requirements it outlined – *i.e.*, identifying costs and

environmental impacts of different alternatives – could be summarily dispensed with at IEPA’s discretion.

Dynegy additionally argues for a lesser level of antidegradation scrutiny based upon the benefits of installing ACI equipment, much as IEPA had done. Dynegy Memorandum at 26-27, R. 545. However, this argument is circular. The social and economic benefits of a proposed new loading come into play only when it has been demonstrated that the new loading is “necessary,” *i.e.*, that there are no available alternatives to it, and hence prohibiting the discharge will interfere with the proposed project. *See* Initial Memorandum at 28. The entire problem in this instance is that IEPA has not performed the necessary alternatives analysis to determine whether requiring Dynegy to dispose of its mercury-laden ACI waste somewhere other than a wet ash pond would interfere with its ability to continue to use the ACI equipment.¹⁵

Aside from their arguments for diminished scrutiny, Respondents make no attempt to actually demonstrate that IEPA’s dismissive look at alternatives met the standard defined by the regulations and the Board, and it clearly did not. IEPA identified an alternative that is acknowledged to be feasible (as IEPA stated that it could be used when Dynegy’s wet ash ponds are full), and is required for new sources,¹⁶ but dismissed it on the ground that it would be unreasonable to make Dynegy spend any money on an alternative when its old approach was still operative. Since the alternatives analysis was inadequate under even the most minimal standard for antidegradation review – let alone the heightened review due to a bioaccumulative pollutant – the Permit should be remanded.

¹⁵ It is fairly evident that it will not, given the finding described in the Draft ELG that an overwhelming majority of coal-fired power plants surveyed no longer use wet ash pond technology. Initial Memorandum at 37.

¹⁶ As discussed in the Initial Memorandum, the Water Quality Standards Handbook provides that antidegradation alternatives analysis must provide “assurance that the highest statutory and regulatory requirements for point sources, *including new source performance standards . . . are achieved.*” USEPA, *Water Quality Standards Handbook*, ch. 4 at 6 (EPA-823-B-12-002) (2d ed. March 2012) (emphasis added) (*Handbook*), Initial Memorandum at 27-28.

Point III

POLLUTION CONTROL WASTE WAS EXCLUDED FROM EPA'S EXISTING ELG, HENCE IEPA WAS REQUIRED TO ESTABLISH CASE-BY-CASE TBELS

As established in the Initial Memorandum, the CWA requires that all permits contain TBELs based on BAT. Sometimes EPA establishes the TBELs through industry-specific ELGs, and where it has not done so the TBELs must be established by permitting agencies on a case-by-case basis. But one way or another, TBELs must be included unless USEPA makes a specific determination that a particular pollutant need not be controlled, which it has not done here.

Dynegy and IEPA take different approaches to addressing the Agency's failure to comply with federal requirements to establish case-by-case TBELs, with Dynegy asserting that the Agency was not required to establish them, and IEPA asserting that it did so. Both arguments, however, are demonstrably incorrect, as they are based on a misreading of both the requirements of law and EPA's actions and interpretations. Dynegy's argument (like the thinly-reasoned Tennessee administrative decision it relies on) ignores the fact that the 1982 ELG *expressly excluded* air pollution control waste from its scope, stating an intention to regulate such waste at a later time (as it is doing now). It further attempts to distort the well-established mandatory requirement to establish case-by-case TBELs into a discretionary requirement by taking an incidence of the word "may" in the regulations completely out of context. IEPA's contention that it has complied with the TBEL requirement has even less merit, as it merely references a 30 year old Illinois mercury limit that was not developed in accordance with legal requirements for a BPJ TBEL determination – and was not, in any event, even included in the Permit.

Neither Respondent provides any valid defense of IEPA's failure to respond to public comments regarding this key issue in its Responsiveness Summary in violation Ill. Admin. Code tit. 35 § 166.192. Comments in the record that the Agency was failing to comply with a major

legal requirement, extensively backed up in comments by multiple pages of legal citation, is unquestionably a “significant comment” to which IEPA must respond. There is no legal basis for the suggestion that IEPA may simply disregard its own rule, particularly when that rule is mandated as part of state programs under the CWA.

