BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, PRAIRIE RIVERS NETWORK, and ENVIRONMENTAL LAW & POLICY CENTER,	)	
Petitioners,	)	
v.	)	No. 15-189
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and MIDWEST GENERATION, LLC,	)	
Respondents.	)	

ILLINOIS EPA'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Respondent Illinois Environmental Protection Agency ("Illinois EPA") respectfully moves for summary judgment pursuant to 35 Ill. Adm. 101.516(b) and asks that the Illinois Pollution Control Board ("Board") reject Petitioners' challenge to its issuance of the subject National Pollution Discharge Elimination System ("NPDES") permit to Respondent Midwest Generation, LLC ("Midwest Generation").

I. INTRODUCTION

Petitioners appeal the Illinois EPA's re-issuance of an NPDES permit to Midwest Generation. That permit authorizes and regulates effluent discharges from the company's Waukegan Generating Station in Lake County, Illinois. Petitioners' challenge rests on two distinct grounds: (1) under Section 316(a) of the Clean Water Act, they challenge the permit's alternative effluent limit for heated (or "thermal") effluent discharges; and (2) under Section 316(b) of the Clean Water Act, they challenge its effluent limit governing discharges from a Cooling Water Intake ("CWI") structure at Midwest Generation's facility. For the reasons set forth below, each challenge is

baseless and the Illinois EPA is entitled to summary judgment in its favor and dismissal of Petitioners' Petition for Review.

II. STATEMENT OF FACTS

A. The Waukegan Generating Station

Midwest Generation operates the Waukegan Generation Station in Lake County, Illinois ("Facility"). (R:661.)[1] The Facility consists of two coal-fired electricity generating units ("EGU")—Units 7 and 8—with a combined nominal generating capacity of 742 megawatts ("MW"). (*Id.*) Two other EGUs at the Facility—Units 5 and 6, with a combined generating capacity of 241 MW—were retired in 1978 and 2007, respectively. (R:203.) The Facility uses water from Lake Michigan in a once-through circulating system for condenser cooling with a design intake flow of 900 million gallons per day ("MGD"). (R:109.)

B. The Board's August 3, 1978 order granting the alternative thermal effluent limit

In 1977 Commonwealth Edison ("ComEd"), the then-owner of the Facility, petitioned the Board for an alternative thermal effluent limit that would restrict the Facility's thermal discharge to an amount corresponding to its generating capacity. At the time, the Facility had four generating units capable of generating 1016 MW of electric power. (R:1-3, 203, 1115.) Illinois EPA supported this request. (R:2.)

Based on expert testimony backed by data compiled by two environmental consulting firms, the Board found "virtually no damage . . . to the Lake Michigan environment as a result of thermal discharges" from the Facility and ordered that its permit be modified to include the alternative thermal effluent limit. (R:2.) The Board

[1] The Record for this proceeding is cited as "R:_____."

did not set any expiration date or renewal requirements in its order, docketed at PCB 77-82. It further noted that the United States Environmental Protection Agency ("USEPA") had reviewed and approved the alternative limit under Section 316(a) of the Clean Water Act. (R:1.)

The following month, the Board determined that ComEd had made a sufficient showing of minimal ecological damage to comply with 35 Ill. Adm. Code 302.211(f).[2] (R:1115-16.) Nonetheless, the Board convened a new hearing docketed at PCB 78-72, -73 (consolidated) to resolve some ambiguities from the record of the previous decision. (R:1115.) The Board's assessment was unchanged: "It is the Opinion of the Board that [Waukegan Generating Station has] not caused and cannot be reasonably expected to cause significant ecological damage to receiving waters." (R:1116.)

Around this time, ComEd obtained an NPDES permit that complied with the requirements of Section 316(b) of the Clean Water Act.[3] Illinois EPA relied on multiple studies conducted for ComEd in the mid-70s, showing that the CWI structures at the Facility had minimal environmental impact. (R:1152-67.) A review of the Board's decisions shows that it did not revisit the issue of the Facility's alternative thermal effluent limit after granting that relief in 1978.

C. Midwest Generation's 2005 application to renew the NPDES permit

On January 21, 2005, Midwest Generation—which, by then, operated the

[2] The Board promulgated 35 Ill. Adm. Code 302.211(f) in 1972. The rule required owners or operators of facilities discharging thermal effluent to demonstrate in a hearing before the Board—not less than five nor more than six years after the effective date of the rule (or, in the case of new discharges, five to six years after commencement of operations)—that their thermal discharges had not caused and could not be reasonably expected to cause significant ecological damage to receiving waters. Section 302.211(f) was originally numbered as Water Pollution Rule 203(i)(5).

[3] Section 316(b) requires that "[a]ny standard" established pursuant to Section 301 (as an effluent limit for a point source) or Section 306 (as a performance standard) "require that the location, design, construction, and capacity of [CWI] structures reflect the best technology available to minimize adverse environmental impact." 33 U.S.C. § 1326(b).

Facility—timely applied to renew its NPDES permit. (R:25.) The company's then-applicable NPDES permit had been issued in 2000 (the "2000 NPDES Permit") and was due to expire on July 31, 2005. (R:1119.) The 2000 NPDES Permit included the alternative thermal effluent limit as a special condition applicable to the Facility's thermal discharge. (R:1124.) Midwest Generation's renewal application used the standard USEPA forms, as required by 35 Ill. Adm. Code 309.103(a)(1). (R:31-111.) The cover letter accompanying the renewal application requested several changes to the 2000 NPDES Permit, including the discontinuation of thermal monitoring. (R:27, 1120.)

Midwest Generation's 2005 NPDES permit renewal application also provided updated information on its thermal discharge based on effluent monitoring results from the preceding years. For example, it provided the maximum daily effluent temperatures (118.5 degrees F winter and 95.8 F summer), the maximum 30-day effluent temperatures (65.1 F during the winter and 79.8 degrees F during the summer) along with long term average values of 58.9 F winter and 71.0 F summer). (R:42.)