A. The 1982 ELG Expressly Excluded Air Pollution Control Wastewater and Left it for Future Rulemaking

Dynegy relies heavily on the contention that the 1982 ELG applicable to the steam electric generating industry intended to address mercury and other contaminants from FGD waste, based on the fact that ELG contains a definition of “low volume waste” that includes scrubber waste streams. Dynegy Memorandum at 33-34; 40 C.F.R. § 423.11(b). However, Dynegy ignores the express statement by USEPA in promulgating the 1982 ELG that it *intentionally excluded* such waste from the rulemaking, and left it for a future rulemaking (which it is pursuing now as reflected in the Draft ELG). USEPA stated in the preamble to the final rule, “EPA is reserving effluent limitations for four types of wastewaters for future rulemaking,” and listed among those four types “flue gas desulfurization wastewaters.” 47 Fed. Reg. 52290, 52291 (November 19, 1982). Accordingly, while the ELG listed ash transport wastewater as part of the category of low-volume waste sources, it did not set limits for the metals known to be associated with FGD waste, but regulated only TSS, oil and grease, pH, and PCBs. 40 C.F.R. § 423.12. USEPA explained that, consistent with its exclusion of air pollution control wastewater, it was not setting limits on various toxic metals due to its own lack of sufficient information at that time concerning technologies that could effectively reduce levels of these pollutants. 47 Fed. Reg. at 52303-04. Similarly, with respect to bottom ash transport waters, USEPA “determined at proposal that the available data regarding the degree of toxic pollutant reduction

to be achieved beyond BPT were too limited to support national limitations,” and therefore “did not propose BAT limitations ... for the priority pollutants.” 47 Fed. Reg. at 52297.

While the reference in the regulation was specifically to web scrubbers, the primary type of coal plant pollution control equipment available at that time, it applies with even greater force to ACI technology, a relatively new pollution control method which did not even exist in 1982 and would not exist until decades later. Nearly 25 years after the 1982 ELG rulemaking, in 2006, one of the experts whose Mercury Rule testimony was cited by Dynegy identified ACI as an emerging technology at the demonstration stage insufficiently developed to be implemented. Mercury Rule, R06-25, Jul. 28, 2006 Prefiled Testimony of J.E. Cichanowicz, at 3 (“despite impressive results at selected demonstrations, the control technology that is the focal point of interest - activated carbon injection (ACI) - is not yet sufficiently developed to consistently deliver high Hg removal under the varied conditions in Illinois.”).¹⁷ USEPA, which was excluding from regulation at that time existing coal plant pollution controls about which information was lacking, clearly was also excluding future pollution control technologies that did not exist yet.

USEPA has repeatedly acknowledged the 1982 exclusion of air pollution control-related wastewater from regulation, and reiterated the reason for it, since that time. The Hanlon Memo explained as follows:

The Steam Electric Power Generating effluent limitations guidelines and standards promulgated in 1982 include wastewater from wet FGD systems under the "catch-all" category of low-volume wastes." 40 C.F.R. 423.11(b). However, the 1982 rulemaking *did not establish best available control technology economically achievable (BAT) limits for FGD wastewaters because EPA lacked the data necessary to characterize pollutant loadings from these systems.* See the Development Document for the 1982 effluent guidelines at p. 248 (noting that

¹⁷ EPRI described ACI technology as being in the testing phase as late as 2009. See EPRI Product Abstract, available at <http://www.epri.com/abstracts/Pages/ProductAbstract.aspx?ProductId=00000000001017564>.

"[a]dditional studies will be needed to provide this data and to confirm the current discharge practices in the industry"). Accordingly, EPA determined that BAT limits for the FGD wastestream were outside the scope of the rulemaking, and explicitly reserved the development of such limits for a future rulemaking. See the Federal Register preamble for the 1982 effluent guidelines, 47 Fed. Reg. at 52291 (Nov. 19, 1982); Development Document at pp. 3, 7.

Hanlon Memo, Attachment A at 3 (emphasis added). The Draft ELG is grounded in the same recognition of the scope of the 1982 rulemaking as the Hanlon Memo, and recognizes that many of the excluded waste streams did not even exist at that time:

The current regulations, which were last updated in 1982, do not adequately address the toxic pollutants discharged from the electric power industry, nor have they kept pace with process changes that have occurred over the last three decades. The development of new technologies for generating electric power (e.g., coal gasification) and the widespread implementation of air pollution controls (e.g., flue gas desulfurization (FGD), selective catalytic reduction (SCR), and flue gas mercury controls (FGMC)) have altered existing wastestreams or created new wastewater streams at many power plants.

78 Fed. Reg. at 34435.

Dynegy's assertion that the Hanlon Memo can be disregarded in favor of Respondents' misinterpretation of the 1982 rulemaking is baseless. The memo reiterates and explains USEPA's position, expressed in the 1982 rulemaking and again in the Draft ELG, that pollutants associated with coal plant air pollution controls were excluded from the current version of the ELG. USEPA's interpretation of its own regulations is persuasive authority. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("[T]he rulings, interpretations and opinions of the [Agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

Dynegy's efforts to distinguish the Hanlon Memo on the ground that it expressly addresses FGD wastewater and not ACI technology is also baseless. Dynegy Memorandum at

38. The portion of the Hanlon Memo quoted above pertaining to the scope of coverage of the 1982 ELG does not turn on the specific type of pollution control equipment at issue. As discussed above, the exclusion for scrubber wastewater in the 1982 rulemaking applies with even greater force to technology that did not exist at the time. Dynegy's argument that the separate portion of the Memo concerning available alternatives to ash ponds should not apply where ACI waste is involved (which is incorrect, as explained in Point I, *supra*) has no bearing on the fact that the Memo's explanation of the 1982 exclusion is plainly accurate and reflective of the law and USEPA's longstanding position.

The Court's decision in *Ky. Waterways Alliance v. Energy and Env't Cabinet (Ky. Waterways Alliance)*, No. 11-C1-1613 (Franklin Cnty. Cir. Ct. Sept. 10, 2013), overturning an administrative determination, was expressly grounded in all of these facts, and in the recognition that it makes no basic sense to interpret a 1982 regulation as a free pass to ignore toxic waste streams about which little or nothing was known at the time. Citing the 1982 rulemaking exclusion of scrubber-related pollutants and quoting from the Hanlon Memo at length, the Court held:

Based on the foregoing, the Court finds it implausible that in 1982 the EPA concluded that setting technology based limits for these toxic pollutants was unnecessary and, by the relevant language published in the Federal Register, meant to totally suspend all efforts to decrease discharge of these pollutants. This interpretation advanced by Respondents is discordant with the plain language of the statutes and regulations. . . . The Court finds it contradictory that the EPA, aiming to eliminate discharge of pollutants by 1985, would in 1982 establish a guideline recognizing the many toxic pollutants found in scrubber wastewater but intending to freeze all efforts to reduce discharge of these pollutants indefinitely, pending new regulation. The Hanlon Memo clearly provides that this was not the intent- scrubber wastewater pollutants were "outside the scope of the rulemaking."

Kentucky Waterways, Slip Op. at 11-12. The reasoned basis of the court's decision stands in stark contrast to the Tennessee administrative determination relied upon by Respondents, *In the*

Matter of Tennessee Clean Water Network, et al v. TDEC and Tennessee Valley Authority (Tennessee Clean Water), Case No. WPC10-0116 (Dec. 2013), which is now on appeal.

Tennessee Clean Water Network and Southern Alliance for Clean Energy v. Tennessee Board of Water Quality, Oil & Gas and Tennessee Valley Authority, Case No. 13-1742-I, Petition for Appeal filed December 18, 2013. The *Tennessee Clean Water* decision disregards entirely both the express exclusion of air pollution control-related pollutants from the 1982 ELG rulemaking and the Hanlon Memo's reiteration of that exclusion. It contains no discussion of the fact, addressed in the Hanlon Memo and the Draft ELG, that both the extent of such pollution and USEPA's technological understanding of it have increased greatly in the 30 years since the 1982 ELG was promulgated. Rather, the Tennessee administrative body chose to quote, selectively and out of context, from the portion of the 1982 rulemaking preamble stating that USEPA was not setting limits on various toxic metals due to lack of information concerning technologies that could reduce them. It wrongly inferred from that language an affirmative determination not to address these pollutants at all, rather than to defer regulation of them as USEPA explicitly stated it was doing. *Tennessee Clean Waterways*, Slip Op at 3, *citing* 47 Fed. Reg. at 52303.