D. Impingement and entrainment monitoring

Midwest Generation included with its January 25, 2005 renewal application a proposed information collection plan ("PIC plan"), as then required by 40 C.F.R. § 125.869(c)(2)(iii) (2005). (R:109-11, 1204-36.) In a previous letter to Illinois EPA dated October 16, 2004, Midwest Generation had requested adequate time to collect the information required by the then-applicable version of the Section 316(b) Phase II Rule[4]

[4] Pursuant to Section 316(b)'s mandate, USEPA promulgated the Phase I Rule governing new facilities in 2001, 66 Fed. Reg. 65256 (Dec. 18, 2001), and moved to regulate existing facilities with promulgation of the Phase II Rule in 2004, 69 FR 41576 (July 9, 2004) ("2004 Phase II Rule"). Among other things, the 2004 Phase II Rule required existing facilities to conduct studies on the impacts of impingement and entrainment on aquatic life. In 2007, USEPA suspended enforcement of the 2004 Phase II Rule following

(R:4) and expressly requested that until the Phase II rule requirements were incorporated into its NPDES permit, it "be allowed to continue to operate its cooling water intake as [the Station] had in the past" because its operation was not causing "any adverse environmental impacts to Lake Michigan." (R:5.) The PIC plan included the results of initial impingement/entrainment studies commissioned by Midwest Generation. The studies produced very similar results to the the 1975-76 ComEd studies: both determined that 97% of the impinged fish were alewifes, a low-value species. (R:1216, 1231.) Midwest Generation subsequently updated this PIC plan in an August 8, 2006 e-mail to Illinois EPA and informed the agency that it had been conducting impingement and entrainment monitoring at all of its affected sites (which included the Facility) for at least two years during the period 2003-2006. (R:112.)

E. The drafting process leading up to the 2015 NPDES Permit

In late 2006, after reviewing previous permits and permit notes, Illinois EPA agreed to remove the thermal monitoring requirement. (R:116-24.) Illinois EPA justified this decision by noting that the Board's ruling in PCB 78-72, -73 did not require thermal monitoring. (R:124.) On February 23, 2007, the agency sent Midwest Generation a tentative draft of the renewed permit. The draft incorporated the alternative thermal effluent limit using language that was identical to the language in the 2000 NPDES Permit. (R:140.) Illinois EPA also granted Midwest Generation more time to conduct the Section 316(b) demonstration studies required by the 2004 Phase II Rule, which had not yet been suspended. (*Id.*)

On December 2, 2011, Illinois EPA issued the first public draft of the NPDES

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an adverse decision in the Second Circuit. *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007). USEPA finally reissued a revised, final version of that rule on August 15, 2014 ("2015 Phase II Rule").

permit. (R:185.) The draft notably did not refer to the alternative thermal effluent limit and thus purported to require the Facility to meet the Lake Michigan thermal standards contained in 35 Ill. Adm. Code 302.507. (*Id.*) Although the notice discussed several modifications the agency had made to the permit, it did not mention the major change in thermal discharge standards. (*See* R:172.)

One modification that Illinois EPA did discuss was the revision of the special condition governing Section 316(b) compliance to reflect applicable federal standards following USEPA's suspension of the 2004 Phase II Rule. (R:185.) The revised condition called for Midwest Generation to follow through on the study it outlined in its PIC plan in advance of the subsequent permit renewal. (R:185-86.) The language anticipated that USEPA might issue a revised Phase II Rule during the permit term, and so allowed for the permit to be automatically modified in that event. (R:186.)

Midwest Generation objected to the draft, arguing, among other things, that the permit's new thermal effluent standards were contrary to the Board's determination in PCB 77-82 with respect to the alternative thermal effluent limit and the multiple studies supporting that determination. (R:201.) The company submitted evidence showing that, in the intervening years, two of the four generating units at WGS had been shut down, reducing the plant's aggregate generating capacity from 1016 MW to 742 MW. (R:205, 619, 880.) The company also provided Illinois EPA with information demonstrating (1) that the heat rejection rate of the Facility had declined by 39% from 1978 to 2012; and (2) that the water flow rate had similarly declined by 37% during that timeframe. (R:239-40.) Midwest Generation included a copy of the 1974 ComEd letter to USEPA containing a summary of the evidence supporting its Section 316(a) request for an alternative thermal effluent limit. (R:241, 492.) It also attached a 2009 United

States Geological Survey of prey fish populations in Lake Michigan. The authors of the study—who had sampled fish populations in the vicinity of the Facility discharger and other areas—attributed recent declines to larger trends of poor fish recruitment, habitat loss and predation. (R:222, 231-32.)

In correspondence between Midwest Generation and Illinois EPA concerning the second draft NPDES permit, the agency recognized that the thermal discharge requirements should reflect the 1978 variance. (R:271.) On October 16, 2012, the agency sent a revised tentative draft of the permit to Midwest Generation. (R:1168.) Citing PCB 77-82, the new draft reinstated the alternative thermal effluent limit, subject to the condition that Midwest Generation prepare and execute a study reevaluating the conclusions of the PCB 77-82 studies. (R:1183.) The special condition for Section 316(b) compliance was unchanged. (R:185-86, 1184.)

1. Third-party comments on the draft permit

In March 2013, Petitioners submitted comments insisting that Illinois EPA was legally required to exclude the alternative thermal effluent limit from the permit and instead incorporate the general thermal water quality standards from 35 Ill. Adm. Code 302.507. (R:473.) Petitioners insisted, for the first time, that the alternative thermal effluent limit had "expired in the early 1980s" and that the agency had been required to obtain new studies on the thermal loading before including the alternative limit in the permit. (R: 474.) Petitioners further commented that Illinois EPA's authority to include alternative thermal effluent limits in renewed permits was "unclear" because "the applicable regulations refer only to the Board's authority to grant such variances." (R:475.) The letter only briefly touched on the Section 316(b) provisions of the draft permit, expressing unspecified skepticism. (R:473.)

Illinois EPA issued a fourth draft of the permit in February 2013. (R:251.) It did not change the Section 316(a) or Section 316(b) provisions. (R:264-65.)