B. Case-by-Case TBELs are Mandatory, not Discretionary, in the Absence of an Applicable ELG

As explained in the Initial Memorandum, the CWA requires that case-by-case TBELs be established in the absence of a controlling ELG. Initial Memorandum at 34-35. There is no actual question about this. The requirement to establish TBELs is stated in the text of the CWA. 33 U.S.C. § 1311(b)(2)(A)(i) (point sources "shall" achieve "effluent limitations" that "shall require application of" BAT to reduce pollutant discharges to the maximum extent "technologically and economically achievable," including "elimination of discharges of all pollutants" if it is achievable). The applicable regulations state, "to the extent that EPA-

promulgated effluent limitations are inapplicable,” NPDES permit writers “*shall apply* the appropriate factors listed in § 125.3(d)” to set case-by-case technology-based effluent limitations based on BPJ. 40 C.F.R. § 125.3(c)(2), (d) (emphasis added). This requirement is applicable to NPDES permits issued by IEPA pursuant to ILL. ADMIN. CODE tit. 35 § 309.141(d).

Multiple courts have affirmed that the case-by-case requirement is mandatory. *See, e.g., Texas Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 928-29 (5th Cir. 1998) (Under 40 C.F.R. § 125.3(c)-(d), “EPA *must* determine on a case-by-case basis what effluent limitations represent the BAT level, using its ‘best professional judgment.’”) (emphasis added); *Northern Cheyenne Tribe v. Montana Dept. of Env’tl. Quality*, 356 Mont. 296, 302-306 (Mont. 2010) (explaining why, in the absence of applicable ELGs, there is a “non-discretionary” duty under the Clean Water Act and governing regulations to impose case-by-case TBELs, which the court referred to as “pre-discharge treatment standards”); *In re: Chukchansi Gold Resort and Casino Waste Water Treatment Plant*, NPDES Appeal Nos. 08-02, 08-03, 08-04 & 08-05, 2009 EPA App. LEXIS 4 (EAB Jan. 14, 2009) (“In cases where no applicable effluent limitation exists, permit issuers *must* use their ‘best professional judgment’ or ‘BPJ’ to establish appropriate technology-based effluent limitations on a case-by-case basis.”) (emphasis added) (*citing In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 712 n.1 (EAB 2006) (citing CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1); 40 C.F.R. §§ 122.44, 125.3)). Even the poorly-reasoned *Tennessee Clean Water* decision did not question that basic principle, but rather found (incorrectly) that the 1982 ELG was controlling concerning scrubber pollution.

Dynegy’s attempt to read discretion into this mandatory requirement rests on a pretzel-like distortion of the actual language of the applicable regulation. Dynegy Memorandum at 31-31. 40 C.F.R. § 125.3, governing TBELs, states that NPDES permits “*shall* contain the

following technology-based treatment requirements,” a list which includes “For all toxic pollutants . . . effluent limitations based on BAT.” § 125.3(a), (a)(iv). In subsection (c), this regulation then lists the varying ways that a TBEL may be established in different circumstances, depending on whether or not an applicable ELG is in place. That section states, “Technology-based effluent limits *may* be imposed through one of the following three methods,” and proceeds to list (1) application of ELGs, (2) on a case-by-case basis, or (3) a combination of (1) and (2). 40 C.F.R. § 125.3(c) (emphasis added). With respect to (3), the regulation explains that any aspects of a discharger’s operation not covered in an ELG must be addressed on a case-by-case basis: “Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger’s operation, or to certain pollutants, other aspects or activities *are subject to regulation on a case-by-case basis* in order to carry out the provisions of the Act.” 40 C.F.R. § 125.3(c)(1) – (3) (emphasis added).

Dynergy argues that the “may” at the beginning of subsection (c) – TBELs “*may* be imposed through one of the following three methods” – renders the case-by-case requirement to establish TBELs in subpoints (2) and (3) discretionary. This is an absurd interpretation. If the “may” in the initial sentence were to render (2) and (3) discretionary, it would also have to render (1) discretionary – thus rendering wholly optional as well the requirement that TBELs be established even when there is a directly applicable ELG. This would directly contradict the basic CWA mandate that TBELs be established, and the requirement (not disputed by Dynergy) that applicable ELGs must be applied in doing so. Additionally, the language of (3) is itself mandatory, stating that “limitations guidelines only apply to certain aspects of the discharger’s operation, or to certain pollutants, other aspects or activities *are subject to regulation on a case-by-case basis* in order to carry out the provisions of the Act.” 40 C.F.R. § 125.3(c)(3) (emphasis

added). Clearly, the “may” in subsection (c) refers to the fact that the section sets forth different means by which a permitting agency may comply with the mandatory TBEL requirement established in the CWA and reiterated in 40 C.F.R. § 125.3(a).

Dynegy also fails to explain how the how the case-by-case permitting provisions of Section 125.3(c) can plausibly be read as discretionary in light of 40 C.F.R. § 122.44, which the Agency is also bound to follow pursuant to ILL. ADMIN. CODE tit. 35 § 309.141(d). That section sets forth the permitting requirements that apply in approved NPDES permitting programs including the Illinois program administered by IEPA. Section 122.44 mandates: “each NPDES permit *shall* include conditions meeting the following requirements when applicable” including “[t]echnology-based effluent limitations and standards based on: effluent limitations and standards promulgated under section 301 of the CWA, or new source performance standards promulgated under section 306 of CWA, on [sic] case-by-case effluent limitations determined under section 402(a)(1) of CWA, or a combination of the three, in accordance with § 125.3 of this chapter.” *Id.* § 122.44(a)(1).

Dynegy suggests that the Hanlon Memo, which reaffirms that the CWA requires case-by-case TBELs in the absence of an applicable ELG, should be disregarded because it is somehow out of the mainstream of USEPA’s views on the matter. Dynegy Memorandum at 37. That is not the case, as the Memo is consistent with USEPA’s longstanding position on the issue. USEPA stated in the very beginning, in promulgating 40 C.F.R. § 125.3(c)(1), that case-by-case TBELs are mandatory in the absence of an applicable ELG. In the preamble to the proposed rule, EPA stated unequivocally:

Where guidelines do not completely cover a particular waste stream or particular pollutants in the waste stream, the permit writer *must* use his or her best professional judgment to set appropriate limits. This case-by-case approach, authorized by section 402(a)(1), allows permit writers to assure that all significant

pollutant parameters are limited, so that EPA may focus its guidelines development on the most severe toxic pollutant discharges.

National Pollutant Discharge Elimination System; Revision of Existing Regulations, 44 Fed. Reg. 34393, 34396 (June 14, 1979) (emphasis added). As discussed above, strong deference must be afforded an agency's interpretation of its own regulations.

Nothing in USEPA's NPDES Permit Writer's Handbook suggests to the contrary. The Handbook merely reiterates the principle that where USEPA reached an affirmative conclusion that a particular pollutant need not be regulated, or is already regulated by an indicator pollutant in the ELG, that determination is controlling.¹⁸ As discussed in Subsection A, *supra*, that is not what happened here. On the contrary, USEPA made an affirmative determination that it *would* regulate pollutants associated with coal plant pollution controls, not in the 1982 ELG iteration but in a subsequent rulemaking (which it is pursuing now).

C. The Permit Did Not Comply with Requirements Applicable to Case-by-Case TBELs

As explained in the Initial Memorandum, the CWA and associated regulations, made applicable in Illinois via Ill. Admin. Code tit. 35 § 309.141(a), set forth detailed and stringent requirements for conducting case-by-case BPJ analysis. Initial Memorandum at 38-39 (explaining factors required to be considered in case-by-case analysis set forth in 40 C.F.R.