2. Illinois EPA requests and receives additional information concerning the Facility's CWI structure

Subsequently, by e-mail dated July 10, 2013, Illinois EPA requested—and Midwest Generation provided—additional information regarding the CWI structure at the Facility. (R:511-12.) The information included a detailed description of the CWI structure, describing the passage of cooling water through the intake canal, into the embayment, through two intakes (one for each of the two operating Units 7 and 8), and the fact that bar racks are located in front of traveling screens at each intake. (R:512.) It went on to describe each component of the screenhouse (i.e, fixed trash bars, through-flow traveling screens, and a high-pressure wash-water system); the screens configuration (#12 gauge wire with 3/8-inch openings); and the orientation of the traveling screens. (*Id.*) The CWI structure description also included a detailed description of each of the pump systems for Units 7 and 8. (*Id.*)

F. The July 2013 public hearing on the draft permit

A public hearing was held on July 21, 2013. (R:660.) In response to public hearing questions and comments, Illinois EPA confirmed that the omission of the alternative thermal effluent limit provisions from the 2011 draft permit was an error because the 1978 Board order granting the alternative limit remained in effect. (R:665.) The agency reiterated that the alternative limit had been reflected in all previous NPDES permits after it was originally granted in the 1970's. (R:668.) The agency further confirmed that it had reviewed the thermal studies information from 1975 and 1976 "and determined that there have not been any changes at the facility which would result

in additional heat being discharged into the lake." (R:665-66.) In addition, Illinois EPA observed that "Unit 6, rated at 100 MW, was removed from service on December 21, 2007, thus, decreasing the heat load." (R:666; *see also* R:662.) The agency noted that it was requiring additional aquatic, biological and thermal mixing zone studies in the permit" for its review "during the next permit cycle." (R:668, 676, 679.)

Illinois EPA also provided a detailed description of the CWI structure at the Facility and summarized the 1975/1976 § 316(b) studies showing that of the millions of fish larvae and eggs collected during these studies, only three species were identified: alewife, rainbow smelt and common carp. (R:666-67.) The agency also cited the PIC plan studies conducted in 2005 as a source it utilized in exercising its best professional judgment and provided a review of the changes in the Lake Michigan aquatic community since 1978. (R:770.) It noted that most of the large-scale changes were the result of declines in lake productivity, resulting in "less available nutrients/energy to move through the food web." (R:673.) It further observed that the declines in productivity and also lower trophic levels species composition "have been largely attributed to effects of invasive species (*e.g.*, zebra and quagga mussels, and spiny and fish hook water fleas)", not to thermal conditions. (*Id.*) The declines in productivity were cited as the likely contributing factor to declines in yellow perch and alewife populations. (*Id.*) The Agency obtained this information from the Illinois Department of Natural Resources. (R:618.)

G. Subsequent legal and regulatory changes

Following completion of public notice, comment and hearing concerning the draft NPDES permit in July 2013, there were two key changes to the state and federal regulations implementing Sections 316(a) and (b) of the Clean Water Act, respectively:

(1) in February 2014, the Board promulgated new procedural rules for alternative thermal effluent limits ("Subpart K"); and (2) in August 2014, USEPA promulgated a new final rule governing CWI structures at existing facilities.

1. Changes to state regulations implementing Section 316(a)

For years, USEPA afforded state regulators across the country substantial discretion in administering Section 316(a)'s requirements. In 2008, however, USEPA issued a memo from then-Director James A. Hanlon ("Hanlon Memo") indicating that the agency was no longer satisfied with the variation among the states in how they enforced Section 316(a). (R:1128.) Most importantly, the memo opined that Section 316(a) alternative thermal effluent limits expire with each NPDES permit and thus had to be re-justified with each permit renewal. (R:1130.) USEPA deemed it "essential" that state administrators obtain as much information "as necessary" to demonstrate that the alternative thermal effluent limit protected local ecology. (*Id.*) "Such information may include a description of any changes in facility operations, the waterbody, or the BIP since the time the [AEL] was originally granted. (*Id.*)

In practice, USEPA did not require immediate compliance with the new Section 316(a) interpretation outlined in the Hanlon Memo,[5] and neither the Board nor Illinois EPA took immediate action to revise Illinois regulations to reflect the USEPA's new understanding of Section 316(a). But in response to other circumstances requiring new rules governing thermal discharges, [6] in June 2013, Illinois EPA proposed new

[5] For instance, when Illinois EPA modified an NPDES permit for the Ameren Coffeen Power Station in 2011 (an action requiring USEPA review,) USEPA observed that the permit incorporated an alternative thermal effluent limit that was not renewed in the manner outlined in the Hanlon memo during the previous permit cycle. (R:1011.) But instead of exercising its power under 40 C.F.R. § 123.44(d)(2) to object to the permit modification, USEPA simply encouraged Illinois EPA to address these questions during the station's next renewal cycle. (R:1007.)

[6] The Board had recently ruled it could no longer allow dischargers seeking to make a thermal effluent

procedural rules for alternative thermal effluent limits ("Subpart K"). Subpart K created specific rules for renewal of such limits, including an early screening process "where the Agency can evaluate whether the conditions on which the prior relief was based have changed." R. 12-20, Agency Statement of Reasons, at 10 (June 20, 2013) (attached as Exhibit A). Illinois EPA explained that it was creating "a process for streamlined renewal of alternative thermal effluent limitations," (Ex. A, at 10) and that this new provision had come up in the context of the 2008 Hanlon Memo and the Agency's efforts to "work[] with U.S. EPA Region V to review the status of Illinois electric generation facilities and their thermal discharges to ensure consistency with Section 316(a) of the Clean Water Act." (Id. at 4). The Board adopted Subpart K on February 20, 2014, and became effective six days later. See 38 Ill. Reg. 6086 (Feb. 20, 2014).