¹⁸ The NPDES Permit Writer's Manual provides:

Effluent guidelines are not always established for every pollutant present in a point source discharge. In many instances, EPA promulgates effluent guidelines for an *indicator* pollutant. Industrial facilities that comply with the effluent guidelines for the indicator pollutant will also control other pollutants (e.g., pollutants with a similar chemical structure). For example, EPA may choose to regulate only one of several metals present in the effluent from an industrial category, and compliance with the effluent guidelines will ensure that similar metals present in the discharge are adequately controlled. Additionally, for each industry sector EPA typically considers whether a pollutant is present in the process wastewater at treatable concentrations and whether the model technology for effluent guidelines effectively treats the pollutant.

EPA, NPDES Permit Writer's Manual, 5-18 (2010).

§ 125.3(d)). Here, IEPA's analysis failed to expressly consider "the age of equipment and facilities involved," "the process employed," "engineering aspects of the application of various types of control techniques," "process changes," "the cost of achieving such effluent reduction," "non-water quality environmental impact (including energy requirements)," and "any unique factors relating to the applicant." 40 C.F.R. § 125.3 (d)(3).

IEPA counters that "technology based limits do exist in Illinois and such limits are contained in the Board's effluent limits found at 35 Ill. Admin. Code, Part 304," and notes that the limit applicable to mercury is 0.5 µg/L, per ILL. ADMIN. CODE tit. 35 § 302.208(f). IEPA Memorandum at 14. In the first instance, this is a strange assertion given that this technology-based limit was not actually included in the Permit. Even if it had been included, however, it does not constitute a BAT determination for purposes of 40 C.F.R. § 125.3, despite the Board's stated intention to meet BAT standards as they existed at the time. *In the Matter of Amendments to Chapter 3: Water Pollution (Effluent Standards)*, R76-21, Proposed Opinion of the Board (September 24, 1981). The rulemaking makes no reference to – and cannot substitute for – the requirements at 40 C.F.R. § 125.3 concerning identification of TBELs. This regulation requires that BAT be determined either by a federal ELG, or by a case-by-case determination – which would by the terms of 40 C.F.R. § 125.3(d) require a case-specific review of *current* technology, not technology as it existed more than 30 years ago.

Additionally, Respondents assert that the Permit monitoring requirement was sufficient in this context, given lingering uncertainty as the amount of mercury contained in the east ash pond effluent, but nothing in the law allows monitoring in place of a TBEL. The applicable regulations do not excuse the obligation to establish TBELs on account of either lack of facility-specific information or a belief that the level of pollutants discharged is not significant. As

explained in the Initial Memorandum, USEPA has repeatedly stated that a case-by-case TBEL *must* be established in the manner defined by 40 C.F.R. § 125.3 (d) *even in the absence of facility-specific data*, in which case data available from other sources must be used. Initial Memorandum at 40-41. The only applicable significance threshold for controlling toxic pollutants subject to BAT-based TBEL requirements is that the pollutant at issue must be discharged at a higher level than can be achieved by BAT controls. 40 C.F.R. § 122.44(e)(1) (“Limitations must control all toxic pollutants which the Director determines (based on information reported in a permit application under § 122.21(g)(7) or in a notification under § 122.42(a)(1) or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c) of this chapter.”). Pollutants associated with ACI-contaminated wastewater fall into this category, as both the applicable NSPS and the Draft ELG identify zero-discharge technologies; as, indeed, does IEPA’s antidegradation analysis, which identifies dry handling as a feasible alternative. 40 C.F.R. § 423.15(g), 78 Fed. Reg. at 34456.

Dynergy’s reliance upon *Natural Resources Defense Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) is misplaced. That decision preceded the promulgation of 40 C.F.R. § 125.3, and stands only for the very general proposition that Petitioners do not dispute: that in some permits, for some pollutants, monitor-only conditions are appropriate. Here, however, they are plainly not appropriate for mercury and other ACI-related metals, since *any* level of such pollutants can be reduced to zero by application of BAT. 40 C.F.R. § 423.15(g).

Point IV

**IEPA'S FAILURE TO RESPOND TO PETITIONERS' COMMENTS
CONCERNING THE REQUIREMENT TO ESTABLISH CASE-BY-CASE
TBELS VIOLATED PUBLIC PARTICIPATION REQUIREMENTS**

Although Petitioners devoted a large portion of their comments to the case-by-case TBELs requirement, IEPA said not one word about this issue in the RS. NRDC Comments at 14-20, R. 905-11, Petitioners' Memorandum at 42. This failure violated ILL. ADMIN. CODE tit. 35 §§ 166.192(4) and (5), which require that IEPA provide both a "summary" of and a "specific response" to all significant comments.

Respondents' claims that IEPA complied with this requirement are based on subterfuge. According to IEPA, it was enough that the Agency explained why it did not establish a completely different set of limits, the WQBELs that Petitioners' separately requested. IEPA suggests that "[t]hough these responses did not use specific words like BPJ, BAT and TBEL, it is very clear that the Agency was addressing the specific comments of the Petitioners regarding the discharge by Dynege." IEPA Memorandum at 15. Really, by not referring to the subjects of Petitioners' comments they responded to Petitioners' comments? If that were indeed the standard – that *any* response concerning the permitted discharge is good enough to respond to all comments – then the regulation would have no meaning. So long as the Agency's response in some manner pertained to the permitted discharge (as opposed to, say, baseball), then it would be deemed to constitute a "specific" response, no matter how little of the substance of the comments it actually addressed. Fortunately, that is not the standard, as the words "specific response" and "significant comment" do have some meaning.

The fact that § 166.192 is an IEPA-promulgated regulation rather than a Board-promulgated regulation is of no significance. IEPA acknowledges that § 166.192 was

promulgated pursuant “to the implementing and authorizing provisions of Section 4 of the Act” (citing 415 ILCS 5/4 (2012)). IEPA Memorandum at 15. The Illinois Act grants the Board authority to conduct proceedings “upon complaints charging violations of this Act, *any rule or regulation adopted under this Act*, any permit or term or condition of a permit, or any Board order.” 415 ILCS 5/5(d) (emphasis added); and the Board “has the authority to act as otherwise provided by law.” ILL. ADMIN. CODE tit. 35, § 101.106(c). The Act also specifies that third-party permit appeals are to be conducted pursuant to the rules specified in 415 ILCS 5/32 -33. *See* 415 ILCS 5/40(e)(3), referencing 5/40(a), incorporating 5/32-33 by reference. Section 5/33 states as follows:

After due consideration ... the Board shall issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances. It shall not be a defense to findings of violations of the provisions of this Act, [or] *any rule or regulation adopted under this Act*, ... that the person has come into compliance subsequent to the violation.

415 ILCS 5/33(a) (emphasis added). Additionally, both the Board and the Agency are bound to “comply with *all* requirements, prohibitions, and other provisions of the Act *and of regulations adopted thereunder*.” 415 ILCS 5/47(a) (emphasis added).

Accordingly, courts have held that the Board has authority to apply and enforce all law applicable to the permitting process. “In its adjudicative role, the Board has the authority to conduct hearings concerning violations of the Act, *its regulations*, or the denial of a permit. In the latter instance *it is the Board's principal function to interpret regulations defining the requirements of the permit system*.” *Illinois Power Co. v. Illinois Pollution Control Bd.*, 100 Ill. App. 3d 528, 530-31 (1981) (emphasis added) (also finding that a “Board's order depreciates its functions as an adjudicative body” and fails to adjudicate the controversy before it, where the Board leaves the resolution of a valid complaint “up to the Agency as it [sees] fit”.) (*citing Landfill, Inc. v. Pollution Control Board*, 74 Ill.2d 541, 557 (1978)); *Illinois Env'tl. Prot. Agency*