2. Changes to federal regulations implementing Section 316(b)

Following its July 2007 suspension of the 2004 Phase II Rule, USEPA instructed its regional administrators to follow an interim approach while the Phase II rules were reworked: "[A]ll permits for Phase II facilities should include conditions under section 316(b) of the Clean Water Act developed on a Best Professional Judgment basis." (R:144). A revised version of that rule—the 2014 Phase II Rule—was finally reissued on August 15, 2014 and went into effect on October 14, 2014. 79 Fed. Reg. 48300 (Aug. 15, 2014). The 2014 Phase II Rule required, among other things, that larger facilities conduct multi-year ecological studies to assist permitting authorities in determining what site-specific controls were necessary. 40 C.F.R. § 122.21(r)(9) (requiring dischargers withdrawing 125 MGD or more to prepare entrainment characterization

demonstration to use the procedures created for adjusted standards. *In re Petition of Exelon Generation*, AS 13-1 (Oct. 18, 2014). Because such demonstrations did not have specific procedures, they had to proceed under the default site-specific rulemaking procedures. See 415 ILCS 5/27(a).

study based on "a minimum of two years of entrainment data collection"). Since compliance with the 2014 Phase II Rule thus required large amounts of lead time, and since the rule became effective late in the permit cycle for many facilities, USEPA—in various aspects that are discussed in more detail below—designed the rule to "allow[] the [state administrator] flexibility where there are ongoing permit proceedings . . . ." 79 Fed. Reg. at 48380.

H. USEPA review of the final draft NPDES permit

On August 18, 2014, the Agency submitted a draft of the final permit to the USEPA. (R:594.) Three months later, the USEPA responded that it "would not object to the permit and the permit can be issued in accordance with the Memorandum of Agreement and pursuant to the Clean Water Act." (R:620.) USEPA did include a recommendation, however, reminding Illinois EPA of USEPA's new interpretation of Section 316(a) summarized in the Hanlon Memo. (R:620, 622.) USEPA also noted that "Special Condition 7 provides the best professional judgment Best Technology Available determination for the cooling water intake structure as required by [CWA] § 316(b)." (R:622.) USEPA's only comment on the Section 316(b) conditions raised a procedural concern: Special Condition 7 contained a provision for self-modification, and the USEPA instead thought that such modifications had to be done through a more formal permit modification process. (*Id.*)

I. Issuance of the final permit and this appeal

In December 2014, Illinois EPA concluded that the renewal conditions it included for the alternative thermal effluent limit complied with Section 316(a) and adopted USEPA's recommended change to the § 316(b) condition. (R:637-38.) Illinois EPA thus issued the final permit on March 25, 2015 ("2015 NPDES Permit"). (R:683.)

On April 29, 2015, Petitioners filed a "Petition for Administrative Review of an NPDES Permit Issued by the Illinois Environmental Protection Agency" with the Board, challenging the renewal of the 2015 NPDES Permit.

III. LEGAL STANDARD

"[S]ummary judgment 'is a drastic means of disposing of litigation,' and therefore it should be granted only when the movant's right to the relief 'is clear and free from doubt.'" *Des Plaines River Watershed Alliance v. IEPA*, PCB 04-88, slip op. at 17 (Apr. 19, 2007) (quoting *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483 (1998)). "[S]ummary judgment is appropriate when there is not any genuine issue of fact and the record demonstrates a clear right to judgment as a matter of law." *Dynergy Midwest Gen., Inc.*, PCB No. 13-17, slip op. at 12 (citing 35 Ill. Adm. Code 101.516(b). If "the movant's right to relief is clear and free from doubt," then the Board should grant summary judgment. *Des Plaines River Watershed Alliance, et al. v. IEPA*, 2007 WL 1266926, *16, PCB 04-88 (Apr. 19, 2007) (quoting *Gauthier v. Westfall*, 639 N.E.2d 994, 999 (2d Dist. 1994)).

Both the Act and the Board's regulations require that the Board's review of permit appeals be limited to the administrative record. 415 ILCS 5/40(e); 35 Ill. Adm. Code § 105.214(a). Accordingly, where, as here, the administrative record in a permit appeal demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *City of Quincy v. IEPA*, 2010 WL 2547531, *26, PCB 08-86 (Jun. 17, 2010). Illinois EPA submits that the administrative record meets this standard and that it is entitled to summary judgment in its favor.

IV. PETITIONERS' BURDEN OF PROOF

"Section 40(e)(3) of the Act unequivocally places the burden of proof on the petitioner, regardless of whether the petitioner is a permit applicant or a third-party." *Prairie Rivers Network v. IEPA and Black Beauty Coal Co.*, PCB 01-112, slip op. at 8 (Aug. 9, 2001) (citing 415 ILCS 5/40(e)(3)). In a third-party challenge to a NPDES permit, the third party must prove that "the issuance of the permit violates the Act or Board's regulations." *NRDC v. IEPA and Dynergy Midwest Gen., Inc.*, PCB 13-17, at 36 (Jun. 5, 2014). "[Illinois EPA's] decision to issue the permit in this instance must be supportable by substantial evidence. This does not, however, shift the burden away from the petitioner, who alone bears the burden of proof in this matter." *Prairie Rivers Network*, PCB 01-112, slip op. at 9 (citing *Waste Mgmt., Inc. v. IEPA*, PCB 84-45, PCB 84-61, PCB 84-68 (November 26, 1984) (consolidated)). Additionally, in examining what constitutes "substantial evidence" for purposes of administrative decisions, the Board has stated that "the main inquiry is whether on the record the agency could reasonably make the finding." *Waste Management, Inc. v. IEPA*, 1984 WL 37589, *7, PCB 84-45 (Nov. 26, 1984) (emphasis added).

V. ARGUMENT

A. ILLINOIS EPA IS ENTITLED TO SUMMARY JUDGMENT ON PETITIONERS' SECTION 316(a) CLAIM.

Petitioners' Section 316(a) claim is based on three distinct lines of argument: (1) that the Illinois EPA could not possibly have renewed Midwest Generation's alternative thermal effluent limit when it issued the 2015 NPDES Permit because that limit expired in 2000, at the latest; (2) that the agency's renewal of Midwest Generation's alternative thermal effluent limit failed to comply with Subpart K, the new state regulation

governing issuance and renewal of such limits; and (3) that Midwest Generation failed to submit an application to renew the alternative limit. None of these arguments has any merit.

1. The IEPA had authority to renew the alternative thermal effluent limit in 2015.

Petitioners first argue that the Illinois EPA could not possibly have renewed Midwest Generation's alternative thermal effluent limit when it issued the 2015 NPDES Permit because that limit expired in 2000, at the latest. Petitioners reason that

> [u]nder Clean Water Act rules, NPDES permits may be issued for a term no longer than five years. [. . .] As far as can be ascertained from the record, the first time the Waukegan Station NPDES permit was renewed subsequent to the Board's 1978 316(a) variance was on July 31, 2000. The previous NPDES permit may have expired many years before that, but at latest, must be deemed expired on the date the 2000 Permit was issued. Therefore, at latest, the Board's 1978 316(a) variance expired on July 31, 2000.

Petitioners' Motion for Summary Judgment ("Motion") at 23. Petitioners' entire argument rests on a mistaken premise, however: the July 2000 renewal of the Facility's NPDES permit was not, as they assert, the first since 1978. In fact, that permit was reissued on no less than four occasions during that timeframe: in 1979, 1985, 1990 and 1995. In 2000, as Petitioners correctly note, it was renewed for another five-year term ending in July 2005. And in January of 2005, more than 180 days before that deadline, the Illinois EPA received Midwest Generation's application for the next (and current) iteration of that permit, which was finally issued in March of this year. (R:25, 687.) Accordingly, in the intervening time period, as the renewal application was pending, the permit was "administratively continued" pursuant to 35 Ill. Adm. Code 309.104(a), and Midwest Generation remained authorized to discharge thermal effluent in accordance

with the alternative limit established in 1978. That alternative limit has thus existed continuously during the relevant timeframe and was properly renewed in the 2015 NPDES Permit.

2. Subpart K is inapplicable because it cannot be retroactively applied to the 2015 NPDES Permit.

As of February 2014, Subpart K has governed the issuance and renewal of alternative thermal effluent limits in Illinois pursuant to Section 316(a) of the Clean Water Act. 35 Ill. Adm. Code 106.1180. Among other things, the regulation authorizes the Illinois EPA to renew such limits (thereby codifying the agency's longstanding practice of doing so[7]), sets forth the specific grounds on which the agency may do so,[8] requires certain demonstrations by the permittee in order to support renewal, and requires that the permittee "be prepared" to offer supporting documentation based on "actual operation experience during the previous permit term." 35 Ill. Adm. Code 106.1180(b). In this case, Petitioners argue that the agency's renewal of Midwest Generation's alternative limit failed to comply with Subpart K in three respects: (1) the Board did not re-establish the alternative limit after enactment of Subpart K in 2014, which Petitioners contend deprived Illinois EPA of the authority to renew it in 2015; (2) Midwest Generation supposedly failed to make the required demonstrations under Subpart K to support renewal of the alternative limit; and (3) Midwest Generation was

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[7] (R: 0201 (noting that, with respect to the NPDES permit governing discharges from Midwest Generation's Facility, whenever that permit has previously been up for renewal, the Illinois EPA has "repeatedly . . . continued and included" the alternative thermal effluent limit in successive iterations of the permit).) *See, e.g., Exelon Generation, LLC (Dresden Nuclear Generating Station) v. IEPA*, PCB 79-134 (NPDES Permit No. 0002224); *Electric Energy, Inc. v. IEPA*, PCB 78-042 (NPDES Permit No. IL0004171).

[8] Specifically, the regulation provides that "[i]f the permittee demonstrates that the nature of the thermal discharge has not changed and the alternative thermal effluent limitation granted by the Board has not caused appreciable harm to a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is made, the Agency may include the alternative thermal effluent limitation in the permitee's renewed NPDES permit." 35 Ill. Adm. Code 106.1180(c).

supposedly unprepared to offer adequate documentation, as required.

As a threshold matter, the Board should reject these arguments because they attempt to retroactively apply Subpart K to a permit renewal process that was not only underway at the time the regulation came into effect, but also, in many respects, already complete. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence" and embodies a basic, centuries-old principle: "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landsgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). Applying these precepts, Illinois courts have developed a three-tiered test for determining whether a law should be construed to apply retroactively:

> First, has the legislature clearly indicated the temporal, or retroactive, reach of the [enactment]. If not, is the [enactment] procedural or substantive in nature. Only those [enactments] that are procedural in nature may be applied retroactively. And finally, if the statute is procedural, does it have a "retroactive impact." Absent retroactive impact, the amended statute will apply.
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> A finding that the statutory change is procedural in nature, however, does not end the inquiry. Even if a statutory amendment is procedural, it may not be applied retroactively if it (1) impairs rights that a party possessed when it acted, (2) increases a party's liability for past conduct, or (3) imposes new duties with respect to transactions already completed.

Schweickert v. AG Services of America, Inc., 355 Ill. App.3d 439, 442-44 (2005). *See also GreenPoint Mortg. Funding, Inc. v. Poniewozik*, 2014 IL App (1st) 132864, at ¶¶ 15-22 (1st Dist. 2014). In Illinois, these principles apply with equal force to administrative regulations like Subpart K. *Itasca Public School Dist. No. 10 v. Ward*,

179 Ill. App.3d 920, 926 (1st Dist. 1989) (holding that the exception for procedural enactments "is equally applicable to rules and regulations promulgated by an administrative body pursuant to authority delegated by the legislature").