v. Illinois Pollution Control Bd., 386 Ill. App. 3d 375, 383 (2008) (emphasis added) (“The Board must review the entire record relied upon by IEPA to determine whether the third party has shown that IEPA failed to comply with criteria set forth in the *applicable statutes and regulations* before issuing or denying the NPDES permit.”). *See also Kaeding v. Pollution Control Bd.*, 22 Ill. App. 3d 36, 38 (1974) *aff’d sub nom. N. Shore Sanitary Dist. v. Pollution Control Bd.*, 62 Ill. 2d 385 (1976) (citing *City of Waukegan v. Pollution Control Bd.*, 57 Ill. 2d 170, 183 (1974)) (“the legislature has conferred upon the Illinois Pollution Control Board those powers that are reasonably necessary to accomplish the legislative purpose of the administrative agency.”); *Lloyd A. Fry Roofing Co. v. Pollution Control Bd.*, 20 Ill. App. 3d 301, 309, (1974) (“the authority and powers bestowed on the Board to ... adjudicate cases are in keeping with the spirit of the Environmental Protection Act for the practical application and operation of the Act.”).

Furthermore, it is a well-established principle of administrative law that agencies are generally required to follow their own rules. *Accardi v. Shaughnessey*, 347 U.S. 260, 268 (1954); *Holland v. Quinn*, 67 Ill. App. 3d 571, 574 (1978) (“Even though a statute confers absolute discretion in a particular area, once an agency establishes rules or regulations implementing that statute it is bound to adhere to them.”); *Illinois Bell Tel. Co. v. Allphin*, 95 Ill. App. 3d 115, 124 (1981) *aff’d*, 93 Ill. 2d 241 (1982) (“We conclude that the Department is bound by the express written rules and regulations it mandated the taxpayer to follow.”)

IEPA’s obligation to comply with the § 166.192 requirement to respond to significant comments – and the Board’s authority to enforce that obligation – is particularly significant given that this requirement is not merely an IEPA rule but a CWA requirement for state programs. *See* 40 C.F.R. § 124.17(a)(2) (requirement to “[b]riefly describe and respond to all

significant comments on the draft permit . . . raised during the public comment period, or during any hearing” made “applicable to state programs” under 40 C.F.R. § 123.25). The § 166.192 requirement to provide a specific response to public comments was implemented by IEPA expressly “to comply with State *and federal* requirements.” ILL. ADMIN. CODE tit. 35 § 166.101(g) (emphasis added). The Board has expressly recognized that §124.17(a)(2) has been made applicable to IEPA permit proceedings. *See American Bottom Conservancy (US Steel Corp. Permit) v. IEPA*, 2010 WL 2018761 (Ill.Pol.Control.Bd.) (“When the final NPDES permit is issued, the Agency does have to issue a written response to comments, which response must, among other things . . . ‘respond to all significant comments on the draft permit.’”) *Id.* at 31 (citing 40 C.F.R. 124.17(a)) (quoting *Illinois Power Co. (Hennepin Power Plant) v. IEPA*, PCB 85-119, slip op. at 3 (Mar. 27, 1986), “40 CFR 124.17 ... is specifically made applicable to states such as Illinois which have permitting authority under the NPDES program pursuant to 40 CFR 123.25”).

Conclusion

For the foregoing reasons, Petitioners request that their motion for summary judgment be granted, and that the Permit be remanded to IEPA with instructions that it require Dynegy to submit a complete application, and that it conduct all analyses required under the Clean Water Act.

Respectfully submitted this 24th day of March, 2014 by:



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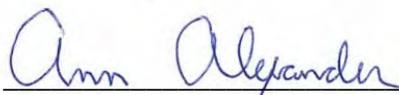


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CERTIFICATE OF SERVICE

I, Ann Alexander, the undersigned attorney, hereby certify that I have served via electronic mail the attached **Petitioners' Reply Memorandum of Law in Support of Petitioners' Motion for Summary Judgment** upon the persons listed in the foregoing Notice of Filing, by depositing said documents in the United States Mail, postage prepaid, from 20 North Wacker Drive, Suite 1600, Chicago, IL 60606, before the hour of 5:00 p.m., on this 24th day of March, 2014.

A handwritten signature in blue ink that reads "Ann Alexander". The signature is written in a cursive style and is positioned above a horizontal line.

Ann Alexander, Natural Resources Defense Council