With these principles in mind, Subpart K—even if procedural in nature—cannot be retroactively applied in this case because doing so would "impose[] new duties with respect to transactions already completed." *Schweickert*, 355 Ill. App.3d at 444. As discussed above, Petitioners invoke Subpart K to challenge two specific aspects of the process of renewing Midwest Generation's alternative thermal effluent limits: (1) the sufficiency of the demonstrations Petitioners claim were required to support renewal; and (2) the sufficiency of the documentation Petitioners claim Midwest Generation should have been prepared to offer. Yet, as Petitioners concede, Subpart K codified these requirements in Illinois for the first time. Petitioners' Motion at 19-20. By the time the regulation became effective, the public hearing and comment phase for what would become the 2015 NPDES Permit—as well as the opportunity to comply with such mandates, assuming Midwest Generation had not already done so—had concluded. Subpart K thus cannot apply retroactively.

3. Petitioners have failed to show that they raised their Section 316(a) issues during public comment and hearing on the draft permit, as required by the Illinois Environmental Protection Act.

Section 40(e)(2) of the Illinois Environmental Protection Act requires that a petition for such an appeal contain "a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing of the NPDES permit application, if a public hearing was held, and a demonstration that the petitioner is so situated as to be affected by the permitted

facility." 415 ILCS 5/40(e)(2) (2014). This demonstration, however, is conspicuously absent from the Petition for Review, and understandably so: as discussed above, since Subpart K was enacted after the opportunity for public hearing and comment had closed, Petitioners could not possibly have raised the issues currently on appeal during that time. This failure is alone dispositive of their 316(a) claim and Illinois EPA is thus entitled to summary judgment in its favor.

4. Even if Subpart K were applicable, it does not require the Board to re-establish an alternative thermal effluent limit before the Illinois EPA can renew it.

Subpart K provides, among other things, that a "permittee may request continuation of an alternative thermal effluent limitation granted by the Board, pursuant to this Subpart, as part of its NPDES permit renewal application." 35 Ill. Adm. Code 106.1180(a). Petitioners construe this language to mean that the Illinois EPA "does not have authority to renew 316(a) variances that were not granted by the Board pursuant to Subpart K." Their proposed reading would thus effectively nullify all alternative thermal effluent limits existing at the time of Subpart K's promulgation by requiring them to be re-established by the Board—just like brand-new alternative limits—before the Illinois EPA could begin renewing them. Once again, Petitioners' reading of Subpart K amounts to a retroactive application of the regulation that "imposes new duties with respect to transactions already completed"—in this case, the burdens associated with making every permittee apply again for a new alternative limit, a considerably lengthier process than simply renewing existing limits. *Schweickert*, 355 Ill. App.3d at 444. The Board should thus reject that reading and enter summary judgment in favor of the Illinois EPA.

5. Midwest Generation timely submitted its NPDES Permit renewal application.

Petitioners next contend that Midwest Generation failed to "submit an application to establish or renew a Section 316(a) variance," either with the January 2005 NPDES permit renewal application or at any subsequent point in the process. A cursory review of the record, however, reveals this assertion to also be baseless. As specifically provided for by federal regulation, Midwest Generation had until "the close of the comment period" on the draft permit to apply for renewal of its alternative thermal effluent limit.[9] Accordingly, the company did so—at the very latest[10]—in the context of its January 12, 2012 comment on that draft. (R:201-207.) In that comment, the company noted the absence of an alternative limit in the draft permit, reiterated the scientific and legal basis for it, and specifically requested that it be included in the final permit. (*Id.*) Midwest Generation was thus properly deemed to have timely applied for renewal of its alternative thermal effluent limit, and the Board should reject Petitioners' baseless suggestions to the contrary.

6. Even if Subpart K applies, Midwest Generation's NPDES Permit renewal application was adequately supported.

Petitioners also contend that Midwest Generation failed to "ma[k]e the demonstrations required" to obtain an alternative thermal effluent limit under 35 ILCS

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[9] 40 C.F.R. § 122.21(m)(6) provides that "if thermal effluent limitations are . . . based on water quality standards[,] the request for a variance may be filed by the close of the public comment period under § 124.10." Here, Midwest Generation's original alternative thermal effluent limit—granted by the Board in 1978—relieved the company from compliance with Rule 206(e)(1)(A)(iii) of Chapter 3: Water Pollution Regulations. (R:1.) That rule, a water quality standard, "imposes a limitation on thermal discharges to Lake Michigan of 3 [degrees Farenheit] above natural temperatures beyond the mixing zone." (*Id.*) Accordingly, pursuant to 40 C.F.R. § 122.21(m)(6), Midwest Generation had until close of the public comment period to submit a request for renewal of the alternative thermal effluent limit.

[10] In fact, the company has a viable argument that it did so even earlier, in the context of its January 25, 2005 NPDES permit renewal application. In that application, Midwest Generation gave Illinois EPA notice that it was requesting renewal by asking for the end of thermal monitoring—a request that would make no sense if the alternative thermal effluent limit was going to terminate. (R:27.)

§ 106.1180. That provision was enacted as part of Subpart K in February 2014. For the reasons discussed above, Subpart K cannot be retroactively applied to the renewal process for the alternative limit in this case. In Subpart K's absence, that process was instead informed by longstanding USEPA guidance, which advised as follows with respect to the demonstrations and findings required to support renewal of an alternative thermal effluent limit:

> The amount of data required by the permitting authority to support reissuance of the variance at the time of permit reissuance usually is minimal. The permittee only needs to provide a basis for that reissuance. The basis could be as simple as: 1) there have been (and will be) no changes to thermal discharges that could interact with the permittee's thermal discharges; 2) there are no changes to facility discharges that could interact with the permittee's thermal discharges; and 3) there are no changes (to the permittee's knowledge) to the biotic community of the receiving water body. For many studies, there is no need to perform additional reissuance studies, because no changes have occurred, and a reissuance is reasonable.

USEPA, *Review of Water Quality Standards, Permit Limitations and Variance for Thermal Discharges at Power Plants*, EPA Doc. 831-R92001, at 25 (Oct. 1992) (attached as Exhibit B). The information and data submitted during the renewal process easily complied with this minimal threshold[11] and Midwest Generation's application (including its request for renewal of the alternative limit) was thus adequately supported.

But even if Subpart K were to somehow apply, that same information and data also complied with this new standard. Subpart K provides, in relevant part, as follows:

> b) Any application for renewal should include sufficient

[11] As discussed in more detail below, in connection with its request to renew its thermal variance, Midwest Generation submitted various information and data specifically concerning (1) the amount of its original thermal discharge at the inception of the variance; (2) the current amount of that discharge; (3) biotic conditions at the inception of the variance; and (4) current biotic conditions.

> information for the Agency to compare the nature of the permittee's thermal discharge and the balanced, indigenous population of shellfish, fish, and wildlife at the time the Board granted the alternative thermal effluent limitation and the current nature of the petitioner's thermal discharge and the balanced, indigenous population of shellfish, fish, and wildlife. The permittee should be prepared to support this comparison with documentation based upon the discharger's actual operation experience during the previous permit term.
>
> c) If the permittee demonstrates that the nature of the thermal discharge has not changed and the alternative thermal effluent limitation granted by the Board has not caused appreciable harm to a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is made, the Agency may include the alternative thermal effluent limitation in the permitee's renewed NPDES permit.

35 Ill. Adm. Code 106.1180. The regulation thus requires "information" from the permittee—as well as "prepared[ness]" to offer supporting documentation, if so requested[12]—regarding (1) the nature of the thermal discharge at the time the Board granted the alternative limit; (2) the nature of aquatic wildlife at the time the Board granted the alternative limit; (3) the current nature of the thermal discharge; and (4) the current nature of aquatic wildlife.

As the record amply reflects, Midwest Generation supplied the required information concerning each of these criteria. With respect to the first and third items, the company's January 12, 2012 comments on the December 2, 2011 draft NPDES permit identified the amount of the original thermal discharge (an amount "associated with the generation of 1016 [MW] of electric power with the generating station equipment on site as of July 1, 1977") and the amount of the current discharge (the

[12] The Record in this case does not reflect any such requests.

original thermal discharge minus the amount associated with generating the sum of 129 MW and 112 MW of electricity, to account for the retirements of Units 5 and 6, respectively). (R:203.) With respect to the second and fourth items, the same comments compared the state of aquatic wildlife near the facility at the time of the original alternative thermal effluent limit to its current state (characterizing current conditions as "not fundamentally different" from those that originally existed, but noting declines in certain aquatic populations that were unrelated to thermal discharges and mirrored larger patterns being observed across Lake Michigan). (R:204.) Midwest Generation's NPDES permit renewal application—and, more specifically, its request to renew its alternative effluent limit for thermal discharges—was thus adequately supported, and the Illinois EPA is entitled to summary judgment on Petitioners' Section 316(a) claim.

B. ILLINOIS EPA IS ALSO ENTITLED TO SUMMARY JUDGMENT ON PETITIONERS' SECTION 316(b) CLAIM.

Section 316(b) of the Clean Water Act requires that "[a]ny standard" established pursuant to Section 301 (as an effluent limit for a point source) or Section 306 (as a performance standard) "require that the location, design, construction, and capacity of [CWI] structures reflect the best technology available to minimize adverse environmental impact." 33 U.S.C. § 1326(b). On August 15, 2014, USEPA issued a revised, final version of one of its Section 316(b) implementing regulations, the suspended 2004 Phase II Rule. The new version of that rule, the 2014 Phase II Rule, went into effect on October 14, 2014. *See* National Pollutant Discharge Elimination System—Final Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed.

Reg. 48300-01 (Aug. 15, 2014). Among other things, the 2015 Phase II Rule requires CWI structures at existing facilities to (1) submit certain items of information in their applications for NPDES permit renewals (40 C.F.R. 122.21(r)); and (2) implement the applicable Best Technology Available to Minimize Adverse Environmental Impacts ("BTA") standards set forth in 40 C.F.R. 125.94(a).

Petitioners contend that "[t]hese standards were in effect when [Illinois EPA] issued the Final Permit on March 25, 2015" and that the permit "violates federal law" because (1) it failed to require Midwest Generation to submit the prescribed [CWI] studies prior to issuing its NPDES permit" pursuant to 40 C.F.R. 122.21(r); and (2) "its purported best professional judgment determination is unsupported and inconsistent with law." These arguments are also meritless.

1. 40 C.F.R. § 122.21(r) did not apply to this permit cycle.

Petitioners first contend that Midwest Generation failed to submit the information required by 40 C.F.R. 122.21(r) in its NPDES permit renewal application. Yet this argument is expressly foreclosed by 40 C.F.R. § 125.95(a)(2), which provides that

> [t]he owner or operator of a facility subject to this subpart whose currently effective permit expires prior to or on July 14, 2018, may request the Director to establish an alternate schedule for the submission of the information required in 40 CFR 122.21(r) when applying for a subsequent permit . . . If the owner or operator of the facility demonstrates that it could not develop the required information by the applicable date for submission, the Director must establish an alternate schedule for submission of the required information.

As authorized by this provision, and as specifically reflected in Special Condition 7 of the final 2015 NPDES Permit, Midwest Generation was placed on an "alternate schedule"

for compliance with 40 C.F.R. 122.21(r):

> [T]he permittee shall comply with the requirements of the [CWI] Structure Existing Facilities Rule as found at 40 CFR 122 and 125. Any applications and materials required for compliance with the Existing Facilities Rule, shall be submitted to the Agency no later than 4 years from the effective date of this permit.

(R:696.) The inclusion of Special Condition 7 was entirely proper under 40 C.F.R. 122.21(r), given that this permit proceeding began well in advance of the 2014 Phase II Rule.[13] Because 40 C.F.R. 122.21(r) is thus inapplicable to this most recent permit cycle, Petitioners' arguments based on that provision are inconsequential and the Illinois EPA is entitled to summary judgment in its favor.

2. The Illinois EPA's interim Best Professional Judgment determination was legally sound.

Petitioners next contend that "the actual effluent standard [Illinois EPA] applied to establish [BTA] from the [CWI] structure in the 2015 Final Permit was invalid and unsupported by the record" because it did not consist of "one of seven alternatives" set forth in 40 C.F.R. § 125.94(c).[14] But 40 C.F.R. § 125.98(b)(6), another provision enacted as part of the 2015 Phase II Rule, expressly exempts permits "issued after October 14, 2014, and applied for before October 14, 2014"—such as the 2015 NPDES Permit—from immediate compliance with 40 C.F.R. § 125.94(c). 40 C.F.R. § 125.98(b)(6). Specifically, it provides that, for such permits,

> the Director may include permit conditions to ensure that the Director will have all the information under 40 CFR

[13] As the record reflects, Midwest Generation filed its renewal application on January 25, 2005 (R:25), a draft permit was public noticed on February 8, 2013 (R:251), and a public hearing on the draft permit was held on July 31, 2013 (R:660).

[14] Those alternatives consist of: (1) closed-cycle recirculating system; (2) 0.5 feet per second through-screen design velocity; (3) 0.5 feet per second through-screen actual velocity; (4) existing offshore velocity cap; (5) modified traveling screens; (6) systems of technologies as the BTA for impingement mortality; and (7) impingement mortality performance standard. 40 C.F.R. § 125.94.

> 122.21(r) necessary to establish impingement mortality and entrainment BTA requirements under § 125.94(c) and (d) *for the subsequent permit.*

Id. (emphasis added). Accordingly, in such cases, it further provides that

> [t]he Director must establish interim BTA requirements in the permit on a site-specific basis based on the Director's best professional judgment in accordance with § 125.90(b) and 40 CFR 401.14.

Id. 40 C.F.R. § 125.90(b), in turn, provides that

> [CWI] structures not subject to requirements under §§ 125.94 through 125.99 or subparts I or N of this part must meet requirements under section 316(b) of the CWA established by the Director on a case-by-case, best professional judgment (BPJ) basis.

As authorized by these provisions, Special Condition 7 of the 2015 NPDES Permit expressly reflects the Illinois EPA's determination,

> [b]ased on available information, . . . that the operation of the [CWI] structure meets the equivalent of [BTA] in accordance with the Best Professional Judgment provisions of 40 CFR 125.3 and 40 CFR 125.90(b), based on information available at the time of permit issuance.

(R:696.) Petitioners correctly note that this "implies . . . that the Waukegan Station is not subject to the requirements of 40 C.F.R. § 125.94." The mandates of Special Condition 7, after all, are precisely the result contemplated by 40 C.F.R. § 125.98(b)(6), which specifically authorizes "interim BTA requirements . . . on a site-specific basis based on the Director's best professional judgment" ("BPJ") for permits "issued after October 14, 2014, and applied for before October 14, 2014" where "the information under 40 CFR 122.21(r) necessary to establish impingement mortality and entrainment BTA requirements" will only be available in time "for the subsequent permit."[15] 40

[15] 40 C.F.R. § 125.90(b) reinforces this interpretation, as it applies to "[CWI] structures not subject to

C.F.R. § 125.98(b)(6).

Even assuming that BPJ is the applicable standard for setting these interim BTA requirements, however, Petitioners also take issue with the fact that "Special Condition 7 identifies no . . . effluent limit." Yet that provision specifically governs the Facility's CWI structure, which, by definition, does not discharge effluent and only *takes in* water. The absence of an effluent limit in Special Condition 7 is thus immaterial and the Illinois EPA is entitled to summary judgment in its favor.

3. The Illinois EPA was sufficiently informed about the operation of the Facility's CWI structure to make a Best Professional Judgment determination.

Petitioners also challenge the Illinois EPA's BPJ determination on the grounds that "neither [it] nor Midwest Generation knows what 'the operation of the [CWI] structure' entails." According to Petitioners, "[t]his absence of information does not define the 'best technology available' to minimize adverse environmental impact in any way sufficient to represent an enforceable permit condition." Yet Petitioners' argument is belied by the agency's Responses to Comments, Questions and Concerns accompanying the final 2015 NPDES Permit, wherein, in response to the question of whether the agency could "explain what [CWI] structures are operated at this facility," the agency described the operation of that system in detail:

> The cooling system for each unit is designed as a once-through system. Cooling water from the lake is withdrawn from an on-shore location, and passes through the intake canal into a constructed embayment prior to entering the plant through two intakes, one for Unit 7 and one for Unit 8. Bar racks are located in front of the traveling screens at each intake. Each screenhouse is equipped with fixed trash bars, through-flow traveling screens, and a high-pressure wash-water system. All screens are made with #12 gauge wire with

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requirements under §§ 125.94 through 125.99 or subparts I or N of this part."

> ¾-inch openings. The traveling screens are oriented parallel to the face of the screenhouse. The intake withdraws water from the entire water column.
>
> Two pumps provide cooling water to Unit 8, whereas four pumps provide cooling water to Unit 7, for a total of six pumps. Unit 7 has one traveling screen and pump bay for each pump, whereas, Unit 8h has two bays each containing one pump and protected by two traveling screens. Screen wash water from the traveling screens for each unit flows into separate trash baskets. The design through screen velocity at critical low water level is 2.0, and 1.8 feet per second for Units 7, and 8, respectively.

(R:666.) Petitioners dismiss these mechanical details as "two paragraphs describing the most basic attributes of the intake structure," but, despite having the burden of proof, their Motion is notably silent as to *how* exactly this supposedly "basic" information falls short of what is required by the BPJ standard contained in 40 C.F.R. § 125.90(b). Petitioners have thus failed to sustain their burden and the Illinois EPA is entitled to summary judgment on their Section 316(b) claim.

VI. CONCLUSION

For the reasons set forth above, Illinois EPA is entitled to summary judgment on both counts of Petitioners' Petition for Review. Illinois EPA thus respectfully requests that the Board enter judgment in its favor and grant it such other relief as the Board deems just and fair.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Angad Nagra, an Assistant Attorney General, certify that on the 10th day of December, 2015, I caused to be served by U.S. Mail, the foregoing Cross Motion for Summary Judgment and Response to Petitioners' Motion for Summary Judgment, to the parties listed above, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.

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